Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3514

Appeal PA13-172

Ministry of the Attorney General

July 28, 2015

Summary: This appeal arises from a request for access to three drafts of a guideline for Crown Attorneys relating to the prosecution of HIV exposure and transmission cases. The ministry took the position that these drafts are subject to solicitor-client privilege under sections 19(a) and (b) of the *Act*. The appellant argued that the drafts are not privileged, but even if they were, privilege was waived by sharing one of them with a third party. This order finds that the drafts were privileged at first instance, but sharing one of the drafts with the third party was not a solicitor-client communication, and no common interest existed that was sufficient to withstand waiver of privilege when the draft was shared. Accordingly, the shared draft is ordered to be disclosed to the appellant. The ministry's decision not to disclose the other two drafts is upheld.

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

Orders Considered: Orders MO-2936, PO-1928, PO-1937, PO-2719, PO-2784, PO-2995, PO-3154 and PO-3167.

Cases Considered: *The Attorney General of Ontario v. Holly Big Canoe, Inquiry officer et al*, Court File No. 197/97 (Div. Crt.); *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); *Ontario (Ministry of Community and Social Service) v. Ontario (Information and Privacy Commissioner)* (2004), 70 O.R. (3d) 680 (Div. Crt); *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Crt.); *Bank of Montreal v. Tortora*, [2010] B.C.J. No. 1997; *Trillium Motor World Ltd v. Cassels Brock & Blackwell LLP*, 2013 ONSC 1789; *Descôteaux*

v. Mierzwinski (1982), 141 D.L.R. (3d) 590; *Smith v. Jones* [1999] S.C.J. No. 15; *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809, 2004 SCC 31; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.).

OVERVIEW:

[1] Remaining at issue in this appeal is a request for access to three drafts of a guideline for Crown Attorneys relating to the prosecution of HIV exposure and transmission cases. Although the Ministry of the Attorney General (the ministry) advises that it is in the process of creating a ministry issued policy guideline for Crown counsel with respect to criminal prosecutions that allege exposure to HIV or other sexually transmitted infections without disclosure, the appellant seeks access to these earlier drafts. The ministry takes the position that the earlier drafts are subject to solicitor-client privilege under sections 19(a) and (b) of the *Freedom of Information and Protection of Privacy Act* (the *Act*). The appellant argues that the drafts are not privileged, but even if they were, any privilege in them was waived when the ministry shared them with the Sexual Health and Harm Reduction Program Manager of the City of Hamilton (the manager). The ministry submits that sharing one of the drafts does not amount to waiver of the privilege, because the manager was an "expert" consulted by the ministry. In the alternative, the ministry submits that there was a common interest present that was sufficient to withstand waiver of privilege.

THE REQUEST:

[2] Initially, the ministry received a request under the *Act* for access to the following information:

> Between Jan. 1, 2009 and Sept. 1, 2012: All documents…related to the prosecutorial guidelines for HIV nondisclosure. All documents related to working group on Criminal Law and HIV Exposure. All documents related to "significant risk of serious bodily harm" as it relates to HIV or other diseases. All documents related to Ontario's decision to withdraw from intervening in *R. v. Mabior*[1] at the Supreme Court of Canada. Any advice provided to the government on HIV and the criminal prosecutions.

[3] After the request was narrowed, the ministry issued its decision letter. The ministry granted partial access to the records that it identified as responsive to the narrowed request, relying on sections 13(1) (advice or recommendations), 18(1)(g), (proposed plans of an institution), 19(a) and 19(b) (solicitor-client privilege), 21(1) (invasion of privacy) and 22(a) (information published or currently available) of the *Act* to deny access to the portion it withheld. In addition, the ministry advised that some information in the records is not responsive to the request. The ministry also indicated

[1] *R. v. Mabior*, 2012 2 SCR 584.

where the appellant could locate the publicly available records that it claimed were subject to exemption under section 22(a) of the *Act*. The appellant appealed the ministry's decision.

[4] During mediation, the appellant indicated that he was interested in obtaining a document that was referred to in an email that the ministry disclosed to him in the course of processing the request. The email is from the manager, to an Assistant Crown Attorney. The reference line mentions a "Prosecutorial Guidelines Consultation Invitation". The relevant portion of this email reads:

> ... I've been invited to attend this consultation meeting ... . Are you invited and are they using the guideline that you wrote and shared with us? ....

[5] As set out in the Mediator's Report, in response to the appellant's request at mediation:

> The ministry agreed to follow up with their legal staff in order to locate the document which the appellant was seeking. The ministry subsequently advised that the document appears three times in the records. Specifically, the ministry noted that the three versions of this draft record are located on pages 2184-2213, 2218-2283 and 2287-2358.

[6] At mediation, a great number of issues were resolved. Ultimately, as set out above, only access to three drafts of a guideline for Crown Attorneys relating to the prosecution of HIV exposure and transmission cases, which are found at pages 2184-2213, 2218-2283 and 2287-2358 of the ministry's index of records, remained at issue in the appeal. The ministry claimed these records to be exempt under sections 19(a) and (b) of the *Act*.

[7] Mediation did not completely resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. I commenced my inquiry by sending a Notice of Inquiry setting out the facts and issues in the appeal to the ministry. The ministry provided representations in response. I then sent the appellant a Notice of Inquiry along with the ministry's non-confidential representations. The appellant provided representations in response. I determined that the appellant's representations raised issues to which the ministry should be provided an opportunity to reply. Accordingly, I sent the appellant's representations to the ministry along with a letter inviting reply representations. The ministry provided reply representations. I determined that the appellant should be provided an opportunity to address these reply representations and sent a copy of the ministry's non-confidential representations to the appellant inviting his submissions in sur-reply. The appellant provided sur-reply representations.

RECORDS:

[8] The sole records remaining at issue in this appeal are three drafts of a guideline for Crown Attorneys relating to the prosecution of HIV exposure and transmission cases, which are found at pages 2184-2213, 2218-2283 and 2287-2358 of the ministry's index of records.

DISCUSSION:

[9] Section 19 of the *Act* states as follows:

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

[10] Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 (prepared by or for Crown counsel) is a statutory privilege. The institution must establish that one of the branches applies.

Branch 1: common law privilege

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

Solicitor-client communication privilege

[12] 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.[2] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[3] 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.[4]

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[2] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[3] Orders MO-1925, MO-2166 and PO-2441.
[4] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

[13] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[5]

[14] 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.[6] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[7]

Litigation privilege

[15] Litigation privilege protects records created for the dominant purpose of litigation. It is based on the need to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial.[8] Litigation privilege protects a lawyer's work product and covers material going beyond solicitor-client communications.[9] It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[10] The litigation must be ongoing or reasonably contemplated.[11]

Loss of privilege

Waiver

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

- knows of the existence of the privilege, and
- voluntarily demonstrates an intention to waive the privilege.[12]

[17] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.[13]

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[5] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[6] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[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] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).
[10] *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).
[11] Order MO-1337-I and *General Accident Assurance Co. v. Chrusz,* cited above; see also *Blank v. Canada (Minister of Justice)*, cited above.
[12] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).
[13] *R. v. Youvarajah*, 2011 ONCA 654 (CanLII).

[18] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[14] However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.[15] This is discussed in more detail below.

