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

ORDER PO-2932

Appeal PA09-320

University of Toronto

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NATURE OF THE APPEAL:

The University of Toronto (the university) received a two-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to an allegation of plagiarism brought by the requester, a university professor, against one of her students. The first part of the request was for a letter identified by the requester. The second part was for any report or minutes from an inquiry committee identified by the requester.

The university located a record responsive to the first part of the request and granted partial access to it. The university initially relied on the discretionary exemption at section 49(b) (personal privacy) to deny access to the portion it withheld. The university advised that there were no records within its custody or control that were responsive to the second part of the request.

The requester (now appellant) appealed the decision.

At mediation, the appellant confirmed that the second part of the request is not at issue in this appeal and that she only seeks access to the withheld portion of the record responsive to the first part of her request.

At the conclusion of mediation, the university issued a supplementary decision letter which also claimed the application of the discretionary exemption at section 49(a) (discretion to withhold requester's own information), in conjunction with section 13(1) (advice or recommendations), to the withheld portions of the responsive record.

As mediation did not resolve the appeal, it was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

I commenced the adjudication by sending a Notice of Inquiry setting out the facts and issues in the appeal to the university. The university provided representations in response to the Notice. I then sent a Notice of Inquiry to the appellant along with the non-confidential representations of the university, inviting their submissions. The appellant provided responding representations.

RECORD:

The responsive record is a two page letter dated November 2, 2001. The undisclosed portions are at issue in this appeal.

BACKGROUND

The procedure to be followed where an instructor believes that a student has committed an academic offence (which includes plagiarism) is set out in the University's Code of Behaviour on Academic Matters (the University Code).

Section C.i.(a) 2 of the University Code provides that where an instructor has reasonable grounds to believe that an academic offence has been committed by a student, the instructor shall so

inform the student immediately after learning of the act or conduct complained of, giving reasons, and invite the student to discuss the matter. Section C.i.(a) 4 provides that if after such discussion, the instructor believes that an academic offence has been committed by the student, or if the student fails or neglects to respond to the invitation for discussion, the instructor shall make a report of the matter to the Department Chair or through the Department Chair to the Dean.

Section C.i.(a) 7 provides that if the Dean, on the advice of the Department Chair and the instructor, or if the Department Chair, on the advice of the instructor, subsequently decides that no academic offense has been committed and that no further action in the matter is required, the student shall be so informed in writing and the student's work shall be accepted for normal evaluation or, if the student was prevented from withdrawing from the course by the withdrawal date, he or she shall be allowed to do so.

In this appeal the requester seeks access to the withheld portions of a letter written by her Department Chair to the Dean of the School of Graduate studies with respect to the allegation of plagiarism brought by the appellant against a student. The university states that it properly conducted an investigation in accordance with the University Code, and that there was a final determination under section 7, as contemplated by the procedure set out in the University Code.

DISCUSSION:

PERSONAL INFORMATION

As already noted, part of the record at issue was disclosed to the appellant. The disclosed portion indicates that the letter concerns the charge of plagiarism brought by the appellant against an identified student.

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

Section 2(1) of the *Act* defines "personal information," in part, as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (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,
>
> …
>
> (e) the personal opinions or views of the individual except where 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 content 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(3) and (4) also relate to the definition of personal information. These sections state:

> (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 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 PO-2435].

The Representations

The university submits that the record at issue contains the detailed personal information of an identified student who was charged with plagiarism by the appellant, including information about the academic offence process and findings related to the charge. The university relies on Order PO-2711 in support of its submission that information about an individual accused of plagiarism (or, in Order PO-2711, academic dishonesty) is the student's personal information.

The university provided both confidential and non-confidential representations in support of its position. In its non-confidential representations, the university submits that:

> Notwithstanding her status and role as a professor at the university, the exempt part of the record comprises the detailed personal information of the appellant, respecting her actions and conduct in connection with the charge of plagiarism and subsequent processes.

It also submits that:

> … the exempt portion of the record comprises the personal information of both the student and the appellant and is the mixed personal information of both of them. Because the personal information is about both the student and the appellant, all of it relates to both of them together and cannot reasonably be said to be about one and not the other.
>
> …
>
> In essence, the personal information in the exempt part of the record is "of a piece", which forms a coherent logical flow that results in and supports the advice and recommendation that is the purpose of the letter. None of the exempt personal information is not about both the student and the appellant, and none of it can be properly understood, taken out of the context of the entire exempt part of the record.

