



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

ORDER PO-2974

Appeals PA08-202-2 and PA08-202-3

University of Ottawa



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NATURE OF THE APPEALS:

The University of Ottawa (the University) received two requests under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

Request #1 (referenced by the University AS-142)

I request under [the *Act*] all E-MAIL records communicated:

- by/to the Legal Counsel to the [University] to/by [a named person] from January 1, 2005 inclusively to June 5, 2008 inclusively;
- by/to the Associate Legal Counsel to the [University] to/by [a named person] from January 1, 2005 inclusively to June 5, 2008 inclusively.

Request #2 (referenced by the University as AS-143)

I request under the [*Act*] all E-MAIL records communicated by/to the Dean of the Faculty of Science at the University of Ottawa to/by [a named person] from January 1, 2005 inclusively to June 5, 2008 inclusively.

The University issued one decision in response to the two requests. In its decision, the University advised that it was denying access to records responsive to the requests as it viewed the requests as frivolous or vexatious pursuant to Section 5.1 of Regulation 460 of the *Act*.

The requester (now the appellant) appealed the University's decision and Appeal file PA08-202 was opened to deal with the two requests.

During the course of mediation, the University agreed not to pursue its frivolous and vexatious claim and provided the appellant with two separate revised decisions, including indexes of records for each request. The University advised the appellant, in the case of both requests, that it was denying access to the records requested in full, pursuant to the exclusion in section 65(6) (labour relations and employment records) and, in the alternative, the exemptions in sections 19 (solicitor-client privilege), 21(1) (personal privacy) and 22 (information soon to be published) of the *Act*. In the index of records accompanying its decision letter for Request #1, the University also claimed the application of section 17(1) (third party information) of the *Act* for Records 24, 25 and 50.

The appellant appealed the University's decisions and this office opened Appeals PA08-202-2 (in respect of Request #1) and PA08-202-3 (in respect of Request #2).

During the mediation of these appeals, the appellant advised that he was not pursuing access to those records withheld pursuant to the application of the exclusion in section 65(6) and the exemptions in section 17(1) and 22. Therefore, the application of sections 17(1), 22 and 65(6) to the records responsive to these appeals is no longer at issue.

Also during mediation, the University issued revised decisions together with revised indexes of records. In its revised decisions, the University confirmed that it was granting partial access to the records remaining at issue. The revised indexes described the records in each appeal that the University continues to withhold under sections 19 and 21(1). The University provided copies of the records being disclosed pursuant to its revised decisions.

After reviewing these records the appellant advised the mediator that he was not interested in pursuing access to those portions of the records withheld under section 21(1), and the parties agreed to remove section 21(1) from the scope of the two appeals. Accordingly, those portions of the records withheld by the University only under section 21 have been removed from the scope of the appeal.

Subsequently, the University provided final revised indexes of records for each appeal, confirming its reliance on section 19(a) and (c) of the *Act* to deny access to the withheld records. The University also confirmed that it was relying on section 49(a) in conjunction with section 19 to deny access to some of the records as they appeared to contain the personal information of the appellant.

As further mediation did not result in a resolution of the appeals, the files were transferred to the adjudication stage of the appeal process for inquiries under the *Act*. As the two appeals are clearly related, I decided to adjudicate them together.

I commenced my inquiry by issuing a Notice of Inquiry, which identified the facts and issues in the appeals, and invited the parties to submit written representations on the issues to be determined. With regard to those issues, I acknowledge the parties' desire to remove the application of section 21(1) from the scope of the appeals. However, since section 21(1) is a mandatory exemption, I must consider its application if there is any possibility that it may apply to any of the personal information remaining at issue. On my initial review of the information still at issue, I determined that the application of the exemption in section 21(1) remained a possibility. Accordingly, I decided to seek representations from the parties on the application of section 49(a), read with section 19, and section 19 on its own, as well as the application of section 49(b), read with section 21(1), and section 21(1) on its own.

I initially sought written representations from the University and another individual whose interests may be affected by the disclosure of the records (the affected party). Both the University and the affected party submitted representations in response.

I then sought representations from the appellant and enclosed with a Notice of Inquiry the non-confidential portions of the University's representations. The affected party takes the position in her representations that the section 19 and section 21(1) exemptions apply to the undisclosed information in the records at issue. However, I decided to withhold the details of the affected party's representations due to concerns she expressed about maintaining confidentiality.

The appellant responded with representations, which I shared in their entirety with the University and the affected party. The affected party responded with reply representations; the University chose not to submit further representations.

After all the representations were obtained, I received an unsolicited email from the appellant addressed to the Commissioner, as well as a letter from a labour organization to the Commissioner, both addressing certain issues in this appeal. I have reviewed this correspondence, and find that it does not affect the outcome of my inquiry into the issues before me in these appeals.

RECORDS:

Between the two requests, there are a total of seven records at issue, comprised of emails or email strings passing between the affected party and the University's legal counsel and Dean of Science. All of the records cover the period of time during which the affected party was employed in some capacity by the University.