Branch 2: statutory privileges

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

Statutory solicitor-client communication privilege

[20] Branch 2 applies to a record that was "prepared by or for counsel employed or retained by an institution for use in giving legal advice."

Statutory litigation privilege

[21] This privilege applies to records prepared by or for Crown counsel "in contemplation of or for use in litigation." It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[16]

[22] Records that form part of the Crown brief, including copies of materials provided to prosecutors by police, and other materials created by or for counsel, are exempt under the statutory litigation privilege.[17] Documents not originally created for use in litigation, which are copied for the Crown brief as the result of counsel's skill and knowledge, are also covered by this privilege.[18] However, the privilege does not apply to records in the possession of the police, created in the course of an investigation, just because copies later become part of the Crown brief."[19]

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[14] 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.).
[15] *General Accident Assurance Co. v. Chrusz,* cited above; Orders MO-1678, MO-2936, PO-3154 and PO-3167.
[16] See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, cited above.
[17] Order PO-2733.
[18] *Ontario (Ministry of Correctional Services) v. Goodis*, cited above, and Order PO-2733.
[19] Orders PO-2494, PO-2532-R and PO-2498, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2009] O.J. No. 952.

[23] In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 19.[20]

Loss of Privilege

[24] Disclosure by Crown counsel to defence counsel during a criminal proceeding has been held not to result in waiver of the statutory privilege.[21]

The ministry's initial representations

[25] In its initial representations, the ministry submitted that the records at issue qualify for exemption under sections 19(a) and (b) of the *Act*. The ministry submits that the records originated in privilege and that privilege was maintained.

[26] The ministry acknowledges that in the email communication set out above, the manager references a "guideline" that the Assistant Crown Attorney, who is the author of the draft guideline, shared with her on a previous occasion.

[27] It is the ministry's position that notwithstanding the sharing of the guideline on that previous occasion, there was no loss of privilege as a result of waiver because:

> (i) communications between solicitors and third parties have been held to be privileged and exempt from waiver, and;
>
> (ii) in the alternative, there was a common interest between the ministry and the third party that is sufficient to withstand waiver of privilege.

[28] With respect to communications between the ministry and third parties, the ministry submits:

> It is well-settled that legal advice privilege can extend to communications between a solicitor or client and a third party. It is also well established that solicitor-client privilege extends to experts assisting a client's legal counsel. Determining when communications between a client and a third party or a solicitor and a third party are subject to solicitor-client privilege often requires an analysis of the activities of the third party and their relationship with the client and/or solicitor. Decisions such as *General Accident Assurance Co. v. Chrusz,*[22] supra, have advocated a functional approach to this determination process. In essence, the true nature, or

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[20] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, cited above.
[21] See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.).
[22] (1999), 45 O.R. (3d) 321 (C.A.).

> "function", of the relationship must be assessed by asking: "is the function essential or integral to the operation or existence of the solicitor-client relationship"

[29] The ministry submits that because Crown counsel hold a very unique, and somewhat complicated, position as it pertains to various sections of the *Act* and the application of historical concepts such as solicitor-client privilege and agency, "[f]rom both a theoretical and practical perspective, an argument can be made that Crown counsel hold the dual roles of solicitor and client when consulting with various third party entities."

[30] The ministry submits that in applying a functional analysis to the present appeal, the key question to consider is whether the function of the third party "is essential or integral to the operation or existence of the solicitor-client relationship?", submitting that in this particular case, it is.

[31] In support of its position, the ministry refers to *Bank of Montreal v. Tortora,*[23] where it submits that the Court held that a consultant company performed a function that was integral to the solicitor-client relationship in the context of an action related to a number of allegations, including breach of an employment contact. The ministry also relies on *Smith v. Jones*[24] where the Supreme Court of Canada considered whether privilege should be maintained in a psychiatric report prepared by a psychiatrist at the request of the client's solicitor.[25]

[32] The ministry submits that in the appeal before me:

> ... the Sexual Health and Harm Reduction manager was approached by the Assistant Crown Attorney in order to provide expert input, advice, and assistance in relation to the legal advice drafted by the Assistant Crown Attorney (in the form of the HIV Document). Previous orders have held that privilege attaches not only to the communications themselves, but also to documents attached to the communications. [Footnote omitted] The accuracy of the legal advice contained in the HIV Document was integral to the operation of the solicitor-client relationship just as it was found to be so in the aforementioned cases of *Bank of Montreal v. Tortora* and *Smith v. Jones*. On that basis, the ministry submits there was never any waiver of solicitor client-privilege precisely because the communications between the Assistant Crown Attorney and the manager

[23] [2010] B.C.J. No 1997 (SC).
[24] [1999] S.C.J. No. 15 (SCC).
[25] The ministry also refers to *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.) and *Royal Securities Corp. v. Montreal Trust Co.*, [1966] O.J. No. 10787 (H.C.), affirmed [1967] O.J. No. 997 (C.A.).

> were properly classified as being privileged irrespective of the manager's potential characterization as a third party entity.

[33] With respect to the common interest argument, it is the ministry's submission that no waiver has taken place in this instance because the record was always intended to be kept confidential, there was no waiver of privilege by the possessor of the privilege, and the document was shared for a specific and common purpose in furtherance of a common interest between the ministry, an institution under the *Act*, and the Public Health Division of the City of Hamilton, an institution under the *Municipal Freedom of Information and Protection of Privacy Act* (hereinafter "*MFIPPA*").

[34] The ministry relies on the reasoning in Order PO-3167, a case dealing with a specific legal memorandum that was shared between the Ministry of the Attorney General and various municipal police forces. In that decision, Adjudicator Donald Hale found a common interest existed that was sufficient to withstand a waiver of privilege.

[35] The ministry submits that in this appeal both the ministry and the Hamilton Public Health Division, represented by the Assistant Crown Attorney and the manager, shared a common interest in "the reduction of harm and the protection of society" which would negate any waiver-based disclosure. The ministry submits:

> As noted in numerous orders, the common interests shared between various parties need not be identical. In this particular case, both parties worked closely together in a co-operative manner towards advancing their common interest(s). With respect to HIV infection specifically, each party had a common and vested interest in ensuring that the state of the law, the nature of the science, and the role of public health, was properly and accurately reflected in both the justice and public health spheres.
>
> ... Provincial and municipal governments work to protect the health and safety of the Ontario public against the spread of HIV. To this end, one of the conditions often ordered on bail is the duty to report to a local public health official/department. Further, many experts called at HIV related prosecutions or who otherwise consult with Crown prosecutors are from the public health sphere. The potential of having legal consultations and interactions disclosed on the basis of waiver would not only have a chilling effect on those consultations but also negatively impact the administration of justice and the protection and education of the public.

[36] The ministry submits that the present appeal is very similar to that in Order PO-3167, and that the key principles applied, and the findings made, in that case should inform the present appeal. It states that key similarities between this case and PO-3167 include the following:

(i) in both instances, the parties involved shared a common interest in having a uniform understanding of the state of the law, as well as a uniform approach to its administration;

(ii) in both instances, a common interest existed even though those interests were not identical and each party played different roles in the administration, and furtherance, of those interests as contained in documents that were shared between the parties;

(iii) in both instances, the shared documents were to remain confidential as between the parties and were not to be shared with others who were not their intended recipients; and

(iv) in both instances, the documents were only shared between the parties because of their common interests.

