



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

ORDER PO-2894

Appeal PA09-289-2

Ministry of Training, Colleges and Universities



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NATURE OF THE APPEAL:

The Ministry of Training, Colleges and Universities (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

...copies of all files relating to my person from the above named entities [Ministry of Colleges, Ontario Student Assistance Program (OSAP) & Seneca College]. This request includes copies of all internal memos, electronic records etc. relating to my person or OSAP or Seneca College concerns to any and all internal or external parties.

The Ministry located records responsive to the request. Pursuant to section 28 of the *Act*, the Ministry notified Seneca College (the College) as an affected party, and provided it with an opportunity to make representations concerning disclosure of the records. Upon receipt and review of the College's submissions, the Ministry issued a decision providing access to most of the responsive records. However, the Ministry denied access to seven records, in whole or in part, claiming the application of the mandatory exemption in section 17(1) (third party information) and the discretionary exemption in section 19 (solicitor-client privilege) of the *Act*. The Ministry also noted in its index of records attached to the decision letter that a portion of Record 42 was not disclosed as it contained non-responsive information.

The requester, now the appellant, appealed the decision to this office.

During the mediation stage of the appeal, the Ministry issued a revised decision in which it raised the possible application of the discretionary exemption in section 49(b) (personal privacy) to Records 10 and 42, in addition to its section 17(1) claim. The Ministry also confirmed that it is relying on the discretionary exemption in section 49(a), taken in conjunction with sections 17(1) and 19, to deny access to the records and parts of records remaining at issue. The Ministry further clarified that it is specifically relying on sections 17(1)(a),(b) and (c), and sections 19(a) and (b).

As further mediation was not possible, the appeal was moved to the adjudication stage of the process where an adjudicator conducts an inquiry under the *Act*. I sought and received the representations of the Ministry, initially. In its representations, the Ministry withdrew its reliance on the mandatory exemption in section 17(1). Accordingly, I will not be considering its application in this order as I am of the view that the exemption in section 17(1) has no application to the records at issue.

I then sent the Notice of Inquiry to the appellant, along with the non-confidential portions of the Ministry's representations. The appellant did not provide me with representations.

RECORDS:

The records remaining at issue in the appeal consist of the undisclosed portions of Records 10, 17, 32, 35, 36, 41 and 42.

DISCUSSION:

PRELIMINARY ISSUE

Throughout the processing of this request by the Ministry and the subsequent appeal to this office, the appellant was represented by an agent acting on his behalf. Based on my review of the correspondence and material relating to this matter, I find that they contain information that relates to both the appellant and his agent representative. Accordingly, in conducting my analysis of the issues before me in this appeal, I will consider the request to have come from both the appellant and his representative.

As noted above, the Notice of Inquiry was sent to the appellant. Although the appellant's representative also requested a copy of the Notice, I did not send a copy to him as he refused to provide a mailing address to which it could be sent.

PERSONAL INFORMATION

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

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

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

Sections 2(2), (3) and (4) also relate to the definition of personal information. These sections state:

(2) Personal information does not include information about an individual who has been dead for more than thirty years.

(3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

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 and 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 and MO-2344].

I have reviewed the Ministry's representations, along with the records or parts of records at issue and make the following findings:

- all of the records contain the personal information of the appellant including his name and other personal information relating to him (paragraph (h)), two identifying numbers relating to him in the form of a student number and a social insurance number (paragraph (c)) and information relating to his educational history (paragraph (b));
- Records 10, 17, 32, 35, 36 and 42 contain information that qualifies as the personal information of the appellant's agent, specifically his views and opinions

(paragraph (e)) and confidential correspondence received by the institution from him (paragraph (f)); and

- Records 10 and 42 contain the personal information of an employee of the College, including information about her ethnic origin (paragraph (a)), her personal views or opinions (paragraph (e)) and the appellant's agent's views or opinions about the employee (paragraph (g)). Because of the context and circumstances surrounding the recording of the personal information relating to the employee, I find that although it was taken in the context of her employment with the College, it includes information of a personal nature, thereby passing into the personal realm, and that it qualifies as her personal information.

INVASION OF PRIVACY

I have found above that Records 10 and 42 contain the personal information of the appellant, his agent and an employee of the College. These records serve to document a telephone conversation between the appellant's agent and the College employee which became heated and confrontational. Records 10 and 42 were prepared by the College employee following this conversation and set out her recollection of what transpired.

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. See below for a more detailed discussion of the exercise of discretion issue.

Sections 21(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met. I have reviewed the exceptions to the general rule against the disclosure of personal information in section 21(1) and find that the only one which may apply is section 21(1)(f) which permits the disclosure of personal information where to do so would not result in an unjustified invasion of personal privacy.

