



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2684

Appeal PA07-188

Ministry of Training, Colleges & Universities



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NATURE OF THE APPEAL:

The Ministry of Training, Colleges & Universities (the Ministry) received the following request under the *Freedom of Information and Protection of Privacy Act* (the *Act*):

1. Copy of all correspondence, communications, records, files including but not limited to studies, reports, documents, correspondence, content/transcript of meetings and telephone conversations, notes, computer records, faxes, letters, e-mails, memos in which any wrongdoing and/or misconducts committed by any employee/official/faculty member of the [a named] College of Applied Arts & Technology [the College] between December 13, 2004 to the date this request is processed were raised, referenced or discussed.
2. Copy of all correspondence, communications, records, files including but not limited to studies, reports, documents, correspondence, content/transcript of meetings and telephone conversations, notes, computer records, faxes, letters, e-mails, memos in which Canadian citizen [name of requester] was referenced or any information/matter/issue regarding Canadian citizen [name of requester] was raised, reference, or discussed between December 13, 2004 and the date this request is processed.

Please take notice that the records described ... above, electronic or otherwise may be found in the files:

1. of the Honourable Chris Bentley, Minister of Training, Colleges and Universities;
2. kept at the Office(s) of Honourable Chris Bentley, Minister of Training, Colleges and Universities;
3. kept by any employee/official of the Office(s) of Honourable Chris Bentley Minister of Training, Colleges and Universities; and
4. in possession of any employee/official/department/office/etc. of the Minister of Training Colleges and Universities.

The Ministry located a number of responsive records and granted partial access to two records (pages 1 and 2 of the records). Access was denied to portions of the two records pursuant to section 21(1) (personal privacy) of the *Act*. The Ministry denied access to the remainder of the records, in their entirety, pursuant to section 19 (solicitor-client privilege) of the *Act*.

The requester (now the appellant) appealed the Ministry's decision.

During mediation, the Ministry issued a supplementary decision letter advising the appellant that records responsive to part 1 of the request did not exist. The appellant subsequently advised the mediator that he is no longer pursuing access to records responsive to part 1 of the request as he had received copies of them from the College.

Also during mediation, the appellant advised that he believed that additional records existed that are responsive to part 2 of his request. Therefore, the reasonableness of the Ministry's search for records responsive to part 2 of the request is an issue in this appeal.

As mediation did not fully resolve the issues in this appeal, the file was transferred to adjudication. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the Ministry, initially, seeking its representations. I sent a complete copy of the Ministry's representations to the appellant, along with a Notice of Inquiry, seeking his representations. I received representations from the appellant. In his representations, the appellant withdrew his request for the pages of the records to which the Ministry applied the personal privacy exemption in section 21(1) as containing the personal information of identifiable individuals other than the appellant. As such, pages 1, 2, 48 and 50 are no longer at issue. I then sent a copy of the appellant's representations to the Ministry and sought its representations in response. I received reply representations from the Ministry.

RECORDS:

The records at issue in this appeal are e-mails, which are more particularly described in the following Index of Records. The Ministry claimed the application of section 49(a), in conjunction with section 19, for these records.

Index of Records

Page #	Description of Record
36	Email from Legal Counsel A to Senior Policy Advisor, Post-Secondary Education Division, dated June 3, 2005 re: appellant-Ministerial Investigation request
37	Email from Legal Counsel A to Senior Policy Advisor, Post-Secondary Division, cc. Legal Counsel B, dated June 3, 2005
38	Email from Legal Counsel A to Senior Policy Advisor, Post-Secondary Division, cc. Manager, Program Quality Unit, Post-Secondary Education Division, re: appellant-Ministerial Investigation request, dated June 3, 2005
39	Email from Legal Counsel A to Senior Policy Advisor, Post-Secondary Education Division; Re: Queries, dated June 3, 2005
40	Legal Counsel A typed note to Legal Counsel B, dated June 3, 2005
41	Email from Legal Counsel A to Senior Policy Advisor, Post-Secondary Education Division; Re: Queries, dated June 3, 2005
42	Email from Legal Counsel A to Senior Policy Advisor, Post-Secondary Education Division; cc. to Legal Counsel B, Re: Queries, dated June 3, 2005