The specific records at issue for each request are described in the following tables:

Request #1

Record #	Description	Severed or Withheld in Full	Exemptions Claimed or Exemptions that Could Apply
3	Email string, dated March 12, 2008 (2 pages)	Severed	49(a)/19, 49(b)/21(1)
12	Email message, dated February 28, 2008 (1 page)	Withheld in full	49(a)/19, 49(b)/21(1)
14	Email message, dated February 26, 2008 (1 page)	Withheld in full	49(a)/19, 49(b)/21(1)
37	Email message, dated November 27, 2007 (1 page)	Withheld in full	19, 21(1)

Request #2

Record #	Description	Severed or Withheld in Full	Exemptions Claimed or Exemptions that Could Apply
11	Email message, dated February 28, 2008 (1 page)	Withheld in full	19, 21(1)
12	Email message, dated February 28, 2008 (1 page)	Withheld in full	49(a)/19, 49(b)/21(1)
35	Email message, dated November 27, 2007 (1 page)	Withheld in full	19, 21(1)

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 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 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]. However, 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].

In addition, 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.)].

Representations

By relying on section 49(a), the University takes the position that certain records contain the personal information of the appellant. The University also identifies that the records contain the personal information of the affected party, and that some records contain the personal information of other identifiable individuals. The University states:

The records at issue contain information about [the affected party] in a personal capacity. It is reasonable to expect that the [affected party] 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.)] Even if the information relates to an individual in a professional, official or business capacity, such information 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] The personal information contained in the records at issue also relates to individuals other than the appellant and [the affected party].

In the confidential portion of its representations, the University describes the status of the affected party. It then states in the non-confidential portion of its representations:

The information in the records contain, for instance, the name of [the affected party], the education and employment history of [the affected party], a personal evaluation of [the affected party], the personal email address of [the affected party] and [the affected party's] views or opinions about the appellant, [the affected party's] own personal concerns about various situations within the University or other matters unrelated to the appellant. The records also contain information about [the affected party] that, if disclosed, would reveal other information about this individual such that the individual could be identified.

The appellant does not address the issue of whether the records contain personal information.

Analysis and findings

I have carefully reviewed the records remaining at issue. As stated above, all of the records are emails or email strings between the affected party and the University's legal counsel and Dean of Science, covering a period of time of approximately four months.

On my review, I find that Records 3, 12 and 14 of Request #1 and Record 12 of Request #2 contain the appellant's personal information, including his name and the views and opinions of other identifiable individuals about the appellant. I also find that Record 37 of Request #1 and Records 11 and 35 of Request #2 do not contain the appellant's personal information. I note as well that Records 37 and 35 are identical records.

I acknowledge that many of the records at issue also contain the personal information of other identifiable individuals. However, the appellant has indicated that he is not interested in the information severed pursuant to section 21(1) and, given my findings below regarding the application of section 19 I need not consider in this case whether this information qualifies as personal information.

I will now determine the application of section 49(a), read in conjunction with section 19, to the information at issue in Records 3, 12 and 14 of Request #1 and Record 12 of Request #2, as well as the application of section 19 alone to the information at issue in Record 37 of Request #1 and Records 11 and 35 of Request #2.

SECTION 49(a) – DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

While 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 exceptions to this general right of access.

Under section 49(a), the institution has the discretion to deny an individual access to his or her own personal information where the exemptions in sections 12, 13, 14, 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 section 19 to deny access to certain records that it claims qualify for exemption under section 19 and which contain the personal information of the appellant (Records 3, 12 and 14 of Request #1 and Record 12 of Request #2).

SOLICITOR-CLIENT PRIVILEGE

The University takes the position that Records 3, 12, 14 and 37 of Request #1 and Records 11, 12 and 35 of Request #2 qualify for exemption under the solicitor-client privilege exemption in section 19 of the *Act*. Section 19 reads 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 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 appears in section 19(a) and 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 [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 University 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.)].

Loss of privilege

Waiver

Under branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege.

Waiver of privilege is ordinarily established where it is shown that the holder of the privilege:

- knows of the existence of the privilege, and
- voluntarily evinces an intention to waive the privilege

[*S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.)].

Generally, disclosure to outsiders of privileged information constitutes waiver of privilege [J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; see also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.)].

Branch 2: statutory privilege

Branch 2 of section 19 arises from sections 19(b) and (c). Section 19(b) 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.

University's representations

The University submits that the records at issue are exempt from disclosure, as they are subject to the common law solicitor-client communication privilege in section 19(1). It states:

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 [*Descoteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)]. 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 University then provides specific representations for the records for which the solicitor-client privilege is claimed.

The University states that Records 12 and 14 of Request #1 and Records 11 and 12 of Request #2 “relate to an exchange of communications” between the University’s legal counsel and the affected party, in which the affected party is “asking for advice as to how to respond to an allegation of another person” in respect of certain legal issues affecting the University.

With regard to Record 3 of Request #1, the University states that the information at issue in that record represents a “confidential communication” between its legal counsel and the affected party regarding legal counsel’s request for assistance from the affected party, as the University’s “agent”, in the “collection and organization of materials in various legal matters.”