[37] The ministry submits that Orders PO-3154 and MO-2936 are distinguishable from the present appeal. This is because in this appeal the draft guidelines originated in privilege and, in the ministry's view, there is a sufficiently strong common interest that exists between the ministry and the City of Hamilton's Public Health Division in relation to the subject matter in question.

The appellant's initial representations

[38] In his initial submissions, the appellant seeks to distinguish between "legal advice" and "legal information" asserting that only "legal advice" is subject to solicitor-client privilege. He submits that the records at issue do not contain any "legal advice", because they are essentially policy documents. The appellant explains his position in the following way:

> Not all activities of a lawyer are protected by privilege. Nor is ordinary government work converted into privileged communication merely because it is conducted at the [ministry]. The document at the centre of this case does not contain or relate to "legal advice" within the meaning of that term ….

[39] In this regard, the appellant relies on *Trillium Motor World Ltd v. Cassels Brock & Blackwell LLP*[26] where the decision of Belobaba J. set out a distinction between legal advice, which was found to be subject to solicitor-client privilege and legal information, which was not.

[26] 2013 ONSC 1789. The appellant also references the decision of McKinnon J. in *Phillips-Renwick v. Renwick Estate*, [2003] 229 DLR (4th) 158 (ONSC).

[40] In support of his position that the guidelines at issue in this appeal are in the nature of a policy document, rather than a solicitor-client communication, the appellant submits that:

> ... It was used to provide uniformity as between Crown offices. I believe it was shared amongst Crown Attorneys. The fact that the [guideline] concerns activities which are legal in nature (when to oppose bail, how to approach plea bargaining, etc.) does not matter. For instance, the ministry's Practice Memoranda, which include guidelines about when to oppose bail, plea bargaining, the use of evidence, appropriate treatment of the complainant, and so on is not protected by solicitor-client privilege. The general Practice Memorandum on Sexual Assault, for instance, was disclosed at an earlier stage of this process. Disclosure of Practice Memoranda is, I believe, standard practice at the ministry. ...

[41] The appellant submits that while the ministry contends that the drafts of the guideline were not an official policy of the ministry, they were used in a similar way. He explains:

> ... I concede that it was not adopted as an official Practice Memoranda by the ministry. Yet it was used by Crowns in a similar way, namely to provide guidance between offices and to promote consistency. The [guideline] is not binding on Crowns; but neither are Practice Memoranda. It would be wrong for the ministry to avoid disclosure of such documents simply by using them unofficially, rather than officially.
>
> Because the [guideline] doesn't apply the principles it contains to a specific set of facts, it fails to meet the legal advice branch of the test for solicitor-client privilege, and is therefore not covered.

[42] The appellant submits that privilege could nonetheless attach if the ministry could establish that it falls within the scope of litigation privilege. However, the appellant submits that the ministry has failed to do so in this case. The appellant submits that for litigation privilege to apply, the materials would have to have been prepared for a specific case, which is not what occurred here.

[43] The appellant refers to Orders PO-1928 and PO-1937 and asserts that the adjudicators in those cases found that materials prepared without any specific or particular litigation in mind did not attract litigation privilege.

[44] The appellant submits, however, that even if the guideline was prepared in the context of a specific case:

> ..., you must ask one further question. Was the [guideline's] dominant purpose its application to that case, or was its dominant purpose the creation of [a guideline] of general application? To answer that question, the structure and wording of the [guideline] may assist you. Was it formulated with a specific case in mind, or is it formulated in more general terms?

[45] Finally, the appellant submits that in any event, the ministry waived any privilege that may exist by disclosing the guideline. The appellant submits that the ministry concedes that the guideline was shared outside the ministry, but he does "not have a complete list of who received it."

[46] In that regard, the appellant submits that the decision in *Bank of Montreal v. Tortora* does not assist the ministry. He submits that:

> *... Tortora* can be distinguished on the facts. In that case, the third-party investigator was formally retained to perform the investigation. Counsel and its client both knew and approved of the use of the third-party investigator. And the documents which were in issue were the work-product of that investigator. That is not the case here, where there was no retainer or formal business relationship between the ministry and the Hamilton public health worker, and the communication isn't the third-party's work product, but rather a complete draft of the [guideline] completely written by the ministry.

[47] The appellant also submits that *Smith v. Jones* is not applicable. The appellant submits that "the attachment of solicitor-client privilege was not argued" in that case[27]. In any event, the appellant submits that "the ministry's argument nonetheless fails":

> ... A threshold question is whether the underlying facts have been made out. For instance, the ministry hasn't presented evidence that the public health worker was in fact an expert in the relevant areas. The ministry hasn't presented evidence that the ministry sought out the Hamilton public health worker as an expert, engaged her as such and relied on the results ....

[48] The appellant submits that even if the ministry did rely on her opinion, the manager's role is not similar to that of the psychiatrist in *Smith v. Jones*:

> The psychiatrist's assessment of the accused in *Smith v. Jones* was "essential" to the litigation, because his mental competency would form

[27] The appellant is correct. The Supreme Court of Canada did not have to decide that issue as the existence of privilege in the psychiatric report was not contested.

> an essential part of the pleading (not guilty by reason of mental defect), the verdict (not criminally responsible), and the sentencing (choice of appropriate facility). It was "essential" in the sense that it was necessary to get a psychiatric opinion in order to choose between legal options. A lawyer would be negligent if they made such important decisions without this kind of assessment. Here, it was in no way essential that the drafter of the [guideline] get advice from the public health worker. However valuable, it was not essential in the *Smith v. Jones* sense.
>
> Moreover, unlike in *Smith v. Jones*, other options were possible and more consistent with the goals of getting advice and maintaining confidentiality. Sharing the [guideline] was not required to get the feedback she wanted. For instance, the drafter of the [guideline] could have simply called or emailed the public health worker and asked questions about the areas in which she wanted advice. Alternatively, the drafter could have sent only the portions of the document which were relevant, like those related to public health orders. By sending the whole document to the public health worker, the drafter was not holding the [guideline] in confidence, and therefore she waived whatever privilege had attached to the document.

[49] The appellant also takes issue with the ministry's assertion that a common interest existed that was sufficient to withstand waiver of privilege. The appellant sets out previous orders of this office and the courts on the issue and submits that the "outer bounds" of a common interest must be marked by PO-3167 which, the appellant submits, does not stand for the proposition that all government workers have a common interest in this sense. The appellant submits:

> ... The Crown lawyers and police chiefs in PO-3167 have a common interest in that they represent different stages of the same legal process, i.e. arrest and trial. And they must work together; there is literally no way for the Crown or the police to operate without the other. Their work is inextricably bound up.
>
> This is not the case between the ministry and public health. The main goal of municipal health workers is the promotion of health, not the arrest and punishment of wrongdoers. They do not represent different stages of the same process. Whereas Crown interventions are post-act, punitive and reactive, public health work is pro-active, preventative and ameliorative. Whereas the Crown and police share overarching goals and tasks, namely enforcement and punishment, this is not the case with public health workers, whose typical activities are medical or educational or both.
>
> On the question of whether the interests of public health and the ministry line up in this particular case, the ministry assumes that it does. However,

> that is simply not the case. HIV non-disclosure cases have often pitted criminal law goals against public health goals. ...
>
> ... Contrary to what you might expect, public health and the Crown simply do not have common interests when it comes to HIV prosecutions.