Page #	Description of Record
43	Email from Legal Counsel A to Senior Policy Advisor, Post-Secondary Education Division; cc. to Legal Counsel B; Re: appellant letter – section 5 <i>Colleges Act</i> , dated June 7, 2005
44	Draft letter (attachment to June 7, 2005 email)
45	Email from Senior Policy Adviser, Post-Secondary Education Division, to Secretary, Post-Secondary Education Division; Re: forward appellant letter and attached draft letter, dated June 8, 2005
46	Email from Legal Counsel B to Senior Policy Adviser, Post-Secondary Division; cc. Legal Counsel A, dated June 8, 2005
47	Continued email from Legal Counsel B to Senior Policy Adviser, Post-Secondary Education Division; cc. Legal Counsel A, dated June 8, 2005
49	Continued email from Legal Counsel B to Senior Policy Adviser, Post-Secondary Education Division, cc. Legal Counsel A re: appellant letter– section 5 <i>Colleges Act</i> , dated June 14, 2005
51	Email from Legal Counsel B to Legal Counsel A, Re: appellant letter – section 5 <i>Colleges Act</i> , dated June 8, 2005
52	Continued from above
53	Email from Legal Counsel A to Senior Policy Advisor, Post-Secondary Education Division, cc. to Legal Counsel B dated June 21, 2005
54	Email from Senior Policy Adviser, Post-Secondary Education Division, to Writer, Communications Branch and attached email from Legal Counsel A to Senior Policy Analyst, Post-Secondary Education Division; cc. Legal Counsel B, dated June 6, 2005
55	Email from Legal Counsel B to Senior Writer/Editor, Communications Branch; cc. to Senior Policy Adviser, Post-Secondary Education Division; Writer, Communications Branch; Manager, Correspondence and Public Inquiries Unit, Communications Branch; Legal Counsel A; dated August 2, 2005
56	Draft letter prepared by Legal Counsel B- confidential legal advice for Minister Bentley with regard to (file #, appellant)
57	Email from Senior Policy Adviser, Post-Secondary Education Division to Secretary, Post Secondary Education Division; cc. Secretary to Director, Post Secondary Education Division; re: appellant letter, dated June 29, 2005 (Continued email from page 43)
58	Continued from above
59	Email from Legal Counsel B to Senior Writer/Editor, Communications Branch cc. Senior Policy Adviser, Post-Secondary Division; Writer, Communications Branch; Manager, Correspondence and Public Inquiries Unit, Communications Branch; Legal Counsel A; re: appellant letter, dated August 2, 2005
60	Continued from above
61	Email from Legal Counsel B to Senior Policy Advisor, Post-Secondary Division, cc. Senior Policy Analyst, Post-Secondary Education Division; Manager, Correspondence and Public Inquiries Unit, Communications Branch; forward request Legal’s input on standard wording in Colleges Branch letters, dated August 15, 2005
62	Continued from above

Page #	Description of Record
63	Email from Senior Policy Adviser, Post-Secondary Education Division to Colleges Branch, dated August 17, 2005 (Continued email from page 61)
64	Email from Legal Counsel B to Senior Policy Analyst, Post-Secondary Education Division, Re request Legal's input on standard wording in Colleges Branch letters, dated August 12, 2005
65	Continued from above
96	Email from Senior Policy Adviser, Post-Secondary Education Division, to Legal Counsel B, Re: appellant letter – section 5 <i>Colleges Act</i> , undated
97	Draft letter prepared by Legal Counsel B to Minister's Office – Confidential Legal Advice for Minister Bentley
98	Email from Senior Policy Adviser, Post-Secondary Education Division, to Secretary, Post-Secondary Division, cc. Secretary to Director, Post-Secondary Education Division; Re: appellant letter (Continued email from page 43)
99	Continued from above

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains “personal information” and, if so, to whom it relates. That term is defined in section 2(1) as follows:

“personal information” means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,

- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

Effective April 1, 2007, the *Act* was amended by adding sections 2(3) and 2(4). These amendments apply only to appeals involving requests that were received by institutions after that date. Section 2(3) modifies the definition of the term "personal information" by excluding an individual's name, title, contact information or designation which identifies that individual in a "business, professional or official capacity". Section 2(4) further clarifies that contact information about an individual who carries out business, professional or official responsibilities from their dwelling does not qualify as "personal information" for the purposes of the definition in section 2(1).

