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

ORDER PO-2750

Appeals PA07-448 and PA07-449

University of Ottawa

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NATURE OF THE APPEAL:

The University of Ottawa (the University) received two requests from the same requester under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

1. …all records mentioning and/or discussing me and/or my activities and communicated by/to [name] personally and/or to [name] in all his official capacities at the University of Ottawa, including but not limited to Dean of the Faculty of Graduate and Postdoctoral Studies at the University of Ottawa, to/by another person or other persons other than myself and in which I am not a/the recipient of such communication from March 20, 2007 inclusive to present [October 10, 2007].

2. …all records mentioning and/or discussing me and/or my activities and communicated by/to [name] personally and/or to [name] in all her official capacities at the University of Ottawa, including but not limited to Vice-Dean of the Faculty of Graduate and Postdoctoral Studies at the University of Ottawa, to/by another person or other persons other than myself and in which I am not a/the recipient of such communication from March 20, 2007 inclusive to present [October 10, 2007].

The University located the responsive records and granted the appellant with access to them.

During the course of mediation, the appellant advised the mediator that he is of the view that additional records exist. Accordingly, the reasonableness of the University's search is at issue in these appeals.

The University also confirmed that some of the information contained within the records was severed pursuant to section 21 (personal privacy) of the *Act*. The appellant advised the mediator that he is pursuing access to the severed portions of the records.

As mediation did not resolve these appeals, the files were transferred to me to conduct an inquiry. I sent a Notice of Inquiry, setting out the facts and issues for each of these appeals to the University, initially, seeking its representations. I received representations from the University, a complete copy of which was sent to the appellant, along with a Notice of Inquiry. I received representations from the appellant. I sent a copy of the appellant's representations to the University seeking reply representations. I received reply representations.

RECORDS:

The records at issue consist of the withheld portions of e-mails dated May 29, 2007, July 31, 2007, August 6, 2007 (in Appeal PA07-449) and August 29, 2007 (in Appeal PA07-448).

DISCUSSION:

SEARCH FOR RESPONSIVE RECORDS

I will first determine whether the University conducted reasonable searches for records responsive to the two requests.

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.

The University was asked to provide a written summary of all steps taken in response to the request. In particular, the University was asked to respond to the following questions:

1. Did the University 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 University 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 University 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 University inform the requester of this decision? Did the University 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.

Representations

The University states that both the Dean and the Vice-Dean of the Faculty of Graduate and Postdoctoral Studies (the Dean and Vice-Dean) were asked to search through all their records, including emails. Both the Dean and the Vice-Dean affirmed in their affidavits that they searched their email and paper records. Searches were conducted for the appellant's last name.

The appellant submits that the University should not have restricted the scope of its searches to records that contained only his surname and should have searched for records that substantively relate to him and his activities, whether or not he is named in these records. He says as a result, the University did not search for records concerning his "activities" as stated in his request. He also points out that his last name as a search term is mispelled in the affidavit of the Vice-Dean.

He included an example e-mail record that he believes puts into disrepute the affidavits of the Dean and Vice-Dean. These e-mails do not mention the appellant by name. If the University did in fact restrict its searches to only records that contained the appellant's last name, he submits that it is impossible for it to have produced these e-mails.

In reply, the University submits that:

> It is our belief that using the appellant's surname to conduct the search was a reasonable way to proceed. Not only was this the most effective way to proceed, but it was also the least expensive way to conduct the searches. For an institution with more than 30,000 students, using the appellant's surname made it easier to retrace the documents relevant to the parameters of the request. In regards to the affidavit of [Vice-Dean] in which the appellant's surname was spelled incorrectly, this was a simple typographical error in the affidavit. If the search had been conducted with an incorrect spelling, it would have been impossible for the University to retrace the relevant records that were provided to the appellant, since the computer would not have been able to recognize them.
>
> As mentioned in [the Dean and Vice-Dean's] affidavits, searches were conducted through their emails in order to find all documents relevant to the appellant's request. [They] both confirmed that they created a specific folder [or folders] for all communications relevant to [the appellant]… Therefore, emails related to this request came from searching [these specific] folders…

> [The Dean] also performed a search in his other folders in order to produce all the requested records. The folder named after the appellant logically explains why some records were provided to the appellant even if his name was not mentioned in these documents. This also demonstrates that our methods were efficient, since it allowed us to find more documents than those containing the appellant's name and therefore documents related to "his activities".