[50] In support of that argument, the appellant attached a journal article to his submissions.[28]

[51] The appellant concludes his representations on the application of the common interest exception to waiver of privilege by stating:

> The ministry puts forward the following common interest between itself and the Hamilton public health worker: "reduction of harm and the protection of society" ... . This is much too broad. It is true that the reduction of harm is a laudable goal. It is also widely held. To accept this as a "common interest" in this sense would be to exempt disclosure by the ministry to a wide variety of actors, from workers at homeless shelters to partygoers who agree to be designated drivers. It would include naturopaths and acupuncturists, and manufacturers of everything from Advil to Dr. Scholl's shoe inserts. To accept this explanation is to draw the exception so broadly it would swallow the rule.

[52] With respect to the "chilling effect" and negative impact that the ministry claims would arise if the guideline was disclosed, the appellant submits:

> It would do no such thing. All of the confidential day-to-day ways in which the Crown office deals with medical professionals would remain intact. Certainly, the preparation of, for instance, expert medical evidence to be used in a trial would be protected by [section 19]. So would the delivery of health documents obtained by warrant, or the monitoring of an accused who has health-related obligations under his or her bail conditions.

The ministry's reply representations

[53] The ministry submits in reply that because the appellant is unaware of the type of information contained in the records, his argument that the records do not contain "legal advice" is based on speculation. The ministry submits that a review of the records clearly demonstrates that they contain "legal advice" and are subject to solicitor-client privilege. The ministry submits:

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[28] O'Byrne P, Bryan A, Roy M, "HIV Criminal Prosecutions and Public Health: an Examination of the Empirical Research" *Med Humaniti* 2013; 39:85-90. The appellant refers in particular to page 88 of the article.

> ... the [guideline] was clearly prepared by Crown counsel, not only for their own use, but also for the benefit of other Crown counsel who were already/would undertake similar HIV prosecutions in the future and/or would be providing legal advice of their own. In that respect, the [guideline] is unique in that it was, and can, be used in a number of different ways for a variety of purposes. For instance: the [guideline] was used by its author as a strategic legal tool when conducting their own HIV litigation cases; it can also be used to provide advice, guidance, and education to other Crown counsel dealing with their own HIV prosecutions; finally, it can help form the basis of legal advice provided to other client-departments such as the police [footnote omitted] or to those working in the private health sphere. Those actual and potential uses by no means represent an exhaustive list of how versatile the [guideline] can be, but the key point to be made is that it was produced "by Crown counsel" and "for Crown counsel" for use in giving "legal advice" or for use in "litigation."
>
> As for labeling the document "legal information," that is a completely inaccurate description of the document given that it represents a considered, methodical, and relevant legal endeavour that was brought about by the careful selection, inclusion, and synthesization of specific legal materials and cases by Crown counsel. It also contains suggestions on how to deal with certain legal scenarios with legal implications. The legal analysis contained in the [guideline] is bolstered by the careful inclusion of factual material that supports the legal analysis and recommended courses of action.

[54] The ministry submits that the materials contained in a Crown Brief are a perfect illustration of how selective copying and inclusion of even factual materials will be protected under litigation privilege and qualify as "legal advice":

> Certainly if items as innocuous as case reports and/or their summaries are protected under s. 19, which numerous IPC Orders and Court decisions confirm, there can be no doubt that the [guideline] is properly exempt as well given that it represents far more than mere legal information. All told, the [guideline] is the absolute epitome of what Crown work product represents and is a perfect example of what a legal advice document resembles. It is a strategic document born out of the legal experience of a Crown counsel with recognized expertise in HIV prosecutions.

[55] The ministry also takes issue with the appellant's argument that the guideline cannot be subject to litigation privilege because it was not created with a specific case in mind:

> ... , the main problem with the appellant's argument is twofold: (i) the [guideline] was created in the course of a major HIV prosecution, and; (ii) the litigation cases cited by the appellant do not accurately capture the unique nature of the records created and used by Crown counsel let alone the special roles that Crown counsel play within criminal prosecutions and the administration of justice in general.

[56] The ministry submits that contrary to the assertions made by the appellant the guideline was initially prepared by the author while working on "the extremely complex and lengthy case" of *R v. Aziga.*[29]

[57] The ministry submits that it raised the application of litigation privilege primarily because the guideline "serves a myriad of purposes and was borne out of a myriad of necessities". The ministry submits:

> First and foremost, it is a document created by, and for, Crown counsel for use in giving legal advice. On top of that, it can also be viewed as a document created by Crown counsel for use in litigation, real or reasonably contemplated. Generally speaking, records that were prepared prior to the commencement of litigation, or the fact that litigation for which the records were prepared did not materialize or has since been discontinued, will not necessarily hinder the application of s. 19, so long as the records were created with specific or contemplated litigation in mind. [footnote omitted] This is often referred to as the dominant purpose test.
>
> That said, Order MO-1337-I has held that the dominant purpose test does not preclude the potential application of litigation privilege to records that were not created for the purpose of the litigation but have, nevertheless, found their way into a lawyer's brief. Litigation privilege will apply to such records if they involved selective copying or result from research or the exercise of skill and knowledge on the part of the lawyer. The types of records that may qualify are those that are otherwise publically available such as newspaper clippings, case reports, and others that were not created with a specific litigation in mind but nevertheless find their way into a Crown counsel's Crown Brief.

[58] The ministry submits that in many ways, the guideline is no different than any other legal research that finds its way into a specific Crown Brief. The ministry submits that in this case, not only was the guideline created regarding specific litigation but it is also capable of being used in other prosecutions in the future.

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[29] Sentencing at [2011] O.J. No. 3525 (S.C.J).

[59] The ministry further submits that the appellant's contention that the guideline is akin to a practice memorandum is incorrect:

> Although it is true that Crown Policy Manual materials and practice memoranda are available to the public and thus not considered confidential (via s. 19 solicitor-client privilege), the ministry, specifically the Criminal Law Division, does create privileged materials strictly for use by Crown counsel working throughout the province of Ontario. These materials are created by Crown counsel, for other Crown counsel, for use in giving legal advice or for use in litigation. The [guideline] is this type of document. It is by no means similar to a practice memorandum or materials contained in the Crown policy manual which are vague and outline what is expected of Crown counsel in furtherance of their public duties. These documents are publically available precisely because they articulate general principles; all of which are aimed at helping educate the public on how Crown counsel exercise their discretion. The [guideline] is neither of those things. It is a precise, focused document, specifically created using the unique legal skills of its author and contains legal advice pertaining to complicated HIV prosecutions.

[60] The ministry further submits that the manager has particular expertise and knowledge when it comes to HIV transmission and its intersection with the law and public health:

> ... It is precisely because of their reputation that they are held in such high regard, not only by peers but also others within the legal, public health, and public interest group realm.

[61] The ministry states in a footnote to its representations that in this particular instance, the author of the guideline wanted the manager's expert perspective on the entire document, not just one portion.

[62] The ministry submits that the manager consults with police on HIV related matters and investigations and that the consulting relationship between the manager and the author of the records is akin to a solicitor-expert relationship. The ministry submits that asking for the manager's input on the draft guideline was a natural extension of that working relationship.

