Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2626

Appeal PA06-301

York University

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NATURE OF THE APPEAL:

York University (the University) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for:

> Copies of any and all documents, records and correspondence, including electronic, in the possession of York University and dating from January 1, 2004, which mention, pertain to, or relate in any way, to [the requester].

The requester clarified his request to include only records that mention, pertain to or relate in any way to him that are located in the offices of the following individuals:

> President, Vice-President, Academic; Vice-President, Research and Innovation; Counsel; Marketing and Communications; Dean of Arts; Dean of Graduate Studies; Chair of Social Science and Program Director, Social and Political Thought.

The requester also advised the University that routine operational personnel records were not of interest to him.

The University located a number of responsive records and issued a decision letter to the requester, indicating it was granting access to some records and denying access to the remainder. The denial of access was based on the application of the exemptions in sections 21(1) (personal privacy), 13(1) (advice or recommendations) and 19(c) (solicitor-client privilege), along with the exclusionary provisions in section 65(6) (labour relations and employment records) of the *Act*.

The requester, now the appellant, appealed the University's decision.

During the course of mediation, the University located additional responsive records and issued two supplemental decision letters granting access to additional records and denying access to others**.** Also during mediation, the appellant further narrowed the scope of his appeal by withdrawing his appeal concerning certain records.

As mediation did not fully resolve the issues in this appeal, the file was transferred to me for adjudication by means of an inquiry under the *Act*. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the University, and an affected person whose personal information may be contained in Record 82, seeking their representations. I received representations from the University and the affected person.

I then sent a Notice of Inquiry to the appellant, along with a complete copy of the University's representations. I did not provide a copy of the affected person's representations to the appellant, due to concerns about the confidentiality of this information. I received representations from the appellant in response.

In his representations, the appellant withdrew his appeal concerning certain records, including Record 82. Therefore, section 21(1) is no longer an issue in this appeal. In his representations, the appellant also appeared to raise the application of the public interest override in section 23 of the *Act* to the records still at issue. I then sought specific representations from the appellant on

the issue of the applicability of section 23 to the one record that the University had claimed to be exempt from disclosure by reason of section 13(1), Record 183. I also sought specific representations from the appellant on the applicability of section 23 to the records that the University had claimed to be exempt by reason of section 19(c), in light of the Ontario Court of Appeal decision in *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)* (2007), 86 O.R. (3d) 259. The appellant provided representations in response concerning the applicability of section 23, and also withdrew his appeal with respect to certain records at issue. In particular, the appellant withdrew his appeal concerning those records for which the University has claimed the application of section 65(6) that did not involve the Marketing and Communications and Media Relations divisions of the University.

I provided the University with a complete copy of both sets of the appellant's representations and sought reply representations from the University on the applicability of section 23 to the records remaining at issue that it had claimed to be exempt from the *Act*. I received reply representations from the University.

RECORDS:

The records at issue are set out in the index in the attached Appendix.

DISCUSSION:

BACKGROUND

The University describes the circumstances surrounding the creation of the records, as follows:

> The appellant is a faculty member of York University who has made two grievances alleging breach of academic freedom and failure to permit him to carry out his professional responsibilities. One of these grievances is currently in arbitration, while the other was withdrawn by the union. The appellant has also filed a human rights complaint and commenced a [law]suit against …named [individuals and] organizations for defamation.

The appellant agrees with the University that the records concern:

> …legal actions [the appellant has] taken against the University, consisting of two grievances, a human rights complaint, and a civil lawsuit.

LABOUR RELATIONS AND EMPLOYMENT RECORDS

The University has claimed that section 65(6) operates to exclude Records 17, 83, 85, 87, 163, 165, 184 and 189 from the *Act*.

The University submits that:

> All of the records for which the labour relations and employment exclusion is being claimed were collected, prepared, maintained and used by York University. Some of the records were prepared in relation to labour relations proceedings or anticipated proceedings (i.e., a grievance under the Collective Agreement) between the appellant and the University; others were prepared for consultations, discussions or communications with regards to the appellant's employment responsibilities in which the University has an interest…

Section 65(6) states:

> Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

If section 65(6) applies to the records, and none of the exceptions found in section 65(7) applies, the records are excluded from the scope of the *Act*.