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

The Ministry submits that:

Personal information of the appellant is contained in all of the records at issue in the appeal, being pages 36 - 64 and 96 - 99. The appellant's personal information in all of the records is his name, the bare fact that he wrote to the Ministry about [the] College, and, to varying degrees in each record at issue in this appeal, the content of [the] issues raised in that correspondence.

The appellant did not disagree with the Ministry's position that the records at issue contain only his own personal information.

Analysis/Findings

Upon my review of the records at issue, I find that they contain the personal information of only the appellant, in his personal capacity. This personal information includes the appellant's personal opinions or views (paragraph (e)) and the appellant's name where it appears with other personal information (paragraph (h)) within the definition of personal information in section 2(1) of the *Act*.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/SOLICITOR-CLIENT PRIVILEGE

Section 47(1) gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

Under section 49(a), an institution has the discretion to deny an individual access to their own personal information where the exemptions in sections 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, **19**, 20 or 22 would apply to the disclosure of that information.

In this case, the Ministry relies on section 49(a) in conjunction with section 19.

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 for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 contains two branches as described below. The Ministry must establish that one or the other (or both) branches apply.

Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the Ministry must establish that one or the other, or both, of these heads of privilege apply to the records at issue. [Order PO-2538-R; *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)].

Branch 2 is a statutory exemption that is available in the context of Crown counsel giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

It appears that the Ministry is relying on the common law solicitor-client communication privilege in Branch 1. This 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 [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for common law solicitor-client communication privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The privilege applies to “a continuum of communications” between a solicitor and client:

. . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

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 [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

The Ministry submits that:

[The records] are a chain of emails between various staff of the Colleges Branch of the Ministry and the Ministry’s legal department. In the course of these emails, the Colleges Branch sought and received the legal department’s advice regarding legal aspects of the response to the appellant’s correspondence.

[Legal Counsel A and B] are both in-house counsel for the Ministry; that is to say, they are government lawyers.

[B]oth lawyers who provided advice to the Ministry in this matter are, in fact, government employees...

[The records] consist of:

- emails including draft responses prepared by a Ministry staff member (the lawyer's client), with regard to which legal advice is being sought from counsel of the Ministry's legal services branch...
- the "back and forth" discussions between counsel and the Ministry program area setting out recommendations and legal advice regarding how to respond to the appellant's correspondence to the Minister...
- email communications in which the client (Post-Secondary Education Division of the Ministry) is seeking legal advice...
- communications from the Ministry's legal department to the Ministry's Communications Branch...

Collectively, the overlapping nature of these requests for legal advice and the provision of legal advice in these email records show that client and counsel worked closely together, and that their "continuum of communications" cannot be effectively severed in order to release some information to the appellant.

The appellant did not provide direct representations on this issue. He did agree that the two Ministry lawyers, identified above as Legal Counsel A and B, are "law practicing employees of the Ministry".

Analysis/Findings

Based on my review of the Ministry's representations and the records, I find that they contain the details of direct communications of a confidential nature between Ministry lawyers and Ministry staff made for the purpose of obtaining or giving professional legal advice. Accordingly, I find that the records qualify as confidential solicitor-client communications as they represent direct communications of a confidential nature between a solicitor and client for the purpose of obtaining professional legal advice. I have not been provided with any evidence to support a finding that the privilege in these records has been waived.

Accordingly, I find that branch 1 of the solicitor-client communication privilege component of section 19 applies to the records. Subject to my review of the Ministry's exercise of discretion, I conclude that the records are exempt from disclosure under section 49(a), in conjunction with section 19 of the *Act*.

EXERCISE OF DISCRETION

I will now determine whether the Ministry appropriately exercised its discretion under section 49(a) and if so, whether I should uphold the exercise of discretion.

The sections 49(a) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

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

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

In either case this office may send the matter back to the institution 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 institution [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

The Ministry submits that:

...the application of [the] solicitor-client privilege [exemption] in this situation clearly outweighs the appellant's right to access his own information. This is particularly so as the personal information contained in the records is only that provided by the appellant himself, and that information has been released to the appellant in the context of other records in response to his request, which are not at issue in this appeal.

The appellant did not address this issue directly in his representations.

