



Information and Privacy
Commissioner/Ontario

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

ORDER P-1450

Appeal P_9700129

Fanshawe College of Applied Arts and Technology



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NATURE OF THE APPEAL:

The appellant is a former employee of Fanshawe College of Applied Arts and Technology (the College). The appellant submitted a request to the College under the Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to the investigation of his complaint against the College by the Ombudsman's Office. In particular, the appellant requested:

- (1) all written correspondence to and from College personnel and the Ombudsman's Office;
- (2) all written communication to and from any legal solicitors and College personnel;
- (3) all written communication to and from any legal solicitors and the Ombudsman's Office; and
- (4) as it is generated, all written correspondence, within the next 12-month period, between any and all of the above-mentioned parties.

In his request letter, the appellant stated that he did not want records which had already been copied in full to him.

The College located responsive records and initially denied access to them in full based on the exemptions in sections 19, 21, 24 and 65 of the Act. The requester appealed the denial of access.

The College subsequently issued a second decision in which it granted partial access to three records and full access to one record. The College denied access to the balance of the records based on the exemptions in sections 19 (solicitor-client privilege) and 21 (invasion of privacy) of the Act. As the College has withdrawn its reliance on sections 24 and 65 of the Act, I will not consider them further.

During mediation, the appellant withdrew his request for continuing access to correspondence generated over the next 12 months.

This office sent a Notice of Inquiry to the appellant, the College and two affected persons. As the records appear to contain the appellant's personal information, the Notice raised the possible application of sections 49(a) (discretion to refuse requester's own information) and 49(b) (invasion of privacy) of the Act. Representations were received from the College and the appellant.

The five records at issue consist of the following:

1. Letter from Ombudsman Ontario to Fanshawe College, dated May 26, 1995 (severed in part);
2. Letter from Ombudsman Ontario to College solicitors, July 21, 1995 (severed in part);
3. Letter from Ombudsman Ontario to College solicitors, February 5, 1996 (severed in part);
4. Letter from College solicitors to Ombudsman Ontario, June 14, 1995 (severed in full);
5. Letter from College solicitors to Ombudsman Ontario, June 22, 1995 (severed in full).

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the Act, “personal information” is defined, in part, to mean recorded information about an identifiable individual. I have reviewed the records and I find that they all contain the personal information of the appellant.

The College has withheld the name of the Chair of the College and the name of the College’s lawyer from the first three records, portions of the content of the lawyer’s letter in Record 3 and Records 4 and 5 in full. The College submits that the information in these records qualifies as the personal information of the Chair and the lawyer. Many previous orders of this office have found that information pertaining to an individual in his or her professional capacity does not constitute personal information. I find this to be the case in this appeal as well. Therefore, the information withheld from Records 1, 2 and 3 and Records 4 and 5 in their entirety does not qualify as the personal information of these two individuals.

Because the records only contain the personal information of the appellant, sections 21(1) and 49(b) cannot apply to exempt the information from disclosure.

REFUSAL TO DISCLOSE REQUESTER’S OWN INFORMATION/SOLICITOR-CLIENT PRIVILEGE

Under section 49(a) of the Act, the College has the discretion to deny access to an individual’s own personal information in instances where certain exemptions would otherwise apply to that information. The College submits that the records qualify for exemption under section 19.

Section 19 of the Act consists of two branches, which provide a head with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1); and
2. a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

The College does not indicate which Branch it is relying on. Indeed, in its representations, the College simply states:

The severed portions of the records contain information which is privileged as between the College and its solicitors...

The College’s representations provide no assistance in this regard. Accordingly, I have reviewed the content of the records to determine whether they are subject to either branch of the exemption in section 19. I will begin with Branch 1.

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the record must satisfy either of the following tests:

1. (a) there is a written or oral communication, **and**
 - (b) the communication must be of a confidential nature, **and**
 - (c) the communication must be between a client (or his agent) and a legal adviser, **and**
 - (d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Order 49]

It is clear from a reading of the records that the requirements of the exemption under part 1 of the Branch 1 test have not been met. The records are not communications between a client and a legal advisor, but, are rather, communications between the College's legal advisor and a third party or between the College and a third party.

With respect to part 2 of the Branch 1 test, although the records indicate a response by the College to the Ombudsman relating to the appellant's complaint, there is no evidence before me that there exists any "litigation" or that "litigation" is contemplated. Accordingly, I find that the records do not qualify for exemption under Branch 1.

A record can be exempt under Branch 2 of section 19 regardless of whether the common law criteria relating to Branch 1 are satisfied. Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for Crown counsel; and
2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order 210]

With respect to whether the College's legal advisor can be considered as acting in the same capacity as "Crown counsel", I note that in Order 52, former Commissioner Sidney B. Linden found that:

... the proper interpretation of "Crown counsel" under section 19 should include any person acting in the capacity of legal advisor to an institution covered by the Act.

I agree with this view and I find that the first part of the Branch 2 test has been met.

With respect to the second part of Branch 2, however, similar to my findings above under Branch 1, I have no evidence before me that the College was or is involved in litigation or that any litigation is contemplated.

Further, although it is possible that the information contained in the letter reflects legal advice which was at one point given by the solicitor to his client (the College), in my view, the records at issue were not used in giving that legal advice, but rather, set out the College's position with respect to the matter.

Accordingly, I find that the College has not established that the records fall within Branch 2 of the section 19 exemption. Nor is this apparent from the records themselves. Therefore, the records do not qualify for exemption under section 19 of the Act.

As no other exemptions apply to the records, they should be disclosed to the appellant in full.

ORDER:

1. I order the College to disclose the records at issue to the appellant in full by sending him a copy on or before **October 16, 1997**, but not earlier than **October 13, 1997**.
2. In order to verify compliance with the provisions of this order, I reserve the right to require the College to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Laurel Cropley
Inquiry Officer

_____ September 11, 1997