Analysis/Findings

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

A reasonable search would be one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request [Order M-909].

Although there is no burden of proof specified in the *Act* in this instance, the burden of proof in law generally is that a person who asserts a position must establish it.

I disagree with the appellant that the University was obligated to search for responsive records concerning the appellant in a manner other than using the appellant's name as a search criterion. The appellant has requested records mentioning and/or discussing him or his activities. Although responsive records were located that did not contain the appellant's name, these records were located because the Dean and Vice-Dean had created specific folders in their email records system concerning the appellant. I find that it is not reasonable to expect that the University would be able to locate other responsive records without searching for records that contain the appellant's name.

As set out above, the issue before me is whether the searches carried out by the University for responsive records was reasonable in the circumstances. In my view, I find that the University has provided a thorough explanation of the efforts made by experienced employees to identify and locate any records, both electronic and paper, responsive to the requests, as well as an explanation as to why no additional responsive records could be located. Therefore, I uphold the University's search for responsive records in both requests and I dismiss that part of the appeal.

PERSONAL INFORMATION

I will now determine whether the records contain "personal information" as defined in section 2(1) 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.)].

Representations

The University submits that in order to protect the privacy of identifiable individuals other than the appellant in the records, the University severed some of their personal information such as their personal home telephone numbers or information concerning their personal schedule and personal interests.

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

Analysis/Findings

The records contain both the personal information of the appellant and of other identifiable individuals. Based upon my review of the information severed from the records at issue, I find that this severed information consists of the personal information of identifiable individuals other than the appellant in their personal capacity. This severed information includes these individuals' home telephone numbers (paragraph (c)), their medical histories (paragraph (b)) and their names which appear with other personal information (paragraph (h) of the definition of personal information in section 2(1)).

PERSONAL PRIVACY

I will now determine whether the mandatory exemption at section 21(1) or the discretionary exemption at section 49(b) applies to the information at issue.

Section 47(1) of the *Act* 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(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

If the information falls within the scope of section 49(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

Under section 21, where a record contains personal information only of an individual other than the requester, the institution must refuse to disclose that information unless disclosure would not constitute an "unjustified invasion of personal privacy".

The University submits that disclosing the severed personal information to the appellant would constitute an unjustified invasion of another individual's personal privacy.

The appellant does not believe that the personal information in the records at issue was severed by the University properly. He provides two specific examples. With respect to the severed information in the email chain of August 29, 2007 at issue in Appeal PA07-448, he submits, concerning one email in this chain, that he finds:

> …it unbelievable that in the middle of the discussion [in the email] the subject matter would abruptly change to a discussion of another party in its entirety, completely ceasing discussions about me, only to come back to discussions about me in the following paragraph…

Concerning another email in this email chain, he submits that he does not believe that the severing of a part of this email was performed by the University in accordance with section 21(1) of the *Act*, since the portion immediately following what has been severed has nothing to do with the appellant. Therefore, he speculates that in order for the email to make sense, that the first sentence, which is severed in its entirety, is personal information relating to him.

Analysis/Findings

As the records contain the personal information of both the appellant and other individuals, section 49(b) applies. This section reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

Sections 21(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold under section 49(b) is met.

If the information fits within any of paragraphs (a) to (e) of section 21(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under sections 49(b) or 21. In the circumstances, it appears that the only exception that could apply is paragraph (f), which reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

The factors and presumptions in sections 21(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 21(1)(f). Section 21(3) identifies certain types of information, the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) identifies information whose disclosure is not an unjustified invasion of personal privacy.