[63] The ministry states that the manager is well regarded in the field and is regularly consulted precisely because of their knowledge and expertise in the area. In support of this submission the ministry points to the manager appearing as a panelist at a specified seminar. It also submits that in March of 2011, the manager was invited by the Ontario Working Group on Criminal Law and HIV Exposure (CLHE), to participate in a series of consultations being held across Ontario in response to the ministry's

announcement that it would be preparing prosecutorial guidelines for criminal cases involving allegations of HIV non-disclosure. The ministry submits that "[t]he invitation explicitly acknowledged that [the manager] was being invited specifically because of their particular knowledge of matters related to the criminalization of HIV non-disclosure."

[64] The ministry closes its submissions on this point by stating:

> ... Integral to Crown counsel's ability to formulate and provide legal advice, they must first be accorded the freedom to consult with third party experts in order to ensure the accuracy, uniformity, and reliability of the advice being formulated. It is only when this occurs that Crown counsel are able to fulfill their role and responsibility to the ministry and to the proper administration of justice in this province. Understanding s. 19 in this manner should, respectfully, bring an end to this appeal.

[65] With respect to the possible application of the common interest exception to waiver of privilege, the ministry submits that the appellant's assertion that the ministry and Public Health as a whole do not share a common interest, does not correctly frame the issue and does not apply the proper test. The ministry submits that the author of the guideline and the manager did have a common interest:

> First, the fact that this particular Health Official and the Crown counsel regularly consulted one another, in a relationship akin to solicitor-expert, [...] in the promotion of health, safety, and the reduction of harm clearly shows they had a common interest.
>
> If they did not share such common interests, the two would not have been consulting one another the way they did and the Crown would not have sought out the Public Health official's advice and expertise. As an aside, it is interesting to point out that the formal title of Sexual Health and Harm Reduction Manager for Hamilton, in and of itself, indicates that this particular official has an interest in promoting the health of Hamilton's residents as well as the reduction of harm in relation to sexual health; all of which are also common interests shared by the author of the HIV Document as Crown counsel.
>
> Second, the appellant states ... that the main goal of the ministry is the arrest and punishment of wrong doers and not the promotion of health. That comment places the role of the Crown in far too narrow a light. Crown counsel have multiple responsibilities and obligations. On a practical level, they are obligated to ensure, amongst many other things, that cases have a reasonable prospect of conviction, that an accused receives a fair trial, and that victim injuries are addressed. Apart from

> these micro level obligations, they also have to ensure that the administration of justice is upheld and that the community/society's best interests are taken into account. In that respect, and specifically within the context of HIV prosecutions, the Crown has an interest in promoting not only the law but also the health and safety of the community/society as it pertains to HIV transmission. It follows that the appellant's comments on this particular point are inaccurate and overly narrow.
>
> Third, wholly apart from the fact that the proper test for common interest is whether the particular parties sharing the document had a common interest, the journal article which the appellant attached to his submissions can hardly stand for the general proposition that all Public Health Officials have no common interests with the ministry with respect to the promotion of health and the reduction of harm. Indeed, certain individuals may have different views on how best to achieve that goal, but at the end of the day, it is a common goal, which is what the common interest exemption is all about. … [I]t is an undisputable fact that the parties in this particular case did share a common interest simply by the fact that they utilized each other's particular expertise and advice. Moreover, the journal article itself, while interesting from a social/health science perspective, really adds nothing to the issues at play in this particular Inquiry. No concrete conclusions were reached in the article precisely because of gaps in the literature and the absence of relevant empirical studies. At most, the authors could only speculate on the effects that HIV criminalization had on public health, regularly using inconclusive descriptors when describing their analysis such as "HIV laws probably compromise public health and other clinicians' ability to" …, and, "Even though a review of the existing empirical research suggests that such laws only appear to affect a small number of persons [query the conclusions that can be made when dealing with such a small cohort] these laws appear to undermine the abilities of public health officials and allied health practitioners to" … .[30]

[66] With respect to the "chilling effect" from disclosure, the ministry takes issue with the appellant's counter-arguments and submits:

> … In this particular case, Crown counsel chose to share the document with one specific Public Health Official who had a particular expertise. The HIV Document was not shared at a public conference; it was not posted on-line; nor was it distributed to a lay person for their own personal interest or information. The exchange that happened in this case is precisely the sort of exchange that happens on a day-to-day basis in order

[30] The ministry references page 69 of the journal article in support of this submission.

> to ensure that Crown counsel are undertaking their responsibilities and prosecutions in an educated, fair, and informed manner.
>
> ... if the HIV Document were disclosed, then every written conversation or otherwise recorded communications with an expert in furtherance of a particular legal issue or prosecution could be requested, and provided, via the FOI process. In such a case, Crown counsel would have little choice but to close off such consultations altogether and rely on their own understanding of a particular subject matter regardless of their knowledge of the area/field. Worse, they may be even be forced to withdraw the charges altogether as sensitive information pertaining to the prosecution would have been disclosed prior to the hearing of evidence; one concern being that witnesses could be tainted with the now publically available information. Both scenarios would be an untenable result, thereby inhibiting Crown counsel's role as minister of justice.

Appellant's sur-reply

[67] The appellant submits that he does not agree with the ministry's characterization of the records. He explains:

> In 2010 and 2011 a group of non-governmental organizations [NGO's] conducted consultations regarding the development of a Crown Practice Memorandum about the prosecution of HIV non-disclosure cases. Those organizations, under the name "The Working Group on Criminal Law and HIV Exposure [CLHE], invited a variety of stakeholders to participate in consultations. Among them was a public health worker in Hamilton. That worker forwarded her invitation to [the Assistant Crown Attorney] and added a short preface.

[68] The appellant submits:

> Context is important. The public health worker was invited to consultations about drafting a general purpose document. That document was to provide guidance to Crowns about how to proceed in HIV non-disclosure cases. This triggered a memory: the public health worker remembered another document, a "guideline," created by the ministry, and "shared" with her. The public health worker thought they might be identical.

[69] The appellant accepts that the guideline was never adopted as an official policy, however, he submits that the guideline "serves a policy function". He submits that it is used across the province by a variety of ministry staff. The appellant states that the ministry admits that the guideline "serves a myriad of purposes" and can be used to

"provide advice, guidance and education to other Crown counsel." The appellant submits:

> The author of the [guideline] was counsel in the trial of *R. v. Aziga* ..., a high profile trial which ended April 4, 2009 and for which sentencing took place in August of 2011. But it is important to be clear about what role *Aziga* did and did not play in the development of this document. The ministry's own submissions hedge on this point. It does not claim the document was created for use in that case, rather, "while" working on it ... or "in the course of" ... that case. In [its representations], the ministry lists the "myriad" uses to which the [guideline] is put but it does not list "use in *R. v. Aziga*" as one of them. Rather, it claims the [guideline] was "used by its author as a strategic tool when conducting their own litigation cases" – which is consistent with the [guideline] being a document of general application. The ministry would like you to infer that the document was created to be used in the *Aziga* case. Was it? That is a matter for you to decide.

[70] The appellant submits that the ministry has failed to establish that the guideline was created for use in "specific litigation" or was created in order to give particularized advice. The appellant submits that if the record is a guideline, an unofficial policy, generalized advice not tailored to a specific case, or educational in nature, then the record does not qualify for exemption under section 19 of the *Act* and should be disclosed.