The term "in relation to" in section 65(6) means "for the purpose of, as a result of, or substantially connected to" [Order P-1223].

The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship [Order PO-2157].

If section 65(6) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507].

Section 65(6) may apply where the institution that received the request is not the same institution that originally "collected, prepared, maintained or used" the records, even where the original institution is an institution under the *Municipal Freedom of Information and Protection of Privacy Act* [Orders P-1560, PO-2106].

Section 65(6)1: court or tribunal proceedings

For section 65(6)1 to apply, the institution must establish that:

1. the record was collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; and

3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.

The University has claimed that section 65(6)1 operates to exclude Records 17, 163, part of 165, and 189.

Record 17 is described by the University as:

> …a synopsis of a telephone conversation between a third party and the appellant as described by the third party. The third party was asked by the Chief Marketing and Communications Officer [of the Marketing and Communications Division of the University] to create this record for legal purposes as it was anticipated that it might be needed for the grievance proceeding…

Record 163 is described by the University as a duplicate of Record 17, with an additional email forwarding the message on to the University's General Counsel and the Vice-President of Finance and Administration. The University submits that the email message in this record also fits within the context of labour relations proceedings as it concerns the grievance launched by the appellant.

Part of Record 165 was released to the appellant by way of a supplemental decision letter dated April 11, 2007. The severed portions of the record consist of an email thread discussing the appellant's apparent grievance methodology. The unsevered part of Record 165 consists of a press release discussing the appellant's grievance proceeding.

Record 189 consists of an email string between the Chief Steward of the York University Faculty Association and various University employees and executives. This record discusses the incident that spawned the appellant's grievance.

The appellant submits that the *Act* should apply to these records as each of these records involve communication with the Chief Marketing and Communications Officer of the Marketing and Communications Division of the University, since this division plays no role in matters regarding employment relations and collective bargaining.

Part 1: collected, prepared, maintained or used

The information in Records 17 and 163 was collected by the University. In addition, the emails in Records 163, 165 and 189 were prepared and maintained by the University. I find that part 1 of the test has been met for all of the records for which the University has claimed section 65(6)1.

Part 2: proceedings before a court or tribunal

Based on the University's description of the records and the purposes for which they were created and/or used, I find that Records 17, 163, 165 and 189 were collected, prepared or maintained "as a result of, for the purpose of, or substantially connected to" actual or anticipated grievance proceedings before an arbitrator, and were therefore "in relation to" that proceeding

With respect to the meaning of "proceedings", previous orders have established the relevant criteria, as follows:

> The word "proceedings" means a dispute or complaint resolution process conducted by a court, tribunal or other entity which has the power, by law, binding agreement or mutual consent, to decide the matters at issue [Orders P-1223, PO-2105-F].
>
> For proceedings to be "anticipated", they must be more than a vague or theoretical possibility. There must be a reasonable prospect of such proceedings at the time the record was collected, prepared, maintained or used [Orders P-1223, PO-2105-F].
>
> An arbitrator is an "entity" under the *Act*. An "entity" is a body or person that presides over proceedings distinct from, but in the same class as, those before a court or tribunal. To qualify as an "entity", the body or person must have the authority to conduct proceedings and the power, by law, binding agreement or mutual consent, to decide the matters at issue [Order M-815].

As the appellant has in fact brought grievance proceedings that were the focus of the communications at issue, and therefore I am satisfied that they were prepared and/or maintained in relation to the grievance proceedings. Therefore, I find that part 2 of the test has been met.

Part 3: labour relations or employment

The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships [Order PO-2157, *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.)].

The records were collected, prepared or maintained for grievance proceedings or anticipated grievance proceedings under a collective agreement. Clearly, this is a labour relations matter that relates to the employment of the appellant by the University. [See Orders M-832, P-1223, PO-1769].

I disagree with the appellant that section 65(6)1 does not apply to these records because they were solicited or involved a party that is not part of the grievance proceedings, that is the Chief Marketing and Communications Officer. It is clear from the contents of these records that these records were collected by or on behalf of the University in relation to the grievance proceedings referred to above.

