



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

# **FINAL ORDER PO-2831-F**

**Appeal PA07-427**

**University of Ottawa**



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## NATURE OF THE APPEAL:

The University of Ottawa (the University) received the following request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

...all records mentioning and/or discussing me and appearing in the office of [name], Vice President Resources [VP Resources] at the University of Ottawa from June 8, 2007 inclusive to present [September 28, 2007].

The requester subsequently advised the University to exclude all records in which he was the communicator and/or the recipient from the request.

The University located responsive records and granted the requester access to all of them.

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

During the course of mediation, the appellant advised the mediator that he was of the view that additional records existed. The University clarified that additional responsive records existed but that they were being withheld pursuant to the discretionary exemption in section 19 (solicitor-client privilege) of the *Act*. The appellant advised the mediator that he wished to pursue access to these records.

The appellant continued to maintain that additional responsive records existed. Accordingly, the reasonableness of the University's search was at issue in the appeal.

As mediation did not resolve this appeal, the file was transferred to me to conduct an inquiry. During adjudication, the University located three additional responsive records and issued a decision letter to the appellant, claiming that these records were exempt due to the applicability of section 19.

After receiving representations from both parties, I issued interim order, Order PO-2766-I, which contained the following order provisions:

1. I order the University to conduct searches of the record-holdings of the Vice President Resources and the office of the University's Legal Counsel for responsive paper records. I order the University to provide me with an affidavit sworn by the individual(s) who conducted the searches, confirming the nature and extent of the searches conducted for the responsive records within 30 days of this interim order. At a minimum, the affidavit should include information relating to the following:
  - (a) information about the employee(s) swearing the affidavit describing his or her qualifications and responsibilities;
  - (b) the date(s) the person conducted the search and the names and positions of any individuals who were consulted;

- (c) information about the type of files searched, the search terms used, the nature and location of the search and the steps taken in conducting the search; and,
  - (d) the results of the search.
2. The affidavit referred to above should be sent to my attention, c/o Information and Privacy Commissioner/Ontario, 2 Bloor Street East, Suite 1400, Toronto, Ontario, M4W 1A8. The affidavit provided to me may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in IPC Practice Direction 7.
  3. If, as a result of the further searches, the University identifies any additional records responsive to the request, I order the University to provide a decision letter to the appellant regarding access to these records in accordance with the provisions of the *Act*, considering the date of this interim order as the date of the request.
  4. I order the University to disclose those records or portions of the records that I have found not subject to solicitor-client privilege. For ease of reference I have highlighted the portions of these records that should not be disclosed to the appellant on the copy of the records sent to the University with this interim order.
  5. I order the University to exercise its discretion with respect to the records that I have found to be subject to solicitor-client privilege by reason of the application of section 49(a) in conjunction with section 19. I order the University to advise the appellant and this office of the result of this exercise of discretion, in writing. If the University continues to withhold all or part of the records, I also order it to provide the appellant with an explanation of the basis for exercising its discretion to do so and to provide a copy of that explanation to me. The University is required to send the results of its exercise of discretion, and its explanation to the appellant, with the copy to this office, no later than 30 days from the date of this interim order. If the appellant wishes to respond to the University's exercise of discretion, and/or its explanation for exercising its discretion to withhold information, the appellant must do so within 21 days of the date of the University's correspondence by providing me with written representations.
  6. I remain seized of this appeal in order to deal with any outstanding issues arising from this appeal.

In accordance with provision #1 of Order PO-2766-I, the University provided me with the affidavits of the Administrative Assistant to the Vice President, Resources and the Administrative Assistant to the University's Legal Counsel detailing their searches of the record-holdings of the Vice President, Resources and the office of the University's Legal Counsel. The University located two additional records as a result of these searches. A decision letter

regarding access to these records was sent to the appellant. The appellant appealed this decision letter and the issue of the applicability of the exemptions to these two additional records is the subject of a separate appeal.

Pursuant to item #5 of Order PO-2766-I, the University exercised its discretion by re-examining the records that were subject to solicitor-client privilege to determine if such records could be further disclosed in full or in part. The University disclosed further information from three records as a result of its exercise of discretion, but continued to withhold the information from the remaining records or portions of records to which I had determined were subject to the application of section 49(a) in conjunction with section 19. Therefore, the University's exercise of discretion and the search it conducted in response to Order PO-2766-I remain at issue in this appeal. I sought and received representations from both the University and the appellant on these issues.