[71] In addition, the appellant submits that the ministry has provided no additional information about the actual interaction which led to the guideline being shared with the health worker. The appellant submits:

> The [guideline] is a long document that contains a lot of information which has little to do with public health. The [guideline] may have been "shared" – to use the public health worker's word – for a lot of reasons. Some of those reasons have nothing to do with consultation whatsoever: for instance, the [guideline] could have been shared simply to tell public health the Crown's position. The [guideline] could have been shared in order to solicit advice about matters which fall outside her expertise: for instance, the author could have been worried about political backlash.
>
> I raise the issue to show that there is no evidence of an expert relationship in this case. But ultimately, even if you accept the characterization of their interaction, the ministry's submissions do nothing to advance their argument of the "essential nature" of the relationship. ...

[72] The appellant also submits that in order to establish the existence of a "common interest":

> ... the intentions of the individuals may be relevant, but since both were operating in their official capacities, the institutional interests are also crucial. Certainly, in PO-3167, Adjudicator Hale did not consider whether the authors of the document shared a common interest with any individual police chief in his or her personal capacity. The focus was rightly on the institutional roles they played,

[73] The appellant reiterates that the ministry draws the interests of the parties far too broadly:

> For instance, you must reject framing the common interest as "the community/society's best interests" .... On the contrary: a good sign that the parties do not have a common interest is that they will, necessarily, assess the "success" of any particular event on different terms, and even where the same action is found to be a success for both parties, it will be for different reasons. For the ministry, success looks like pursuing cases with a reasonable chance of conviction, ensuring a fair trial, and addressing victims' injuries. Success for Public Health looks like providing services to HIV-positive people, promoting HIV testing, and participating in prevention campaigns. While the social science evidence about the effect of HIV prosecutions on public health is indeed tentative, it is tentative about a stronger point: in HIV non-disclosure cases, there is reason to believe that success for one party is a failure for the other. However, if you set aside the strong version of this claim, at a minimum the social science evidence shows how the measures of success - and hence interests - are simply different as between the parties.
>
> Finally, care must be taken to avoid a tautology. The ministry submits that "if they did not share such common interests, the two would not have been consulting each other". ... If this logic were accepted then virtually any disclosure would be exempt from waiver of privilege. People are more likely to freely share information with people who are sympathetic; that is certainly true. But without a critical analysis of their interests the exception would swallow the rule. Again, the standard is not whether parties agree, it's whether they have a common interest.
>
> The bottom line is this: the ministry sent a public health worker a lot of information, much of it outside her realm of expertise and none of which was caught by the exceptions to waiver. A department cannot simply share confidential documents with friends without waiving privilege. Once

> the ministry waived its privilege, it became subject to a freedom of information request. The ministry must now release it.

[74] With respect to the consequences of release, the appellant submits that the ministry's concerns are exaggerated. He submits that:

> ... The Crown's ordinary engagement with experts, medical or otherwise, in the course of specific litigation is unaffected. As well, on broader policy issues the ministry would still be free to consult with whomever it likes. Indeed, where the ministry consults on issues not related to specific litigation - whether policy questions or in the production of guidelines – it would be bound by the same freedom of information disclosures, and have available all the other statutory exemptions, as any other department. Such is the nature of the legislative scheme.
>
> The ministry has led no arguments that the release of this particular document would have any negative effect whatsoever. That is perhaps unsurprising: after all, the information contained in the document is no longer up-to-date. As the ministry submitted ..., the [guideline] was drafted before the Supreme Court of Canada released its decision in [*Mabior*] and its companion case, *R v DC*[31], cases which changed the legal test in significant ways. Moreover, the ministry is developing an official practice memorandum on the subject, which displaces the [guideline]. While the [guideline] is therefore primarily of historical importance, it is in the public's interest to be able to compare the ministry's practice memorandum, when it is released, to the unofficial practice during this period. The [guideline] forms part of that historical record.

Analysis and Findings

[75] I find that litigation privilege does not apply to the guideline because, while it may have been created while the Crown counsel was working on *R v. Aziga*, the ministry has failed to provide sufficiently detailed and convincing evidence to satisfy me that it was prepared predominantly for use in that case or any other specifically contemplated litigation. Support for this finding is found in the ministry's submissions which emphasize that it was a document created for a more general purpose, as conformed when the ministry submits that "(f)irst and foremost, it is a document created by, and for, Crown counsel in giving legal advice."

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[31] 2012 SCC 47.

[76] Turning to solicitor-client privilege, in *Pritchard v. Ontario (Human Rights Commission)*[32], Major J., of the Supreme Court of Canada wrote the following in addressing whether a legal opinion prepared by Ontario Human Rights Commission (Commission) counsel for Commission staff and sought by the complainant was subject to privilege:

> The appellant submitted that solicitor-client privilege does not attach to communications between a solicitor and client as against persons having a "joint interest" with the client in the subject-matter of the communication. This "common interest", or "joint interest" exception does not apply to the Commission because it does not share an interest with the parties before it. The Commission is a disinterested gatekeeper for human rights complaints and, by definition, does not have a stake in the outcome of any claim.
>
> The common interest exception to solicitor-client privilege arose in the context of two parties jointly consulting one solicitor. See *R. v. Dunbar* (1982), 138 D.L.R. (3d) 221 (Ont. C.A.), *per* Martin J.A., at p. 245:
>
> > The authorities are clear that where two or more persons, each having an interest in some matter, jointly consult a solicitor, their confidential communications with the solicitor, although known to each other, are privileged against the outside world. However, as between themselves, each party is expected to share in and be privy to all communications passing between each of them and their solicitor. Consequently, should any controversy or dispute arise between them, the privilege is inapplicable, and either party may demand disclosure of the communication. . . .
>
> The common interest exception originated in the context of parties sharing a common goal or seeking a common outcome, a "selfsame interest" as Lord Denning, M.R., described it in *Buttes Gas & Oil Co. v. Hammer (No. 3)*, [1980] 3 All E.R. 475 (C.A.), at p. 483. It has since been narrowly expanded to cover those situations in which a fiduciary or like duty has been found to exist between the parties so as to create common interest. These include trustee-beneficiary relations, fiduciary aspects of Crown-aboriginal relations and certain types of contractual or agency relations, none of which are at issue here.

[32] [2004] 1 S.C.R. 809, 2004 SCC 31 at paragraph 22.

[77] In Order PO-3154, I reviewed the jurisprudence, including orders of this office, pertaining to a determination of whether the common interest exception to waiver of privilege existed in the context of the commercial matter under consideration in that appeal. At paragraph 179 of that decision, I articulated the following test:[33]

> . . . the determination of the existence of a common interest to resist waiver of a solicitor-client privilege under Branch 1, including the sharing of a legal opinion, requires the following conditions:
>
> (a) the information at issue must be inherently privileged in that it must have arisen in such a way that it meets the definition of solicitor-client privilege under section 19(a) of the *Act*, and
>
> (b) the parties who share that information must have a "common interest", but not necessarily identical interest.