All of the requirements of section 65(6)1 of the *Act* have therefore been established by the University for Records 17, 163, 165 and 189. None of the exceptions contained in section 65(7) are present in the circumstances of this appeal. I find that Records 17, 163, 165 and 189 fall within the parameters of this section, and therefore are excluded from the *Act* by reason of section 65(6)1.

Section 65(6)3: matters in which the institution has an interest

For section 65(6)3 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

The University has claimed that section 65(6)3 operates to exclude Records 83, 85, 87 and 184.

The University submits that:

> Records 83, 85, 87 …are part of an email string concerning religious discrimination and it is placed within the context of a professor's teaching responsibilities under the Collective Agreement.

> Record 184 …concern[s] the incident that spawned the appellant's grievance – [the appellant's] distribution of a controversial pamphlet and the University's response to it. Accordingly, this record constitutes discussions about matters regarding the employment of the appellant in which the University has an interest.

Again, the appellant submits that the *Act* should apply to these records as each of these records involve communication with Chief Marketing and Communications Officer of the Marketing and Communications Division of the University, which division plays no role in matters regarding employment relations and collective bargaining.

Part 1: collected, prepared, maintained or used

The University prepared or maintained the records at issue. Therefore, I find that part 1 of the test has been met for all of the records for which the University has claimed section 65(6)3.

Part 2: meetings, consultations, discussions or communications

The records at issue are all internal emails. Based on the description provided by the University, and the contents of the records themselves, I find that these records were all prepared or maintained in relation to consultations, discussions or communications. Therefore, I also find that part 2 of the test has been met for all of the records for which the University has claimed section 65(6)3.

Part 3: labour relations or employment-related matters in which the institution has an interest

The phrase "labour relations or employment-related matters" has been found to apply in the context of:

- a job competition [Orders M-830, PO-2123]
- an employee's dismissal [Order MO-1654-I]
- a grievance under a collective agreement [Orders M-832, PO-1769]
- disciplinary proceedings under the *Police Services Act* [Order MO-1433-F]
- a "voluntary exit program" [Order M-1074]
- a review of "workload and working relationships" [Order PO-2057]
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act* [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)* , [2003] O.J. No. 4123 (C.A.)]

The phrase "labour relations or employment-related matters" has been found *not* to apply in the context of:

- an organizational or operational review [Orders M-941, P-1369]
- litigation in which the institution may be found vicariously liable for the actions of its employee [Orders PO-1722, PO-1905]

The phrase "in which the institution has an interest" means more than a "mere curiosity or concern", and generally refers to matters involving the institution's own workforce [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*].

I find that Records 83 and 87 were not prepared or maintained in relation to "labour relations or employment-related matters". These are single emails discussing a newspaper article. I find that part 3 of the test has not been met with respect to these two records. As no exemption has been claimed by the University for Records 83 and 87, I will order them disclosed.

The information in Records 85 and 184 concerns the employment of the appellant with the University. This office has considered the application of section 65(6)3 (and its equivalent in the *Municipal Freedom of Information and Protection of Privacy Act*, section 52(3)3) to records held by an institution on a number of occasions. Many of these cases have turned on the issue of whether the preparation, collection, maintenance or use of a record is "in relation to" a labour relations or employment-related matter.

The Ontario Court of Appeal reviewed the wording of section 65(6)3 in *Solicitor General* (cited above). In that decision, the Court stated:

> As already noted, section 65 of the *Act* contains a miscellaneous list of records to which the *Act* does not apply. Subsection 6 deals exclusively with labour relations and employment-related matters. Subsection 7 provides certain exceptions to the exclusions set out in subsection 6. Examined in the general context of subsection 6, the words "in which the institution has an interest" appear on their face to relate simply to matters involving the institution's own workforce. Subclause 1 deals with records relating to "proceedings or anticipated proceedings … relating to labour relations or to the employment of a person *by the institution*" [emphasis added]. Subclause 2 deals with records relating to "negotiations or anticipated negotiations relating to labour relations or to the employment of a person *by the institution*" [emphasis added]. Subclause 3 deals with records relating to a miscellaneous category of events "about labour relations or employment-related matters in which the institution has an interest". Having regard to the purpose for which the section was enacted, and the wording of the subsection as a whole, the words "in which the institution has an interest" in subclause 3 operate simply to restrict the categories of excluded records to those

> records relating to the institutions' own workforce where the focus has shifted from "employment of a person" to "employment-related matters"….

