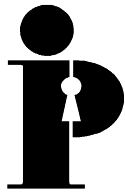

ORDER PO-2746

Appeal PA07-138-2

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*) as follows:

> In an email of March 8, 2007 to [professor's name] of the University of Ottawa, [name], a member of the Board of Directors of the York University Foundation [the YUF], recounted the institutional response to a defamation lawsuit I filed [date] against the Board of Directors of the York University Foundation, among others. [Board member name] stated: "the University made a claim with its insurers. The lawyers were hired by and work for the insurers." This has been confirmed by [name] of the Canadian Universities Reciprocal Insurance Exchange [CURIE], the University's insurer.
>
> Under the [*Act*], I would like to request a copy in full of that "claim" made by the University with its insurers, as well as copies in full of all documents and correspondence, including electronic, related to that action. Please note that the University itself is not a defendant in this lawsuit.

The University located responsive records and granted full access to two documents and denied access to the remaining 33 documents pursuant to sections 17(1)(a) (third party information) and 19(a) and (c) (solicitor-client privilege) of the *Act*. The University also provided a fee of $306.00, based upon 10 hours of search time and photocopy charges for 30 pages.

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

During mediation, the University also notified and obtained consent from additional third parties with respect to the remaining records for which they had claimed section 17(1). Accordingly, section 17(1) is no longer an issue in this appeal. The University issued a supplementary decision to the appellant, providing access to Records 32 and 34. Although section 17(1) is no longer an issue in this appeal, the remaining records are being withheld pursuant to sections 19(a) and (c) of the *Act*.

The appellant advised the mediator that he does not wish to pursue access to Records 16 and 24, and these have been removed from the appeal. However, the appellant confirmed that he wishes to pursue access to the remaining records that are being withheld pursuant to sections 19(a) and (c) (solicitor-client privilege). The mediator also raised the possible application of section 49(a) to the records remaining at issue (discretion to refuse requester's own information). Finally, the appellant confirmed that he is not appealing the University's fee of $306.00.

As further mediation was not successful in resolving the issues in this appeal, the file was moved to the adjudication stage of the inquiry process. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the University seeking its representations. I received representations from the University. I provided a complete copy of these representations to the appellant, along with a Notice of Inquiry, and sought his representations. I received representations from the appellant. I sent a copy of the appellant's representations to the University, seeking its reply representations. In reply, the University relied on its initial representations filed in response to the Notice of Inquiry.

RECORDS:

The records remaining at issue consist of emails correspondence and facsimiles, indexed as numbers: 1-15, 17-23, 25, 28-31 and 33.

DISCUSSION:

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain "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 University submits that:

> The request made by the appellant was not a personal information request. However, the records remaining at issue contain a very limited amount of personal information of the appellant, primarily his name in conjunction with the fact that he brought a legal action by issuing a Statement of Claim against the York University Foundation, its Board of Directors, and certain named individuals. Nevertheless, the records do not concern the appellant as they only deal with discussions between the University, CURIE, and the staff of the Foundation and the Foundation's legal counsel regarding steps in responding to the Statement of Claim.
>
> Although the incident that brought about the lawsuit occurred in the workplace (and thus the appellant filed a grievance against the University which has now

> been adjudicated), the Statement of Claim against the Foundation, a federally incorporated charitable body, was made in the appellant's personal capacity.
>
> The lawsuit has been well publicized and disclosure of the records would reveal nothing that is not already known about the appellant except perhaps very limited information about how he and his lawyer pursued the case (which are facts already known to the appellant).

The appellant did not provide representations on this issue.

Analysis/Findings

Based upon my review of the records, I find that they contain the personal information of the appellant. Specifically, I find that the records contain his name along with other personal information relating to him, as contemplated by paragraph (h) of the definition of personal information in section 2(1) of the *Act*. The other personal information that would be revealed by disclosure of the appellant's name is the lawsuit that he has brought in his personal capacity.

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

Because the records contain the personal information of the appellant, I will now determine whether the discretionary exemption at section 49(a), in conjunction with the section 19 exemption applies to the information at issue.

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 University relies on section 49(a) in conjunction with sections 19(a) and (c).

Sections 19(a) and (c) state as follows:

> A head may refuse to disclose a record,
>
> (a) that is subject to solicitor-client privilege;
>
> (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 institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

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 institution 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)].

Solicitor-client communication privilege

Solicitor-client communication 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 this 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.)].