[78] Parties may have a common interest even if they do not have identical interests. The possibility that parties might at some future point in time become adverse in interest is insufficient in denying a common interest at present.[34]

The information at issue is inherently privileged

[79] At paragraph 26 of *Blank v. Canada (Minister of Justice)*[35] (*Blank*), after citing a number of cases, a majority of the Supreme Court of Canada discussed the origin and rationale of solicitor-client privilege in the following way:

> Much has been said in these cases, and others, regarding the origin and rationale of the solicitor-client privilege. The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.

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[33] This test was followed by Adjudicator Donald Hale in Order PO-3167 and referred to by me in Order MO-2936.

[34] *CC & L Dedicated Enterprise Fund (trustee of) v. Fisherman*, [2001] O.J. No. 637 (SCJ).

[35] (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).

[80] Much of the modern jurisprudence in this area has indicated that solicitor-client privilege is to be generously construed.[36] Solicitor-client privilege under Branch 1 may also apply to the Assistant Crown Attorney's working papers directly related to seeking, formulating or giving legal advice.[37]

[81] In *Ontario (Ministry of Community and Social Service) v. Ontario (Information and Privacy Commissioner)*[38], the Divisional Court found that documents created by in-house counsel at the Family Responsibility Office (FRO) at the request of its Director, for use by its Director, enforcement officers, in-house counsel and its agents on how and when default proceedings should be commenced and how they are to proceed under the *Family Responsibility and Support Arrears Enforcement Act, 1996*[39] (*FRSAEA*), were exempt from disclosure pursuant to the common law solicitor-client communication privilege exemption in section 19.

[82] In that case, the Divisional Court found that the legal advice covered by solicitor-client communication 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."

[83] In discussing the scope of the common law communication privilege in the circumstances of that case, the Divisional Court states:

> An examination of the records in dispute reveals that the documents were created by legal counsel at the instruction of the Director. Without getting into any specific discussion that would necessarily divulge the contents of the documents, all of the documents include instructions and advice as to how and when s. 41 default proceedings should be commenced and how they are to proceed. Among other things, they include discussions of the statutory requirements of these proceedings and the evidentiary requirements of such cases; they include a discussion of criteria to be considered when deciding to proceed with these types of cases; they include an examination of options to be considered, depending on how the default hearings unfold before the court; and, they include a discussion of how the enforcement officers should interact with the panel lawyers on these matters.[40]

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[36] See for example, *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[37] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[38] (2004), 70 O.R. (3d) 680.
[39] S.O. 1996, c. 31.
[40] Paragraph 23 of the decision.

[84] In finding that the communication privilege continues after the creation of the documents in question and the provision of instructions by the Director to FRO's in-house counsel, the Divisional Court states:

> The Commissioner appears to recognize that the communications between the Director and her legal counsel and/or her staff (all being agents of the Director) may be privileged in the preparation of the documents. We fail to see how that privilege can be lost once the documents are completed. Based on the court's examination of the records, the documents are clearly the product of those confidential communications. In the unique circumstances of this case, the fact that the Director then instructs the in-house counsel to share the documents for the purpose of instructing its enforcement officers and the panel lawyers, all of whom are clearly agents of the Director, in our view, does not change the source of those documents as arising from confidential communications from legal counsel. In essence, through the medium of those documents, the agents of the Director are receiving the instructions of the Director with respect to how s. 41 default proceedings are to be conducted in the name of the Director, as the Director has been so instructed by its legal counsel. There is no basis in law for terminating the solicitor-client privilege on these facts.[41]

[85] In concluding that the phrase "particular legal context" need not be confined to a discrete transaction or particular litigation, the Divisional Court states:

> We are also of the view that the Commissioner's interpretation and application of the term "particular legal context" cited in the cases on which the Commissioner relied was too narrow. It need not be limited to a single discrete transaction or particular litigation. In this, the Commissioner appears to have been confusing litigation privilege with solicitor-client communication privilege...While the advice and instructions found in the documents in question can apply to many individual cases brought before the courts by the many agents of the Director throughout the province, all of the cases will be s. 41 default proceedings under the *FRSAEA* on which the Director had sought legal advice from her in-house counsel. The s. 41 default proceedings are one of the litigation tools accorded the Director under the *FRSAEA* in order to fulfill its legislative mandates on which it has sought legal advice. It can, therefore, be considered a "particular legal context" as described in the case of *Balabel and Another v. Air India*, supra.[42]

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[41] Paragraph 24 of the decision.
[42] Paragraph 25 of the decision.

[86] In reaching its conclusion, the Divisional Court also distinguished the circumstances of that case from those in an earlier decision of this office, Order PO-1928. In Order PO-1928, Adjudicator Dora Nipp found that training materials prepared by the staff of the Office of the Children's Lawyer (OCL) to be given to both lawyers and social workers with the help of clinicians, such as psychologists or psychiatrists, provided generic information for trainees to follow when interviewing children and were, therefore, not privileged.[43] In addressing the different circumstances in Order PO-1928, the Divisional Court states:

> [The records in PO-1928] were indeed generic training materials on a non-legal subject. […] [T]he documents in this case are very different. Contrary to the Commissioner's findings, the conclusions reached in PO-1928 are not similarly applicable in this case.[44]

[87] The Divisional Court's reasoning was applied in Order PO-2719, where Adjudicator Bernard Morrow found the withheld portions of two records at issue in that case, being the Office of the Children's Lawyer Personal Rights Nuts and Bolts Manual and Policy and Procedural Manual for Clinical Investigators Office of the Children's Lawyer, qualify for exemption under the solicitor-client communication head of privilege in Branch 1. In Order PO-2784, Adjudicator Morrow reached a similar conclusion with respect to "internal OCL policy and procedure documents provided to OCL lawyers." He described those records as containing "detailed instructions and advice issued by the OCL to panel lawyers and in-house counsel about how to conduct litigation and/or to provide legal services on behalf of OCL".

[88] In Order PO-2719, Adjudicator Morrow relied on the following factors in making his determination that the records at issue in that appeal were privileged:

- the records contain instructions and advice as to how and when to conduct custody/access and child protection cases on behalf of the OCL including
    - discussions of the statutory requirements of these proceedings and the evidentiary requirements of such cases
    - legal advice and directions regarding recommended processes to follow when conducting an investigation or preparing a report

[43] Adjudicator Donald Hale adopted the rationale in Order PO-1928 when he made his findings in Order PO-1937.
[44] Paragraph 26 of the decision.

- communication protocols
- precedent materials

- the records are the product of confidential communications between counsel and management at the OCL

- the information contained in the records is legal in nature and has been provided in confidence to the OCL investigators, its in-house lawyers and agents to apply the advice and instructions provided in the records

- the advice and instructions found in the records can apply to many individual cases; accordingly, it is irrelevant that the litigation in which the appellant in this case has been involved has concluded, since all cases - past, present or future - fall into the "particular legal context" of access/custody and children protection matters

[89] Without getting into any specific discussion that would necessarily divulge the contents of the guidelines at issue, in my view, and applying the reasoning of the Divisional Court to the guidelines at issue before me in this appeal, although they were drafted by an Assistant Crown Attorney to be shared with other Crown Attorneys, I find that the draft guidelines share many similar qualities to those addressed in the authorities discussed above, and accordingly, qualify for exemption under section 19.[45] In that regard, I find that the records contain information that is more "legal advice" than "legal information" under the test set out by Belobaba J. in *Trillium Motor World*.