Based on the nature of the record and the representations of the University, I am satisfied that the Records 85 and 184 were prepared or maintained "for the purpose of" or "as a result of" an employment-related matter in which the University has an interest. As stated above, the term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship [Order PO-2157]. In particular, the University prepared or maintained these records with regard to consultations and communications about the employment of the appellant, a member of its own workforce. As such, these records are "substantially connected to" the activities listed in section 65(6)3, and were therefore prepared or maintained "in relation to" them. As a result, I find that the third requirement of section 65(6)3 has been established for Records 85 and 184.

All of the requirements of section 65(6)3 of the *Act* have thereby been established by the University for Records 85 and 184. None of the exceptions contained in section 65(7) are applicable to these two records. I find that Records 85 and 184 fall within the parameters of section 65(6)3 and therefore are excluded from the scope of the *Act*.

ADVICE OR RECOMMENDATIONS

The University claimed section 13(1) for Record 183, which is an email chain from the Chief Marketing & Communications Officer to the President's Policy Committee concerning a media issue.

I will now determine whether the discretionary exemption at section 13(1) applies to Record 183. Section 13(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005]

O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

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

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

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

[Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 224 (Div. Ct.), aff'd [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563; Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564]

Representations

The University provided the following description of Record 183 in its reply representations:

> [This record] provides advice from the Chief Marketing and Communications Officer and the Vice-President, Academic to the University President regarding how information about the distribution of the appellant's flyer will be

> communicated to the President's Policy Committee (PPC). Like Cabinet ministers in government, senior university executives expect to be able to make recommendations to the President in a confidential manner.

The appellant did not provide direct representations concerning the application of section 13(1) to Record 183.

Analysis/Findings

The University claims that the specific advice in Record 183 concerns the approach for handling communications with regards to a specific incident. As stated above, "advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised.

Based on my review of the record at issue and the University's representations, I find that only certain distinct portions of Record 183 contain "advice or recommendations" within the meaning of section 13(1). These portions do set out a recommended course of action. The exceptions in section 13(2) do not apply to the information that I have found to be subject to section 13(1). The remaining information in Record 183 does not reflect a recommended course of action and is not subject to section 13(1). As no other exemption has been claimed for this record, I will order those portions of Record 183 that do not reveal "advice or recommendations" to be disclosed.

I will consider below whether the University exercised its discretion in a proper manner and whether the public interest override applies to the information I have found to be exempt in Record 183 by reason of section 13(1).

SOLICITOR-CLIENT PRIVILEGE

I will now determine whether the discretionary exemption at section 19(c) applies to Records 193, 209, 210, 216 and 220.

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 of for use in or in contemplation of litigation;
>
> (c) that was prepared by or for counsel employed or retained by an educational institution for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 of the *Act* was recently amended. It has previously been described as containing two branches, as described below. Branch 1 of the section 19 exemption, found in section 19(a), encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege.

Branch 2, now encompassed in sections 19(b) and (c), consists of statutory privileges. The University has specifically claimed paragraph (c) of section 19, which is a statutory privilege. The University does not rely on section 19(a). Therefore, Branch 2 is the relevant part of section 19 for the purposes of this appeal. Under section 19(c), branch 2 applies in the context of counsel employed or retained by the University giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

Representations

The University in its reply representations provided the following information concerning the records that it has claimed is exempt by reason of section 19(c). It submits that:

> Record 193 is a confidential communication from the University's Office of the Counsel to its external counsel asking for the latter's interpretation of the appellant's actions in November 2004 in light of University policies. All University policies are available on the University's website, but the communication itself is privileged pursuant to section 19(c) of the *Act*.
>
> Parts of Record 209 have been disclosed to the appellant (the letter to the Minister of Training, Colleges and Universities from the University Secretary and General Counsel, and the letter from the appellant himself to the Minister). The covering email, for which section 19(c) has been claimed, constitutes legal advice from the University's General Counsel to the Chair of the Board of Governors.
>
> Record 210 constitutes an email thread regarding a draft of comments for delivery at Senate (the body responsible for the academic policies of the University) by the Chair of Senate. The comments were drafted by the University's General Counsel and are considered legal advice and therefore, the section 19(c) exemption has been claimed. The comments themselves were delivered to Senate by the Chair and therefore are a matter of public record.
>
> Record 216 is a draft of a letter prepared for the Chair of Senate by the General Counsel at the Chair's request. The letter responds to concerns of a third party, noting how Senate is constituted and the limits of its authority. Matters concerning Senate's operations are publicly available on the York University website in the Senate Handbook. The record itself, however, is considered to be legal advice and therefore the section 19(c) exemption is claimed. The final

> version of this letter (document #207) was disclosed to the appellant as per York University's decision letter dated January 10, 2007.
>
> Record 220 is a draft of a letter prepared for the Chair of Senate by the General Counsel at the Chair's request in response to a letter sent by the appellant. The appellant would have received the final version of the letter. However, this record is considered to be legal advice and therefore the section 19(c) exemption has been claimed.

The appellant did not provide direct representations on this issue.

Analysis/Findings

Based on my review of the records and the representations of the University, I am satisfied that each record was prepared by or for counsel for the University for use in giving legal advice. In each record at issue, legal advice was being sought from or given by counsel employed or retained by the University. Furthermore, this privilege has not been waived (see *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.)). I find that the records at issue are subject to the statutory privilege provided by section 19(c). Therefore, subject to my discussion below of the University's exercise of discretion and the application of the "public interest override", Records 193, 209, 210, 216 and 220 are exempt from disclosure under section 19(c).

EXERCISE OF DISCRETION

I will now determine whether the University exercised its discretion under sections 13(1) and 19(c) and if so, whether I should uphold this exercise of discretion.

The sections 13(1) and 19(c) exemptions are discretionary, and permit the University to disclose information, despite the fact that it could withhold it. The University must exercise its discretion. On appeal, the Commissioner may determine whether it failed to do so.

In addition, the Commissioner may find that the University erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the University for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the University [section 54(2)].

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

Representations

The University submits that:

> In exercising its discretion, York University considered the ongoing adversarial stance taken by the appellant towards York University and the sensitive nature of the relations with this appellant.

The appellant did not provide direct representations on this issue.

Analysis/Findings

I find that the University exercised its discretion in a proper manner, taking into account relevant factors and not taking into account irrelevant factors, in denying the appellant access to the records for which it has claimed the sections 13(1) and 19(c) exemptions. In particular, the appellant is not seeking his own personal information, he does not have a sympathetic or compelling need to receive the information, disclosure will not increase public confidence in the operation of the University and the exempt information contains advice or recommendations or is subject to the solicitor-client privilege exemption in the context of the University obtaining legal advice. The undisclosed information in the records at issue is significant and sensitive to the University and I uphold the University's exercise of its discretion with respect to Records 193, 209, 210, 216 and 220 and the portions of Record 183 that I have found to be exempt.

PUBLIC INTEREST OVERRIDE

I will now determine whether there is a compelling public interest in the disclosure of the records that clearly outweighs the purpose of the section 13(1) exemption (for the portions of Record 183 that I have found to be exempt), and the section 19(c) exemption (for Records 193, 209, 210, 216 and 220).

Section 23 states:

> An exemption from disclosure of a record under sections **13**, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

In *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)*, [2007] O.J. No. 2038 (application for leave to appeal granted, File No. 32172 (S.C.C.)), the Ontario Court of Appeal held that the exemptions in sections 14 and **19** are to be "read in" as exemptions that may be overridden by section 23. On behalf of the majority, Justice LaForme stated at paragraphs 25 and 97 of the decision:

> In my view section 23 of the *Act* infringes section 2(b) of the *Charter* by failing to extend the public interest override to the law enforcement and solicitor-client privilege exemptions. It is also my view that this infringement cannot be justified under section 1 of the *Charter*. … I would read the words "14 and 19" into section 23 of the *Act*.

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that

in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

A public interest is not automatically established where the requester is a member of the media [Orders M-773, M-1074].

The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)].

A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner),* [1999] O.J. No. 488 (C.A.)]