Analysis/Findings

Based on the Ministry's representations, I find that it exercised its discretion with respect to the undisclosed records at issue in a proper manner, taking into account relevant factors and not taking into account irrelevant factors. The information contained in the records is, in my view, sensitive and is subject to solicitor-client privilege. Furthermore, I find that disclosure will not increase public confidence in the operation of the Ministry.

Therefore, I find that the Ministry properly exercised its discretion not to disclose the records to the appellant.

SEARCH FOR RESPONSIVE RECORDS

The appellant claims that additional records exist in response to part 2 of his request. The issue to be decided is whether the Ministry has conducted a reasonable search for records as required by section 24 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the Ministry's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the Ministry to prove with absolute certainty that further records do not exist. However, the Ministry must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

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

The Ministry was asked to provide a written summary of all steps taken in response to the request. In particular, the Ministry was asked to respond to the following, preferably in affidavit form:

1. Did the Ministry contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.
2. If the Ministry did not contact the requester to clarify the request, did it:
 - (a) choose to respond literally to the request?
 - (b) choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the institution inform the requester of this decision? Did the institution explain to the requester why it was narrowing the scope of the request?
3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.
4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

The Ministry submits that all responsive records have been located by reason of the searches for responsive records which were performed in the Post Secondary Education Division, the Communications Branch and the Minister's office. Records were received from the Postsecondary Education Division and from the Communications Branch. In addition, confirmation was received that the Minister's Office held no responsive records.

The appellant submits that there should be responsive records from 2005 that predate the first record of June 3, 2005. He states that:

According to Ministry's released [Index of Records] in this appeal, it took no less than 10 officials of the Ministry and a period spanning more than two months (early June 2005 to mid August 2005), to produce one [unsolicited] letter for Minister Chris Bentley -- parts of which were a reproduction of sections of the *Ontario Colleges of Applied Arts and Technology Act...*

[N]ot one single record exists to reveal which and how many Ministry officials took part in the drafting and/or preparation of the letter of March 3, 2005 signed by Minister Mary Anne Chambers!

[S]ome form of communication may have taken place [prior to June 3, 2005] between senior officials of the Ministry and senior officials of [the] College and that more internal records were generated ... at the Ministry...

In reply, the Ministry provides a history of the appellant's contact with the Ministry and details the prior release to the appellant of the following responsive records:

- a. The appellant's letter to the Minister, dated January 29, 2005;
- b. The appellant's letter to MPP Laurie Scott, dated February 3, 2005;
- c. MPP Laurie Scott's letter to the Minister, dated February 15, 2005;
- d. The appellant's letter to the Minister, dated February 16, 2005;
- e. The Minister's letter to the appellant, dated March 3, 2005; and,
- f. The appellant's letter to the Minister, dated March 7, 2005.

The Ministry provided additional details in its representations of the steps taken to search for responsive records, the names and titles of the employees who undertook those searches, and the results of those searches. These searches included an email being sent to all Managers in the Ministry's Post Secondary Education Division regarding the request, asking the Managers to check their own files, and to have staff check their files, for paper or electronic records that would be responsive to the request. In addition, keyword searches were conducted for responsive electronic records on the common drive used by the Post Secondary Education Division and on the Ministry's incoming correspondence computer system.

The Ministry also provided information concerning its Communications Branch's general practice in responding to requests. This practice included searching hardcopy files, conducting a keyword search of electronic records on the Branch's computer system common drive and conducting a keyword search of the Branch's email system.

The Ministry also responded to the appellant's argument that, given the number of people involved in the response to the appellant's March 7, 2005 letter, there ought to be some records regarding the preparation of the previous Minister's letter, signed by Minister Chambers on March 3, 2005. In effect, it responded by providing information that work simply was not done in response to the appellant's March 7, 2005 letter during the period March 7, 2005 to June 3, 2005.

Analysis/Findings

Although the appellant asserts that additional responsive records should exist in response to part 2 of his request, I find that the appellant has not provided me with a reasonable basis for concluding that additional responsive records exist.

Upon my review of the Ministry's representations, I find that the Ministry has provided sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

I conclude that the Ministry has provided a comprehensive description of the steps it undertook to locate records responsive to the appellant's request. Accordingly, I find that the Ministry has performed a reasonable search for responsive records and I dismiss that aspect of the appeal.

ORDER:

I uphold the Ministry's decision and dismiss the appeal.

Original signed by: _____
Diane Smith
Adjudicator

June 25, 2008