



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER PO-2621**

## **Appeal PA06-353**

### **York University**



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## **NATURE OF THE APPEAL:**

A journalist filed a request with York University (the University) under the *Freedom of Information and Protection of Privacy Act* (the Act) for the following information:

Total cost of legal fees related to Marsden v. Freeman-Maloy, beginning in April, 2004 through to and inclusive of September 15, 2006, with decision of Supreme Court of Canada not to hear Marsden v. Freeman-Maloy leave to appeal. Inclusive of all proceedings in Ont. Superior Court, Ont. Court of Appeal [and] Supreme Court of Canada.

The Coordinator of the University's Freedom of Information and Privacy Office spoke to the requester on the telephone and then sent a letter to her that stated:

... I understand that you are interested in the total dollar amount spent by York University in defending itself in the case of Freeman-Maloy vs. York University, including costs for pro-active motions taken in court by York University. Your timeframe is April 2004 through to September 15, 2006.

The University located one record responsive to the request in its Office of the General Counsel. This record is a one-page invoice from McCarthy Tétrault, the law firm that represented the University in the proceedings. This invoice is for professional services rendered from June 18, 2004 to July 31, 2004.

The University issued a decision letter to the requester that denied her access to this record pursuant to the discretionary exemption in section 19 (solicitor-client privilege) of the Act. In particular, it cited section 19(a) in its decision letter.

The requester (now the appellant) appealed the University's decision to the Commissioner's office, which appointed a mediator to assist the parties in resolving the issues in this appeal.

The mediator contacted the University to ask whether any additional records exist that are responsive to the appellant's request, because the only responsive record located by the University covers a six-week period from June 18, 2004 to July 31, 2004. However, the appellant's request is for the total cost of legal fees incurred by the University for a period of more than two years (April 2004 to September 15, 2006). The University informed the mediator that the one-page invoice is the only record that is responsive to the appellant's request.

The mediator contacted the appellant and informed her that the University claims that no additional responsive records exist. The appellant provided the mediator with copies of four court decisions ranging from 2004 to 2006 relating to various legal proceedings between Daniel Freeman-Maloy and York University/former President Lorna Marsden. These decisions, which are also available through Quicklaw, identify the lawyers who represented the University:

- *Freeman-Maloy v. York University* [2004] O.J. No. 3123  
An Ontario Divisional Court decision, dated July 20, 2004, which lists Lisa M. Constantine, as the lawyer representing the University.

- *Freeman-Maloy v. Marsden* [2005] O.J. No. 1730  
An Ontario Superior Court of Justice decision, dated April 25, 2005, which lists William C. McDowall, as the lawyer representing the University.
- *Freeman-Maloy v. Marsden* [2006] O.J. No. 1228  
An Ontario Court of Appeal decision, dated March 31, 2006, which lists Thomas G. Heintzman and Christopher A. Wayland, as the lawyers representing the University.
- *Freeman-Maloy v. Marsden* [2006] S.C.C.A. No. 201  
A Supreme Court of Canada decision, dated September 14, 2006, that lists Thomas G. Heintzman as the lawyer representing the University.

All of the named lawyers who represented the University in the above proceedings were from the law firm McCarthy Tétrault.

The appellant informed the mediator that she believes that additional records responsive to her request should exist. Consequently, whether the University has conducted a reasonable search for responsive records is an issue in this appeal.

This appeal was not settled in mediation and was transferred to the adjudication stage of the appeal process. I decided to start my inquiry by issuing a Notice of Inquiry, setting out the facts and issues, to the University and McCarthy Tétrault (which is an affected party in this appeal).

In response, the University submitted representations to the Commissioner's office. In these representations, the University explains why it takes the position that the discretionary exemption in section 19 applies to the one-page legal invoice that it located. In addition, it states the following with respect to the issue of whether it conducted a reasonable search for records responsive to the appellant's request:

York University did not spend any other money to defend itself in *Freeman-Maloy vs. York University*. Additional legal fees in connection with this matter were paid by York University's insurers, Canadian Universities Reciprocal Insurance Exchange ("CURIE"). In particular, CURIE paid for the legal fees for the four proceedings cited on page 2 of the Notice of Inquiry dated April 16, 2007.

The University also asked that limited portions of its representations be withheld from the appellant because they fall within this office's confidentiality criteria for withholding representations, as set out in *Practice Direction Number 7*.

The affected party, McCarthy Tétrault, also submitted brief representations, stating that the privilege in issue belongs to the client and not to the law firm.

I then issued a Notice of Inquiry to the appellant, along with a severed version of the University's representations and a copy of the complete representations of McCarthy Tétrault. In response, the appellant submitted representations to this office.

Shortly after I received representations from the appellant, the Ontario Divisional Court issued its decision in *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)* [2007] O.J. No. 2769. This decision upheld Orders PO-2548 and PO-2484 and found that the bottom line legal fee amounts appearing on legal accounts were not exempt from disclosure under the solicitor-client privilege exemption in section 19 of the *Act*.