- the integrity of the criminal justice system has been called into question [Order P-1779]

- public safety issues relating to the operation of nuclear facilities have been raised [Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805]

- disclosure would shed light on the safe operation of petrochemical facilities [Order P-1175] or the province's ability to prepare for a nuclear emergency [Order P-901]

- the records contain information about contributions to municipal election campaigns [*Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773]

A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations [Orders P-123/124, P-391, M-539]

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568]

- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding [Orders M-249, M-317]

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter [Order P-613]

Representations

The appellant first raised the issue of the applicability of the public interest override to the records. He submits that:

> Because of their professed norms of academic freedom and freedom of speech, the universities constitute one of the only reliable repositories of disinterested expertise available to the public, and, for this reason, government agencies, citizen organizations, and the media depend heavily upon them as an invaluable resource. These norms are thus of vital importance not only to those within the academic community but to the wider public which depends upon academics for a glimpse of the truth. Indeed, tenured professors in particular are afforded a unique measure of job security precisely to insure that they are able to provide honest insight and information to the public when needed without having to fear for their livelihood.
>
> However, for all this professed freedom and formal protection, senior faculty, like their untenured colleagues, students and staff, remain vulnerable to myriad means of administrative reprisal and intimidation. Among these means perhaps the most pernicious is character assassination through libel and defamation, the threat or practice of which has been used to silence dissent and irreparably destroy careers. But if such actions do direct damage to their targets, they also indirectly diminish the range and availability of disinterested expertise to the wider public which the universities are supposed to serve. Likewise, given their prestige and abundant taxpayer support, and, of course, their educational function, universities should serve as models of tolerance and diversity and protectors of human rights. When they instead practice and thus sanction blatant religious discrimination, they do damage not only to their own reputation but to the standards of acceptable behavior of the wider community. All of these grave concerns are of great public interest.
>
> [Disclosure of the records at issue] would more fully inform the public about the abuses described above and the most likely means to prevent their continuation or recurrence.

In response, the University disputes that the public interest override applies. It states in its representations that:

> ***Operations of the University***
>
> None of the records in question sheds any light on the operations of government or on the operations of York University apart from its routine, administrative functioning in drafting letters, corresponding with legal counsel, and providing advice to senior management. None of the records provide any meaningful information that the citizenry has available to make effective use of the means of expressing public opinion or to make political choices.
>
> [T]hese records do not bear upon concerns of interest to the public. Rather, these records all concern how the University managed its response to the appellant's various actions and allegations…
>
> ***Purpose of the exemptions***
>
> Not only is there no public interest in disclosing the records, but York University respectfully submits that there is a strong rationale for not disclosing these records - a rationale embedded in the very nature of the exemptions. The purpose behind both the solicitor-client privilege and the advice exemptions is to create an environment in which advice can be given freely and confidentially, whether by legal counsel or by employees in the service of an institution.
>
> Even though the records in question are fairly innocuous, York University is concerned about protecting this environment, and foresees a chilling effect on the free-flow of institutional and legal advice if the records are disclosed.
>
> ***Interests of the Appellant***
>
> York University respectfully submits that the interests being advanced are essentially private in nature with no general application. The appellant has taken an adversarial stance towards the University on several matters relating to what he sees as challenges to his academic freedom and defamation of his character. He suggests these challenges speak to academic freedom in general. These challenges are currently being dealt with through other fora - a labour relations grievance, a civil lawsuit, and an Ontario human rights complaint. These fora will consider the actions launched by the appellant, and will make judgments accordingly.
>
> ***Information already disclosed***
>
> A significant amount of information has already been disclosed that would adequately address any public interest considerations the appellant may have. More than 75 documents have already been disclosed to the appellant in whole or

> in part under this request. Furthermore he has obtained many documents through the process for his grievance. York University respectfully submits that disclosure of the six documents in question would not provide the appellant with any significantly new information; while on the other hand, disclosure would compromise the integrity of the University's internal communications.
>
> ***Consideration of the Court of Appeal decision***
>
> The decision of the Court of Appeal for Ontario that section 19 should be read into section 23 of [the *Act*] does not have any impact on York University's decision not to disclose the records. Section 23 only gives the possibility of a public interest override of section 19 and York University would not exercise it in this case.