The appellant submits:

> I have been denied access to [the Department Chair's] letter for reasons of protection of the student's privacy. Work submitted by a student to an instructor is not private, leastways not so far as the instructor is concerned. Moreover, when cases of plagiarism are handled under the Code, the whole issue is normally openly discussed with both student and instructor present ... The alleged "privacy" of the student is here merely a red herring designed to prevent me from knowing the contents of [the Department Chair's] letter.…

I have carefully reviewed the letter at issue and I am satisfied that it contains the personal information of both the appellant and the student. In particular, the record contains the views or opinions of the writer about the appellant (paragraph (g)), the views or opinions of the writer about the student (paragraph (g)), as well as the appellant and the student's name along with other personal information about them (paragraph (h)). In addition, in the circumstances of this appeal, I have concluded that although the appellant's information pertains to her role as professor, it has effectively crossed over from the professional to the personal realm, because it reveals something of a personal nature about her.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION

Section 49(a) states as follows:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> (a) 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 [emphasis added]

Section 49(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information [Order M-352].

In this appeal, the university relies on section 49(a) in conjunction with section 13(1) of the *Act*, to deny access to the responsive record.

ADVICE AND RECOMMENDATIONS

Section 13(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

The purpose of section 13 is to ensure that persons employed in the service of an institution are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

Previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information [see Order PO-2681].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations," the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above); see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above)]

Examples of the types of information that have been found *not* to qualify as advice or recommendations include

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- a supervisor's direction to staff on how to conduct an investigation

[Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above); Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above)].

Sections 13(2) and (3) create a list of mandatory exceptions to the section 13(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 13.

The Representations

The university submits that the entire letter "comprises advice and recommendations." In the non-confidential portion of its representations, the university submits:

> Specifically, in the exempt part of the record, [the Department Chair] sets out a "suggested course of action which will ultimately be accepted or rejected by its recipient (the Dean) during the (deliberative) process" of determining - in this case - whether a finding would be made that plagiarism had taken place.
>
> …

> Like the personal information that supports and is part of it, the advice and recommendations in the exempt part of the record are "of a piece", comprising an integrated set of recommendations for the Dean to accept or reject.

In the confidential portions of its representations, the university provides additional submissions in support of its position that the withheld portion of the two page letter is exempt under section 13(1). The university further submits that none of the exceptions in sections 13(2) or (3) apply in the circumstances of this appeal.

The appellant's representations do not specifically address the application of the section 13(1) exemption. Rather, they generally challenge the ultimate ruling about whether plagiarism occurred, and assert that the content of the letter should be released.

Analysis and Findings

The record that is the subject of this appeal is a letter from the appellant's Department Chair to the Dean of the School of Graduate Studies. It concerns an allegation of plagiarism against a student that the appellant reported to her Department Chair. In my view, in his role the Department Chair was operating under the provisions of the University Code. As the Dean of the School of Graduate Studies relied on the letter to decide that no academic offence was committed, it would appear that the Department Chair provided the letter to the Dean under section C.i. (a) 7 of the University Code. Under that section, if the Dean, on the advice of the Department Chair and the instructor, or if the Department Chair, on the advice of the instructor, subsequently decides that no academic offense has been committed and that no further action in the matter is required, the student shall be so informed in writing and the student's work shall be accepted for normal evaluation.

I have considered the representations of the university and based on my review of the withheld portions of the letter I conclude that they contain information that suggests a course of action that will ultimately be accepted or rejected by the Dean or, if disclosed, would permit one to accurately infer the advice or recommendations given. In my view, the withheld portions of the letter fall within the scope of section 13(1). I also find that neither sections 13(2) or 13(3) apply to this information.

As a result, I find that the personal information in the withheld portions of the letter is exempt under section 49(a) of the *Act*.

EXERCISE OF DISCRETION

Where appropriate, institutions have the discretion under the *Act* to disclose information even if it qualifies for exemption under the *Act*. Because section 49(a) is a discretionary exemption, I must also review the university's exercise of discretion in deciding to deny access to the withheld information. On appeal, this office may review the institution's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so.

In such a case, this office may send the matter back to an 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 university [section 54(2)].

In the circumstances of this appeal, I conclude that the exercise of discretion by the university to withhold the severed information was appropriate, given the context in which this information appears and the nature of the information.

ORDER:

I uphold the decision of the university and dismiss the appeal.

Original signed by: November 24, 2010
Steven Faughnan
Adjudicator