## **DISCUSSION:**

### **SEARCH FOR RESPONSIVE RECORDS**

I will first determine whether the University conducted a reasonable search for records in response to provision #1 of Order PO-2766-I.

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 stated above, in accordance with the terms of Order PO-2766-I, the University provided two affidavits detailing the searches carried out. One affidavit was from the Administrative Assistant to the Vice President Resources whose responsibilities include the filing of documents received by the Office of Vice President Resources. She states that:

On March 19 and March 24, 2009, I personally conducted a search of all the paper records in the Office of the Vice President Resources for any documents responsive to the request. There were no files opened under the name of the [appellant]. With respect to all the other paper files, one responsive record was found under the file named: "Dossier: [name, section]" and one responsive record

was found under the file “[name of VP Resources]”. There were no other paper records containing information responsive to the request in the Office of the Vice President, Resources.

The Administrative Assistant to the University’s Legal Counsel Office, whose responsibilities include the filing of documents received by that Office, also provided an affidavit. She states that:

On March 19, 2009, I personally conducted a search of the paper records in the Office of the Legal Counsel for any documents responsive to the request. There were three (3) files opened under the name of the [appellant], namely [list of three file names concerning appellant]...

A thorough search of the three (3) files [was] conducted by myself and no documents were found which were responsive to the request.

In response, the appellant submits that:

The University has not conducted reasonable searches pursuant to ...Order PO-2766-1... In its initial representations to you, the University provided an affidavit from [the] Vice President Resources at the University, concerning his searches for respondent records pursuant to my request. In the course of your inquiry into the present matter, [the VP Resources’] affidavit has been discredited. Irrespective of this fact, it still stands that the University requires [VP Resources] to perform searches for respondent records pursuant to the Order. The search conducted by [his] Administrative Assistant ...is foreseen by the [Act] only as a supplemental resource and does not relieve [the VP Resources] of the obligation to perform searches himself. In 2007, both [the VP Resources and his assistant] performed searches pursuant to my original request.

In its July 25, 2008 representations, the University has asserted that the University was engaged in a common adversary relationship with [named outside law firm] against me...

The present affidavit provided by [named Administrative Assistant] (Office of the Legal Counsel) fails to disclose a reference file for this matter. Her affidavit has established the existence of reference file numbers for other matters related to me ...and the University’s admittance demonstrates that all legal matters with [VP Resources] were transferred to the Office of the Legal Counsel to the University. Therefore, the University did not conduct a reasonable search as it did not locate the necessary reference file.

Directly concerning the Office of the Legal Counsel to the University, at the time of my initial request and the period considered by my request, [name] was the Legal Counsel to the University. [She] has since left employment with the University. To my knowledge, [named Administrative Assistant] was not in employment in the Office of the Legal Counsel during [her] employment at the University.

I believe that it is reasonable for the University to contact [former legal counsel] and ascertain the possible existence of any respondent records. Just as [the VP Resources] had archived records from his office with the Office of the Legal Counsel, [she] may have archived records in a location other than the Office of the Legal Counsel, this possibly accounting for [named Administrative Assistant] not being able to locate the corresponding University-[named law firm] litigation reference file. ...

Following receipt of the appellant's representations, I had a staff member contact the University to ascertain the location of the files of the University's former Legal Counsel at the time it conducted a search for records in response to Order PO-2766-I. The Freedom of Information Coordinator for the University responded and advised that that all records of the former Legal Counsel were searched and it was not necessary to check in archives or any other location, as the records had not been sent to archives or any other location.

### **Analysis/Findings**

Based upon my review of the parties' representations, I find that the University has performed a reasonable search for records responsive to Order PO-2766-I. In that order I ordered the University to conduct searches of the record-holdings of the Vice President Resources and the office of the University's Legal Counsel for responsive paper records.