[90] I now turn to the consequences of sharing a draft of the guideline with the manager.

Communication with a third party

[91] With respect to a communication between a client and a third party or a solicitor and a third party, in *General Accident Assurance Co. v. Chrusz*,[46] Doherty J. A. observed that the authorities establish two principles.[47]

- not every communication by a third party with a lawyer which facilitates or assists in giving or receiving legal advice is protected by solicitor-client privilege; and

[45] In that sense Order MO-2936 is distinguishable, as I concluded that the records at issue in that appeal did not originate in privilege.
[46] (1999), 45 O.R. (3d) 321 (C.A.).
[47] *General Accident Assurance Co. v. Chrusz*, supra, at page 352.

- where the third party serves as a channel of communication between the client and solicitor, communications to or from the third party by the client or solicitor will be protected by the privilege as long as they meet the criteria for the existence of the privilege.

[92] Justice Doherty went on to hold that where a third party is not a channel of communication:

> ... the applicability of [the privilege] should depend on the true nature of the function the third party was retained to perform for the client. If the third party's retainer extends to a function which is essential to the existence or operation of the solicitor-client relationship, then the privilege should cover any communications which are in furtherance of that function and which meet the criteria for client-solicitor privilege.[48]

[93] If a client authorizes a third party to direct a solicitor to act on behalf of the client, or if the client authorizes the third party to seek legal advice from the solicitor on behalf of the client, the third party is performing a function which is central to the solicitor-client relationship.[49]

[94] On the other hand, if the third party is authorized only to gather information from outside sources and pass it on to the solicitor so that the solicitor might advise the client, or if the third party is retained to act on legal instructions from the solicitor (presumably given after the client has instructed the solicitor), the third party's function is not essential to the maintenance and operation of the solicitor-client relationship and should not be protected.[50]

[95] While I am satisfied that the drafts at issue originated the context of a privileged communication, I am not satisfied that the sharing of the guideline with the manager qualifies as a solicitor-client communication.

[96] No evidence was provided that the Assistant Crown Attorney was acting without the authority of the ministry when the draft was shared. While there is evidence of the manager's experience in the area, it is clear that the manager was not a client of the Assistant Crown Attorney. It is also clear on the evidence that the manager was not formally retained by the Assistant Crown Attorney to provide an opinion and/or input on the draft. There was no indication that the draft was provided to the manager with any cover letter setting out expectations and/or limitations for its use. I was not provided with any affidavits from the Assistant Crown Attorney or the manager explaining what

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[48] *General Accident Assurance Co. v. Chrusz*, supra, at page 356.
[49] *General Accident Assurance Co. v. Chrusz*, supra, at page 356.
[50] *General Accident Assurance Co. v. Chrusz*, supra, at pages 356 to 357. See also *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665.

the exact expectations were surrounding the sharing. Was the manager to comment on the guideline, suggest changes or simply read it? The ministry did not provide me with any evidence about whether the manager provided actual input or if the draft was changed in some way as a result of her input.

[97] With respect to expectations of confidentiality surrounding the sharing of the draft, no objective evidence was provided that it was shared in confidence. While the ministry makes bald assertions of confidentiality,[51] no affidavit was provided in support of these assertions, there are no notations of confidentiality on the record itself and there are no documents that suggest that the guideline was provided in confidence. As set out above, I was not provided with a copy of any cover letter from the Assistant Crown Attorney setting out any limitations on its use. The manager's email regarding it being "shared with us" is silent regarding any expectation of confidentiality. In fact, it suggests that the draft may have been shared with other people beyond the manager in question. In my view, if the ministry wished to establish a confidentiality claim, more should have been provided.

[98] Finally, applying a functional analysis the ministry has failed to establish that the communication between the manager and the Assistant Crown Attorney is essential to the existence or operation of any solicitor-client relationship.

[99] As a result, I find that the ministry has failed to establish that sharing the record with the manager qualified as a privileged communication.

No common interest existed that was sufficient to withstand waiver of privilege

[100] Furthermore, in my view, the ministry has failed to establish that a common interest existed that allows it to maintain privilege over the draft guideline it shared with the manager.

[101] I have considered the ministry's arguments and I do not agree that this is a situation similar to the one before Adjudicator Hale in Order PO-3167. There is no similar commonality of interests in the appeal before me with respect to the sharing of the draft guideline. The ministry and the public health authority have very different statutory and practical mandates. The records at issue relate to the ministry's role in deciding how and when to prosecute individuals for breaches of the Criminal Code. In contrast, public health authorities are broadly responsible for protecting and promoting health of a given population. In the circumstances, I do not find that there was any overlap in their mandates or spheres of operation, which would establish a common interest with respect to sharing of the draft guideline.

[51] Including an assertion made at paragraph 15 of the ministry's representations which could not be shared due to confidentiality concerns.

[102] The common interest argued by the ministry of being for the "reduction of harm and the protection of society" is too broad. If accepted by me, such a common interest would permit the ministry to disclose this record to thousands of individuals or organizations whose mandate includes the reduction of harm and protection of society, while still maintaining privilege. In my view, none of the authorities offered by the ministry support such a dramatic expansion of "common interest".

[103] This finding is in keeping with the origin and rationale of solicitor-client privilege as set out in the excerpt from *Blank*, above. While I accept that limitations on the ability of the ministry to freely and fully consult counsel and/or experts could be considered to have a "chilling effect" or impinge on the free exercise of the privilege; my determination in no way impedes or limits the ability of the ministry in that regard. The ministry remains free to properly retain and instruct counsel and retain and instruct experts or engage in formal consultations. Accordingly, I conclude that disclosure of the draft at issue in this appeal would not undermine the rationale for solicitor-client privilege or its purpose, nor would it result in a chilling effect on the ministry as it can consult with its own counsel or experts confidentially on matters.

[104] In a nutshell, this was not a compelled disclosure[52], and by sending the manager what was privileged, the ministry voluntarily waived privilege and that information is no longer shielded from disclosure under the *Act*.[53]

[105] That said, I make this finding only with respect to the draft that was shared and not to the balance of the drafts. I find that the other two drafts were not shared with the manager, and there is no evidence that they were shared with any other third party. They maintain their privileged status accordingly and are therefore exempt under section 19(a) of the *Act*.

[106] Based on the circumstances of this appeal, the nature of the information at issue, and the ministry's representations, I am satisfied that the ministry has not erred in the exercise of its discretion not to disclose to the appellant the other two drafts of the guidelines, that I have found qualify for exemption under section 19(a) of the *Act*.

ORDER:

1. I order the ministry to disclose to the appellant the shared draft of the guideline (being pages 2287-2358 of the responsive records) by sending it to him by **September 2, 2015**, but not before **August 28, 2015**.

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[52] As was at issue in *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.).
[53] See in this regard, *The Attorney General of Ontario v. Holly Big Canoe, Inquiry officer et al*, Court File No. 197/97 (Ont. Div. Crt.).

2. I uphold the decision of the ministry not to disclose the other two drafts of the guideline (being pages 2184-2213 and 2218-2283 of the responsive records).

3. In order to verify compliance with provision 1 of this order, I reserve the right to require the ministry to provide me with a copy of the shared draft guideline as disclosed to the appellant.

Original Signed by: July 28, 2015
Steven Faughnan
Adjudicator