Consequently, I decided to seek additional representations from the parties. I issued a letter to the University, along with a complete copy of the appellant's representations, and invited it to submit reply representations. On the issue of whether the discretionary exemption in section 19 of the *Act* applies to the one-page legal invoice, I invited the University to provide representations on the impact of the Divisional Court's decision in *Ontario (Ministry of the Attorney General)* on the current appeal.

In addition, on the issue of whether the University conducted a reasonable search for records, I invited it to provide representations in response to the following question:

Does York University have any records in its custody or under its control that relate to the University's legal fees that were paid by the Canadian Universities Reciprocal Insurance Exchange (CURIE), in connection with the case of *Freeman-Maloy v. York University*? Such records could include invoices submitted by McCarthy Tétrault or other related documents. If so, please describe these records.

In response, the University submitted reply representations to this office. In these representations, the University agrees to disclose the total amount of legal fees billed to it by McCarthy Tétrault, for the provision of legal services in the case of *Freeman-Maloy v. York University*. In addition, it confirms that it has no records in its custody or control that document the legal fees that were incurred by its insurer (CURIE) with respect to the other legal proceedings related to this case.

I then issued a letter to the appellant, along with a complete copy of the University's reply representations. The purpose of the letter was to obtain the appellant's views as to whether this appeal should be closed. The letter further stated that if the appellant believes that there are outstanding issues in this appeal that must still be resolved, she should identify these issues and also respond to the reply representations submitted by the University.

In response, the appellant submitted representations that asked the Commissioner's office to order the University to disclose the total legal fees incurred by the University in the case of *Freeman-Maloy v. York University*, specifically the legal fees paid through its insurer, CURIE, on behalf of the University.

## DISCUSSION:

### SCOPE OF REQUEST

Before determining whether the University has conducted a reasonable search for the records sought by the appellant, the scope of the appellant's request must be defined.

Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,
  - (a) make a request in writing to the institution that the person believes has custody or control of the record;
  - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
- . . . . .
- (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

As noted above, the appellant's original request was for the following:

Total cost of legal fees related to Marsden v. Freeman-Maloy, beginning in April, 2004 through to and inclusive of September 15, 2006, with decision of Supreme Court of Canada not to hear Marsden v. Freeman-Maloy leave to appeal. Inclusive of all proceedings in Ont. Superior Court, Ont. Court of Appeal [and] Supreme Court of Canada.

Subsequently, the Coordinator of the University's Freedom of Information and Privacy Office spoke to the requester on the telephone and then sent a letter to her that stated:

...I understand that you are interested in the total dollar amount spent by York University in defending itself in the case of Freeman-Maloy vs. York University, including costs for pro-active motions taken in court by York University. Your timeframe is April 2004 through to September 15, 2006.

In her representations, the appellant submits that the University acted in bad faith when it "knowingly" attempted to narrow the scope of her request. She submits that although her original request was straightforward, the University did not reveal to her that its insurer, CURIE, had paid the remaining legal fees when it narrowed the wording of her request:

Having full knowledge that the bulk of the legal fees and disbursements in the case in question were paid through the University's insurer, CURIE, York edited the request to read, "the total dollar amount spent by York University in defending itself in *Freeman-Maloy v. York University*." Had I been aware of CURIE's role in financing of the above case, I would not have let the language offered by York stand.

In its reply representations, the University states that it had not intended to unduly narrow the scope of the appellant's request and was simply trying to address "the ambiguity in terminology" with respect to the name of the case involving Mr. Freeman-Maloy and the University that was cited in the appellant's original request. In addition, it acknowledges that although it had the opportunity to reveal to the appellant that CURIE paid its legal fees for the other proceedings, it was in the midst of sensitive negotiations with Mr. Freeman-Maloy to settle the lawsuit that he had brought against the University:

It was not in the University's best interests for Mr. Freeman-Maloy to know anything whatsoever about how the University was covering its legal costs as this may have influenced the settlement negotiations. While it is no secret that universities have insurers, the University did not want to disclose this information voluntarily to the Appellant who could reasonably be expected to make the information public.

In her response to the University's representations on this point, the appellant states that although she does not dispute that the University did not intend to narrow the scope of her request, the alternate language offered by the University had the effect of excluding all legal fees paid to outside legal counsel by CURIE on behalf of the University.

I have carefully considered the parties' representations with respect to the scope of the request in this appeal. At the outset, I accept the University's submission that it did not intentionally narrow the scope of the appellant's request to exclude any records that would reveal the dollar amount of any legal fees paid by its insurer, CURIE, with respect to the proceedings between the University and Mr. Freeman-Maloy.

However, I am not persuaded by the University's argument that it could not reveal to the appellant, at the time of her request or at an earlier stage in this appeal, that CURIE had paid its legal fees for most of the proceedings involving the University and Mr. Freeman-Maloy. In my view, the University's submission that it could not reveal this information because it was in the midst of "sensitive" settlement negotiations with Mr. Freeman-Maloy, is simply not credible.

In its representations, the University acknowledges that the fact that it uses an insurer, CURIE, to cover some of its legal expenses, is not a secret. Moreover, CURIE's website openly describes it as an organization that insures "the property and liability risks of Canada's most distinguished universities." It is a stretch to suggest that the University needed to keep this public information hidden to avoid prejudicing its position in its settlement negotiations with Mr. Freeman-Maloy.