If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. The ministry argues that portions of

records 10 and 42 include references to the racial origin of the college employee and that the presumption in section 21(3)(h) applies. This section states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

I have reviewed the contents of Records 10 and 42 and agree that they contain a number of references to the employee's ethnic background. I find, accordingly, that the presumption in section 21(3)(h) applies to this information and that its disclosure is presumed to give rise to an unjustified invasion of the personal privacy of this individual.

The remaining portions of Records 10 and 42 describe a difficult and disputatious telephone conversation involving the employee and the appellant's agent. They describe the employee's feelings and reactions towards the things being said to her by the agent, which were aimed at her personally and were meant to hurt and demean her. In my view, these portions of Records 10 and 42 may be properly characterized as "highly sensitive," thereby falling within the ambit of the consideration favouring non-disclosure in section 21(2)(f).

I note that the appellant and his agent did not provide me with representations or make any references to any considerations in section 21(2) which may favour the disclosure of the information in Records 10 and 42.

Because of the unique nature of the information contained in Records 10 and 42 and the difficult events which gave rise to their creation, I conclude that these records are properly exempt from disclosure under section 49(b). I also conclude that it is not reasonably possible to sever the information that is subject to the section 21(3)(h) presumption or highly sensitive under section 21(2)(f) from the remainder of the information. Accordingly, I uphold the Ministry's decision to deny access to Records 10 and 42, in their entirety.

SOLICITOR-CLIENT PRIVILEGE

The Ministry takes the position that Records 17, 32, 35, 36 and 41, comprised of emails passing between legal counsel and the Ministry's Senior Manager, Student Verification and Compliance Unit OSAP (the senior manager), qualify for exemption under section 19 and, because they include the appellant's personal information, are exempt under section 49(a). Section 19 of the *Act* states as follows:

A head may refuse to disclose a record,

- (a) that is subject to solicitor-client privilege;

- (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or
- (c) that was prepared by or for counsel employed or retained by an educational institution for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 contains two branches. The Ministry takes the position that branch 1 applies to Records 17, 32, 35, 36 and 41. Branch 1 arises from the common law and section 19(a).

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. Mierzewski* (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 [Orders PO-2441, MO-2166 and MO-1925].

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.)].

Representations of the Ministry

The Ministry submits that Records 17, 32, 35, 36 and 41 represent email communications where the senior manager provided information to the Ministry's legal counsel in order to assist her in preparing a legal opinion pertaining to the issues addressed therein. It contends that these are confidential communications between a solicitor and her client "generated over the course of seeking professional legal advice." The Ministry goes on to provide specific representations regarding each of the records, as follows:

- Record 17 is an email chain in which the senior manager sought legal advice from the Ministry's legal counsel regarding certain issues raised by the appellant "over the course of his complaints" against the College;
- Records 32, 35 and 36 are email communications between the senior manager and legal counsel in which the senior manager provided additional information to assist her in making "an informed professional legal opinion"; and
- Record 41 represents the Ministry solicitor's legal opinion to the senior manager.

The Ministry goes on to submit that these records are part of the continuum of communications between the senior manager, in his capacity as client, and the solicitor whose legal advice was sought. It also relies on a disclaimer included in Record 41 that refers to the confidentiality of the contents of that record and indicates that it is subject to solicitor-client privilege. The Ministry also submits that all of the communications at issue passed solely between the senior manager and counsel so that no waiver of the privilege occurred.

As noted above, I did not receive representations from either the appellant or his agent.

Analysis and Findings

I have carefully reviewed the contents of Records 17, 32, 35, 36 and 41 and find that they contain confidential communications between a solicitor and client made for the purpose of obtaining or giving legal advice. As a result, these records qualify for exemption under section 19(a). Specifically, I find that the information contained in Records 17, 32, 35 and 36 form part of the continuum of communications between the solicitor and her client whereby each kept the other apprised of the receipt of correspondence from the appellant's agent and other matters relating to the seeking and provision of legal advice. Further, I find that Record 41, in its entirety, contains legal advice about a legal matter from the solicitor to her client, thereby qualifying for exemption under section 19(a) on the basis that it is a privileged communication.

Because I have found above that all of the records include the personal information of the appellant, I find that Records 17, 32, 35, 36 and 41 are exempt from disclosure under section 49(a). I have reviewed the manner in which the Ministry exercised its discretion to deny access to the records and conclude that it did so taking into account only relevant considerations. Accordingly, I will not interfere with its determination not to disclose the records.

ORDER:

I uphold the Ministry's decision to deny access to all of the records.

Original signed by: _____

Donald Hale
Adjudicator

_____ June 11, 2010