Litigation privilege

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank* (cited above)].

In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

> The "dominant purpose" test was enunciated [in *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169] as follows:
>
> > A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.
>
> It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both.
>
> . . . . .
>
> [For this privilege to apply], there must be more than a vague or general apprehension of litigation.

Branch 2: statutory privileges

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.

Statutory solicitor-client communication privilege

Branch 2 applies to a record that was "prepared by or for Crown counsel for use in giving legal advice."

Statutory litigation privilege

Branch 2 applies to a record that was prepared by or for Crown counsel "in contemplation of or for use in litigation."

Representations

The University submits that:

> The exemptions apply to the records since the records concern the University's response to the lawsuit and arrangements to be made with CURIE, the University's insurer. The University itself was not named in the suit since the University was responding to the issue through the grievance process. However, the University was involved in discussing the suit against the Foundation for two reasons. First, the York University Foundation is an additional insured on the University's insurance policy [CURIE], and so the Foundation was asking the University's legal counsel to help them interpret the policy so that the Foundation could make a claim. Second, one of the individuals named in the suit is the University's former President, [name] who was President up until [date]. As President, she occupied an ex officio position on the Foundation's Board of Governors, and accordingly the University's general counsel believed it prudent to maintain a watching brief over the file, notwithstanding that litigation counsel would be retained by the Foundation for it and the President as defendants.
>
> York University has claimed that the records remaining at issue are subject to solicitor-client privilege (s.19(a)) and that they were 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 (s. 19(c)). The records document discussions between the University's legal counsel, the insurance company, the legal counsel hired by the insurance company for the Foundation, and the Foundation's President. All of the discussions were held in the context of the litigation brought against the Foundation and the University's President, and accordingly, the records are exempt from disclosure.

The appellant disputes the right of the University to claim solicitor-client privilege for communications between the University's counsel and the Foundations staff as the Foundation retains its own counsel outside of the University.

Analysis/Findings

The records all contain communications from the University's Secretary and General Counsel or the University's Director of Legal Services, acting as the solicitor, and University staff, acting as the client. In Order PO-2738, I recently determined that the YUF is a separate entity from the University and is not part of the University. I agree with the appellant that the YUF and its staff are not clients of the University and therefore, the YUF is not in a solicitor-client relationship with the University's counsel. However, the appellant has initiated legal proceedings not only against the YUF, but also against one of its staff who at the time of the records' creation was both on the Board of Governors of the YUF and the University's President.

Based on my review of the parties' representations and the records, I find that the records at issue refer directly to direct communications of a confidential nature between University's lawyers and its staff made for the purpose of obtaining or giving professional legal advice. The records constitute email chains and facsimiles in which the University's solicitors are providing legal advice to its staff and this legal advice forms part of the continuum of communications [Order MO-2206].

Accordingly, I find that the records at issue qualify as confidential solicitor-client communications under branch 1 of section 19(a) 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. Subject to my review of the University's exercise of discretion, I conclude that these records are exempt from disclosure under section 49(a), in conjunction with section 19(a) of the *Act*. As I have found that records are subject to section 19(a), it is not necessary for me to consider whether they are also subject to section 19(c)

EXERCISE OF DISCRETION

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

The section 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

The University submits that:

> The primary factor considered by York University in exercising its discretion is that the information is privileged. The records concern communications primarily between the University's legal counsel and its insurers, and the Foundation and its legal counsel regarding the lawsuit brought by the appellant, and therefore disclosure to the appellant could prejudice the Foundation's and the former President's legal position.

> As an additional factor, York University considered the ongoing adversarial stance taken by the appellant towards the University. At the time the request was made, there was an outstanding grievance underway addressing the very same issues…

The appellant did not address this issue in his representations.

Analysis/Findings

Based on the University's representations, I find that it exercised its discretion with respect to the undisclosed information in the 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, subject to solicitor-client privilege. Although the records concern communications primarily between the University's legal counsel and the Foundation and its legal counsel regarding the lawsuit brought by the appellant, all of the records include legal advice being provided by the University's solicitors to its clients, who are staff members of the University. Furthermore, I find that disclosure of the information at issue in the records will not increase public confidence in the operation of the University.

In conclusion, I find that the University properly exercised its discretion not to disclose the records to the appellant.

ORDER:

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

Original Signed by: December 15, 2008
Diane Smith
Adjudicator