Analysis/Findings

Based upon my review of the records at issue and the representations of the parties, I find that there is no compelling public interest in disclosure of the records at issue. In my view, the exempt information would not more fully inform the public about the alleged "character assassination through libel and defamation" as claimed by the appellant. While there may be public curiosity about the information, it does not "rouse strong interest or attention" (Order P-984) and is therefore not "compelling". The appellant is seeking the information at issue in support of his various legal proceedings that he is a party to. A public interest does not exist where the interests being advanced are essentially private in nature, as is the case with respect to the records at issue [Orders P-12, P-347, P-1439]. I find that a significant amount of information has already been disclosed to the appellant and, in my view, this is adequate to address any public interest considerations [Orders P-532, P-568].

Even if I were to find that a compelling public interest does exist in the circumstances of this case, I would find that the public interest in the information in the records at issue does not clearly outweigh the purpose of the sections 13(1) and 19(c) exemptions. In my view, the appellant has not demonstrated that any public interest in making this information publicly available clearly outweighs the need to protect the privileged information that I have found to be exempt by reason of section 19(c), or the "advice or recommendations" to the University President that I have found to be exempt by reason of section 13(1). Therefore, I find that section 23 does not apply to the information that I have found to be exempt by reason of sections 13(1) and 19(c).

ORDER:

1. I uphold the University's decision not to disclose the information in Records 17, 85, 163, 165, 184, 189, 193, 209, 210, 216 and 220.

2. I order the University to disclose the information in Records 83 and 87 to the appellant by **January 4, 2008**

3. I order the University to disclose to the appellant the information in Record 183, except for the information that contains advice or recommendations by **January 4, 2008**. For clarity, I have provided the University with a highlighted version of Record 183 identifying the portions that should *not* be disclosed.

4. In order to verify compliance with this Order, I reserve the right to require the University to provide me with a copy of the records disclosed to the appellant pursuant to provisions 2 and 3 upon my request.

Original Signed By: November 30, 2007
Diane Smith
Adjudicator

APPENDIX

INDEX OF RECORDS

No.	Date	Type	From	To	Subject	Section Applied
17	6-Feb-06	e-mail	x	Chief Marketing & Communications Officer	Synopsis	65(6)1
83	6-Oct-05	e-mail	Director, Media Relations	Vice President Academic	Religious discrimination alleged	65(6)3
85	6-Oct-05	e-mail	Chief Marketing & Communications Officer	Chief Marketing & Communications Officer	Religious discrimination alleged	65(6)3
87	6-Oct-05	e-mail	Chief Marketing & Communications Officer	Vice President Academic	Religious discrimination alleged	65(6)3
163	6-Feb-06	email	Chief Marketing & Communications Officer	University Secretary and General Counsel	Synopsis: Privileged & Confidential	65(6)1
165	3-Jan-06	email & attachments	Chief Marketing & Communications Officer	University Secretary and General Counsel	Fw: New revelations into defamation case against York University - Privileged & Confidential	65(6)1
183	22-Nov-04	email and attachments	Chief Marketing & Communications Officer	President's Policy Committee	Media issue	13(1)
184	21-Nov-04	email & attachments	Chief Marketing & Communications Officer	University Secretary and General Counsel	Re: The Toronto Star	65(6)3
189	30-Nov-04	email & attachments	Director, Media Relations	Director, Academic Employee Relations	Privileged & Confidential	65(6)1
193	19-Nov-04	email & attachments	Coordinator, Administrative Support Services	An Outside counsel	Further to University Secretary and General Counsel' voicemail	19(c)
209	20-Oct-05	email & attachments	Chair, Board of Governors	University Secretary and General Counsel	Appellant	19(c)
210	25-Sep-05	email & attachments	President and Vice Chancellor	Vice President Academic	Re: draft for Chair of Senate	19(c)
216	28-Sep-05	email	University Secretary and General Counsel	Chair of Senate	Letter in reply to the letter from Legal Counsel / Human Rights Coordinator	19(c)
220	6-Sep-05	email & attachments	University Secretary and General Counsel	Administrative Assistant	fwd: Appellant	19(c)