In the present appeal, none of the presumptions in section 21(3) are relied upon by the University and I find that none apply to the personal information at issue. Similarly, section 21(4) is inapplicable in this appeal.

If no section 21(3) presumption applies, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy under section 49(b) [Order P-239]. The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2) [Order P-99].

Section 21(2) reads:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> > (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
> >
> > (b) access to the personal information may promote public health and safety;
> >
> > (c) access to the personal information will promote informed choice in the purchase of goods and services;

> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
>
> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (f) the personal information is highly sensitive;
>
> (g) the personal information is unlikely to be accurate or reliable;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
>
> (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

Based on my review of the information at issue in the records, I find that the factor in section 21(2)(f) is relevant, namely, that the personal information is highly sensitive.

To be considered highly sensitive, it must be found that disclosure of the information could reasonably be expected to cause significant personal distress to the subject individual [Order PO-2518].

With the availability of reverse telephone number directories, the affected persons' names combined with their home telephone numbers provide sufficient information to enable a requester to identify and locate these individuals.

I agree with the findings of Adjudicator Laurel Cropley in Order M-1146, concerning the privacy interests at stake in disclosure of an individual's home address:

> I have considered the rationale for protecting the address of an individual. One of the fundamental purposes of the *Act* is to protect the privacy of individuals with respect to personal information about themselves held by institutions (section 1(b)).
>
> In my view, there are significant privacy concerns which result from disclosure of an individual's name and address. Together, they provide sufficient information to enable a requester to identify and locate the individual, whether that person wants to be located or not. This, in turn, may have serious consequences for an individual's control of his or her own life, as well as his or her personal safety. This potential result of disclosure, in my view, weighs heavily in favour of privacy protection under the *Act*.

> This is not to say that this kind of information should never be disclosed under the *Act*. However, before a decision is made to disclose an individual's name and address together to a requester, there must, in my view, exist cogent factors or circumstances to shift the balance in favour of disclosure.

Adopting this reasoning, I find that the home telephone numbers of the identifiable individuals in the records is highly sensitive in the circumstances and the factor in section 21(2)(f) is applicable. This factor weighs heavily in favour of non-disclosure. Disclosure of this information could reasonably be expected to cause significant personal distress to the identifiable individuals other than the appellant.

In addition, concerning the remaining personal information, I find that this personal information in the records is highly sensitive information. This information includes the medical information. Disclosure of the information could reasonably be expected to cause significant personal distress to the individuals other than the appellant identified in the records [Order PO-2518].

I disagree with the appellant that the University has not properly severed the personal information from the records. Section 10(2) of the *Act* obliges the institution to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt. Based upon my review of the records, I find that the University has reasonably severed the personal information of identifiable individuals other than the appellant in the records pursuant to section 10(2).

In the absence of any relevant factors in favour of disclosure of the personal information at issue, I find that section 49(b) applies to the personal information at issue in the records.

EXERCISE OF DISCRETION

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

The section 49(b) 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 University submits that the undisclosed personal information had no connection with the appellant nor does he have any right or interest in this information. Disclosing such information to the appellant would constitute an unjustified invasion of another individual's personal privacy. The appellant did not address this issue in his representations.

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 information in the records for which it has claimed the section 49(b) exemption. In particular, the appellant does not have a sympathetic or compelling need to receive this information and the information is sensitive. Disclosure will not increase public confidence in the operation of the University. In the circumstances of this appeal, the privacy rights of the identifiable individuals in the records other than the appellant are significant.

Accordingly, I uphold the University's exercise of discretion and find that the records are properly exempt under section 49(b). Having regard to the withheld information, I am satisfied that disclosure of the personal information in the records would constitute an unjustified invasion of personal privacy of the other identifiable individuals in the records.

ORDER:

I uphold the University's decisions and dismiss these appeals.

Original Signed By: January 6, 2009
Diane Smith
Adjudicator