A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request [Orders M-909, PO-2469, PO-2592]. In this case knowledgeable employees, whose responsibilities include the filing of documents received at their respective offices, conducted searches of the paper record-holdings of the Vice President Resources and the office of the University's Legal Counsel. In the circumstances of this appeal, it is not necessary that the Vice President Resources and the University's Legal Counsel, either the current or past Legal Counsel, personally search for responsive paper records.

Furthermore, although the appellant believes that there may be additional records concerning him in the Office of Legal Counsel, his request was not for all records concerning him in that office. His request was for all records for him in the office of the VP Resources. The reason that the Office of Legal Counsel was required to be searched in Order PO-2766-I was that the VP Resources had transferred some responsive records to the Office of Legal Counsel. Although, as claimed by the appellant, there may be records about the appellant in the Office of Legal Counsel, based on the searches undertaken by the University since the issuance of Order PO-

2766-I, I find that I do not have a reasonable basis for concluding that these records are responsive to the request in this appeal.

I find that the University has provided a comprehensive description of the steps it undertook to locate the paper records in response to provision #1 of Order PO-2766-I and has, accordingly, provided sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control [Order MO-2185].

I find that the appellant has not provided me with a reasonable basis for concluding that additional responsive information exists. Accordingly, I find that the University has performed a reasonable search for records in response to Order PO-2766-I.

### **EXERCISE OF DISCRETION**

In Order PO-2766-I, I determined that portions of the 65 records at issue in that order did not reveal solicitor-client privileged information and, therefore, that section 49(a) in conjunction with section 19 did not apply to certain portions of the information at issue. During the University's review of the records that I found in Order PO-2766-I to be subject to these sections of the *Act*, the University disclosed to the appellant portions of three records. These records consisted of email chains involving the VP Resources, the University's President and the Office of Legal Counsel. I will now determine whether the University exercised its discretion concerning the records that the University continues to withhold on the basis of the application of section 49(a) in conjunction with section 19.

Section 49(a) reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, **19**, 20 or 22 would apply to the disclosure of that personal information;

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.

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 it exercised its discretion and did not disclose further information to the appellant. It submits that:

[it] re-examined the records that were subject to solicitor-client privilege to determine if such records could be further disclosed in full or in part...

The solicitor-client communications privilege pursuant to section 19(1) of the *Act*, which was derived from common law, protects direct communications of a confidential nature between a solicitor and a client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice. This privilege also extends to the protection of a continuum of communications between the solicitor and a client. The basis for this rationale is to ensure that a client may confide in his or her lawyer on a legal matter without reservation. (Order P-1551)

In re-examining the undisclosed records or portions of records at issue, these records represent communications of a confidential nature which were prepared for the purpose of obtaining and/or giving legal advice. It has been determined that the information that was severed in whole or in part and not disclosed relates to the actual requests by officers of the University for specific legal advice on how to deal with a situation, background information provided to legal counsel to assist legal counsel in formulating the legal advice, the response of legal counsel to such requests, and a continuum of discussion with legal counsel as to the approach that should be taken on particular issues (including draft documents from legal counsel suggesting the wording in a proposed response). The records also included discussions with legal counsel related to other similar issues involving other individuals.

The requester ...was seeking his own personal information. However, the records or severed portions of the records for which the exemption section 19 has been applied generally did not discuss or contain the requestor's personal information per se, but provided legal advice to University administration as to how to address or treat an alleged breach of a University policy in accordance with the terms of the policy.

While some of the severed portions of the records contain suggested drafts of various responses concerning the requestor (as produced by legal counsel), the requestor received the final version of such responses. Furthermore, other severed portions related to other persons' personal information as well as advice related to issues concerning persons other than the requestor. Accordingly, there is no organizational or structural need for the requestor to receive the undisclosed records or portions of records in order to function and there are no ramifications to the requestor if he does not receive this information. Thus, there is no sympathetic or compelling need for the requestor to receive the information.

On the other hand, the nature of the information is important to the University of Ottawa as it relates to a University policy that is still in effect. The advice provided by the Office of the Legal Counsel would be pertinent to any future issues that may arise as a result of the enforcement of the policy. Furthermore, historically, the University of Ottawa does not disclose solicitor-client communications as such communications are regarded as privileged. This increases public confidence in the operation of the University of Ottawa.