In my view, the University was acting out of an unnecessary abundance of caution, and this approach had the effect of narrowing the appellant's request.

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880]. In my view, an institution must also be as open and transparent as possible in assisting a requester in reformulating his or her request under section 24(2) of the *Act*.

I find, therefore, that the scope of the appellant's request must be based on the wording of her original request, not the amended version sent to her by the University. In my view, this wording is sufficiently broad to include any records in the University's custody or under its control that would reveal the total dollar amount of any legal fees paid by the University itself or by its insurer, CURIE, with respect to the proceedings between the University and Mr. Freeman-Maloy.

I will now assess whether the University conducted a reasonable search for these records, as required by section 24 of the *Act*.

#### **SEARCH FOR RESPONSIVE RECORDS**

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution 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 institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show 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.

As noted above, the University located one record responsive to the appellant's request in its Office of the General Counsel. This record is a one-page invoice from McCarthy Tétrault, the law firm that represented the University in the proceedings. This invoice is for professional services rendered from June 18, 2004 to July 31, 2004. However, the appellant's request is for the total cost of legal fees incurred for a period of more than two years (April 2004 to September 15, 2006).

The appellant provided the Commissioner's office with copies of four court decisions ranging from 2004 to 2006 relating to various legal proceedings between Mr. Freeman-Maloy and York

University/former President Lorna Marsden. All of the named lawyers who represented the University in the above proceedings were from McCarthy Tétrault.

Consequently, it appeared, at first glance, that the University should have had additional invoices in its custody or under its control that were submitted by McCarthy Tétrault with respect to the additional proceedings that took place between April 2004 and September 15, 2006.

However, as noted above, the University explained in its representations that it did not spend any other money to defend itself in *Freeman-Maloy v. York University*. Any additional legal fees in connection with this matter were paid by CURIE, which is the University's insurer. In particular, CURIE paid for the legal fees for the four proceedings cited by the appellant.

In her representations, the appellant asks that the Commissioner's office order the University to disclose the total legal fees incurred by the University in the case of *Freeman-Maloy v. York University*, specifically the legal fees paid through its insurer, CURIE, on behalf of the University.

However, the *Act* applies only to records that are in the custody or under the control of an institution. Section 10(1) of the *Act* states, in part:

Every person has a right of access to a record or a part of a record *in the custody or under the control of an institution* unless . . . (Emphasis added.)

In its reply representations, the University states that it has no records in its custody or under its control that document the legal fees paid by its insurer in the case of *Freeman-Maloy v. York University*:

York University reiterates that it has in its custody or control only one record responsive to the request, which is the invoice submitted by McCarthy Tétrault to York University on 31 August 2004. It does not have any records under its custody or in its control that relate to the University's legal fees that were paid by [CURIE] in connection with the case of *Freeman-Maloy v. York University* or any of the subsequent cases . . .

The process for handling insurance claims for legal fees is that the external law firm submits its invoices directly to [the] insurer for payment. York University does not see the invoices submitted by the legal counsel retained by CURIE.

Consequently, it appears that any remaining records documenting legal fees incurred in the case of *Freeman-Maloy v. York University* are held by CURIE, not the University. However, the *Act* only applies to bodies which are defined as "institutions" in section 2(1):



“institution” means,

- (0.a) the Assembly,
- (a) a ministry of the Government of Ontario,
  - (a.1) a service provider organization within the meaning of section 17.1 of the *Ministry of Government Services Act*, and
  - (b) any agency, board, commission, corporation or other body designated as an institution in the regulations; (“institution”)

Column 1 of the Schedule to Regulation 460 of the *Act* then lists the agencies, boards, commissions, corporations and other bodies that are designated as institutions. Although this Schedule lists Ontario’s universities, including York University, CURIE is not listed as an institution and is therefore not covered by the *Act*. The corollary to this finding is that any records held exclusively by CURIE are not accessible under the *Act*.

I agree with the appellant that in the interests of transparency, the public should be able to scrutinize the amount of public funds that the University expended on legal fees, either directly or through its insurer, in its legal battle with Mr. Freeman-Maloy. However, I do not have the authority to order the disclosure of records that are not in the custody or under the control of an institution or that are held by an organization that is not defined as an institution under the *Act*.

In short, I am compelled to find that the University has conducted a reasonable search for the records sought by the appellant, in accordance with section 24 of the *Act*. In my view, the University has provided sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records that are in its custody or under its control.

## **OTHER ISSUES**

The University has disclosed the total amount of legal fees billed to it, which is found in the only legal invoice that McCarthy Tétrault submitted to the University. Consequently, whether the discretionary exemption in section 19 of the *Act* applies to this information is no longer at issue in this appeal. In addition, it is also not necessary to assess whether the University properly exercised its discretion in applying this exemption.

## **ORDER:**

I dismiss the appeal.

Original signed by: \_\_\_\_\_

Colin Bhattacharjee  
Adjudicator

October 31, 2007  
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