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

FINAL ORDER PO-2832-F

Appeal PA07-445

University of Ottawa

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

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

> …all records mentioning and/or discussing me and/or my activities and communicated by/to [named individual] personally and/or to [named individual] in all his official capacities at the University of Ottawa, including but not limited to President and Vice-Chancellor 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 communications from March 20, 2007 inclusive to present.

The University located responsive records and granted the requester with access to these records.

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

During the course of mediation, the appellant advised the mediator that he is of the view that additional records existed.

The University advised the mediator that it has produced all of the responsive records and that it does not have any other records. The University also provided the appellant with a letter outlining efforts made to locate responsive records.

The appellant maintained that additional responsive records exist. Accordingly, the reasonableness of the University's search was at issue in that appeal.

As mediation did not resolve this appeal, the file was transferred to me to conduct an inquiry. I sent a Notice of Inquiry, setting out the facts and issues in the appeal 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. I then received further representations from the appellant, to which I sought and received further representations from the University. Subsequently, the University located 26 additional responsive records. The University disclosed 20 of these records to the appellant. Six records were not disclosed to the appellant as the University claimed that they were exempt due to the applicability of section 19 (solicitor-client privilege). Five of these six records were responsive to the request at issue. Three of these five records were also responsive to another request made by the appellant and were dealt with me in file PA07-427, which resulted in Order PO-2766-I. As the University had raised the application of section 49(a) in conjunction with section 19, I sought and received representations from both parties as to the applicability of this exemption to these two records. I then proceeded to issue interim order, Order PO-2768-I, wherein I ordered the following:

> 1. I order the University to conduct searches of the record-holdings of the President 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 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 by April 28, 2009. 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 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.

In accordance with provision #1 of Order PO-2768-I, the University conducted another search and did not locate any further responsive records.

Pursuant to provision #5 of Order PO-2768-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 did not disclose any further information from the records as a result of its exercise of discretion. Therefore, the University's exercise of discretion and the search it conducted in response to Order PO-2768-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.

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.

Representations

In accordance with the terms of Order PO-2768-I, the University provided an affidavit detailing the searches carried out. The affidavit was from the University's President's Executive Assistant and Director, Ceremonies who conducted searches of the record-holdings of the President for responsive paper records. In her affidavit she states that:

> On April 1, 2009, 1 personally conducted a search of the paper records in the Office of the President for any documents responsive to the request. A thorough search was conducted by myself and no documents were found which were responsive to the request.

In response, the appellant submits that:

> The search conducted by [the President's Executive Assistant] is foreseen by the [*Act*] only as a supplemental resource and does not relieve [the President] of the obligation to perform searches himself. The University requires [the President] to perform searches for respondent records pursuant to the Order…
>
> [Name] is no longer President at the University. There is no reason for the current President, …who is in office approximately one year, to maintain in his office respondent records of the former President. This is supported by the fact that [the Executive Assistant] was unable to locate any reference files concerning me, despite numerous and lengthy correspondences between [the President] and myself during his term in office. It is reasonable to expect that files concerning me have been archived in a location other than the Office of the President. To this effect, I believe that it is reasonable for the University to contact [the President] and ascertain the possible existence of any respondent records, despite that he is no longer President at the University. To this effect, [the Freedom of Information Coordinator (FOIC)] was the Secretary to the University during the period in question, currently holds occupation as an advisor to [the] President …, and is thoroughly knowledgeable and directly involved in the intricacies of the present matter…

Following receipt of the appellant's representations, I had a staff member contact the University to ascertain if the University searched its archives or other locations for the previous President's records. The FOIC responded and advised that the records of both the current and past President had been searched and, furthermore, that no responsive records of the past President were archived.

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-2768-I. In that order I ordered the University to conduct searches of the record-holdings of the President 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 a knowledgeable employee, whose responsibilities include the filing of documents received at the President's office, conducted a search of the paper record-holdings of the President. In the circumstances of this

appeal, it is not necessary that either the current or past President personally search for responsive paper records.

Based on the search undertaken by the University since the issuance of Order PO-2768-I, I find that I do not have a reasonable basis for concluding that the additional responsive records exist.

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-2768-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].

Accordingly, I find that the University has performed a reasonable search for records in response to Order PO-2768-I.

EXERCISE OF DISCRETION

In Order PO-2768-I, I determined that section 49(a) in conjunction with section 19 applied to the two records at issue in that appeal. 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.

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 decided to not disclose the remaining information from the records. It states 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. (IPC Order P-1551)

The Office of the Legal Counsel provides legal advice of a diverse nature to the University of Ottawa on an on-going basis. It also manages the University's relationship with external counsel retained on behalf of the University…

With respect to the remaining undisclosed records or portions of records, 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, 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 a particular issue. 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 section 19 exemption has been applied generally did not discuss or contain 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 a draft of a letter concerning the requestor (as provided by legal counsel), the requestor received the final version of such letter. 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 exemption continue to be maintained in respect of the [remaining] 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-2768-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-2768-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 to … 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-2768-I.

2. I uphold the University's exercise of discretion.

Original Signed by: October 5, 2009
Diane Smith
Adjudicator