The solicitor-client communication privilege exemption represents an assurance for University administrators and employees that their legal issues will be dealt with discretion and respect. The solicitor-client communication privilege is crucial to individuals being able to request and obtain legal advice in total confidence.

Public confidence in the operation of the University of Ottawa will be undermined if the non-disclosed records or portions of records are disclosed.

Accordingly, in order to protect the integrity of the Office of the Legal Counsel, it is important that the section 19 continue to be maintained in respect of the undisclosed records or portions of records.

The appellant provided extensive representations concerning why he disagreed with my application of section 49(a) in conjunction with section 19 to the records at issue in Order PO-2766-I, as well providing representations concerning other matters. As stated above, this order deals with the University's search for records in response to Order PO-2766-I and the University's exercise of discretion concerning the records that I found to be subject to the application of section 49(a) in conjunction with section 19 in that order. With respect to the University's exercise of discretion, the appellant submits that:

The University exercised its discretion concerning the respondent records pursuant to section 19 of the *Act* and solely in respect of a policy matter internal to the University. The University did not exercise discretion in respect of common adversary with [named law firm] against me nor in respect of termination of litigation. The University's exercise of discretion [is] not reasonable...

The policy that the University is referring in ... is the University's User Code of Conduct for Computing Resources. A disagreement between the University and me concerning this policy has been settled in a completely separate grievance process between the University and the Canadian Union of Public Employees and its Local [#]. The settlement of this grievance, including the terms of settlement, has been made public by CUPE [#], to which the University does not object. Therefore, disclosure of respondent records discussing this policy will not adversely affect "future issues that may arise as a result of the enforcement of the policy"...

Furthermore, the University submits that the respondent records are related to other persons' personal information as well as advice related to issues concerning persons other than the requestor.

However, the University has not exercised, as it is required to do, section 28 of the *Act* to seek representations from those individuals as to the disclosure of their personal information. The University has not exercised discretion in respect of sections 17 and 21 of the *Act*...

Contrary to the University's belief that there is no organizational or structural need for the requester to receive the undisclosed records or portions of records in order to function and there are no ramifications to the requester if he does not receive this information. Thus, there is no sympathetic or compelling need for the requestor to receive the information there is an overriding public interest to the disclosure of the respondent records. The University is rightly concerned that [p]ublic confidence in the operation of the University of Ottawa will be undermined if the non-disclosed records or portions of records are disclosed because the University itself engaged in a course of conduct that public confidence in its governance would likely be diminished, for which the University needs to be held accountable if it is to govern itself with the public's confidence...

Additionally, the University cannot simply assert that disclosure of records would prejudice future circumstances. If it makes this assertion, the University must also provide reasonable rationale as to the prejudicing material. This is in accordance with section 53 of the *Act* where the burden of proof lies with the University; the University has not met this burden of proof...

### **Analysis/Findings**

In denying access to the record, I find that the University exercised its discretion under section 49(a) in a proper manner, taking into account relevant considerations and not taking into account irrelevant considerations. In particular, the University took into account the purposes of the *Act*, the exemption at issue and the interests that this exemption seeks to protect.

In response to the appellant's particular concerns about the lack of notice to affected parties, in this appeal the University has relied on the section 19 exemption which seeks to protect solicitor-client privileged information. It has not relied on the personal privacy or third party exemptions in sections 21 or 17; therefore, notice under section 28 is not at issue.

Furthermore, although some of the records relate to the appellant's alleged non-compliance with a publicly available policy of the University, the records that have not been disclosed to him all contain communications between a solicitor and the University as the client concerning matters other than the publicly available information about the settlement of the grievance.

The information at issue is significant to the University. The appellant does not have a sympathetic or compelling need to receive the information at issue, nor, based upon my review of these records or portions of records at issue, will disclosure increase public confidence in the operation of the University. Therefore, I uphold the University's exercise of discretion.

**ORDER:**

1. I uphold the University's search for records responsive to provision #1 of Order PO-2766-I.
2. I uphold the University's exercise of discretion.

Original Signed by: \_\_\_\_\_  
Diane Smith  
Adjudicator

\_\_\_\_\_ October 5, 2009