The University submits that Record 37 of Request #1 (which it acknowledges is identical to Record 35 of Request #2) relates to the affected party providing information to its legal counsel on a legal matter about which the affected party was assisting the University.

In outlining the mandate of the University’s legal counsel to provide it with legal advice on an as needed basis, it states:

The Office of the Legal Counsel provides legal advice with respect to numerous situations. At times, the Office of the Legal Counsel requires agents to assist with its work and by engaging such agents, ensures that legal issues can be properly dealt with and in confidence. The solicitor-client privilege exemption (section 19) is crucial to individuals being able to request and obtain legal advice in total confidence and without reservation. The [University] is of the opinion that, in order to protect the integrity of the Office of the Legal Counsel, documents providing legal advice, including the continuum of communications between a solicitor and its client and/or the solicitor’s agents (in order to keep all the internal parties informed so that advice may be sought and given as required), are subject to the section 19 exemption and should not be disclosed. [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.); Order P-1551; *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)]

With regard to the issue of waiver, the University states that it “has not taken any action that constitutes a waiver of common law solicitor-client privilege either implicitly or explicitly.” The University adds that the records at issue “have not been disclosed to outsiders by either legal counsel or the [affected party] receiving the advice nor has the [University], knowing of the existence of the privilege, voluntarily evinced an intention to waive privilege.”

Appellant's representations

The appellant submits that although the University has claimed that the affected party was its agent, it has not "proved" this to be the case. In particular, the appellant states that the University has "failed to demonstrate that it and [the affected party] entered into a contractual agreement for services that [the affected party] would perform for the Institution and the purposes of such services."

The appellant adds that the affected party could not have been a "legal 'agent'" of the University because "espionage activities must be undertaken by an expert whose testimony would be recognized in a court of law." In support of his view, the appellant cites the decision in *MacDonald v. Roth*, 83 B.C.L.R. (3d) 171, in which Wong J. describes the term "agent" as:

the position of a person who is employed by another to perform duties often of a technical or professional nature which he discharges as that other's alter ego and not merely a conduit pipe between the principle and the third party.

On the issue of waiver, the appellant states that if branch 1 communication privilege is found to exist, it was waived because of the public disclosure of the affected party's identity and espionage activities by the affected party.

Analysis and findings

I have carefully considered the representations submitted by the parties and I have closely examined the records remaining at issue for which the section 19 claim has been asserted by the University.

The University has stated that the records represent an exchange of confidential communications between its legal counsel and the affected party, acting as the University's agent, which address legal issues affecting the University's interests.

I am satisfied that these records, which were exchanged between the affected party and legal counsel (and, in all cases, the Dean of Science), qualify for exemption under section 19 of the *Act*. Based on my review of the records and the University's representations, I am satisfied that these records constitute confidential communications between a solicitor and her client (University staff or agents), made for the purpose of obtaining or giving professional legal advice. Accordingly, I find that they qualify for exemption under the solicitor-client communication privilege in branch 1 of the *Act*.

This finding is consistent with the findings of Adjudicator Frank DeVries in Order PO-2951, in which he determined, on the same basis, that email communications between the same affected party and the University's legal counsel, regarding issues relating to the same events and circumstances, qualified for exemption under the branch 1 solicitor-client communication privilege exemption in section 19(1). I concur with the analysis and findings of Adjudicator DeVries in Order PO-2951 and I see no reason to diverge from those findings in this case.

I acknowledge the concerns raised by the appellant in this case regarding the affected party's relationship with the University and the matter of waiver. However, with regard to the affected party's employment by the University, I am satisfied based on the contents of the records that the affected party was employed by the University to assist with certain legal matters and that, in doing so, the affected party represented the University as its agent in discussions with legal counsel about these matters. Further, while in the words of Wong J. in *MacDonald v. Roth*, an agent can be defined as someone employed by another to perform duties "often of a technical or professional nature," there is no requirement that such an individual perform technical or professional duties. Finally, with respect to the appellant's position on waiver, I see no basis for concluding that because the affected party's identity and activities have become publicly known that this somehow constitutes waiver. The privilege in this case attaches to the email communications in question and I have not been provided with evidence to suggest that the University, the affected party or legal counsel waived its rights to privilege in connection with these communications.

Having found that the section 19 exemption applies to the information at issue, I need not consider whether section 49(b), in conjunction with section 21(1), or section 21(1) on its own, applies to these records.

To conclude, subject to my review of the University's exercise of discretion below, I find that Records 3, 12 and 14 of Request #1 and Record 12 of Request #2, which contain the personal information of the appellant, qualify for exemption under section 49(a), read in conjunction with section 19, and that Record 37 of Request #1 and Records 11 and 35 of Request #2, which do not contain the personal information of the appellant, are exempt under section 19.

UNIVERSITY'S EXERCISE OF DISCRETION

Where appropriate, institutions have the discretion under the *Act* to disclose information even if it qualifies for exemption under any of the *Act*'s discretionary exemptions. Because sections 19 and 49(a) are discretionary exemptions, I must also review the University's exercise of discretion in deciding to deny access to the records.

The University's representations identify the considerations it took into account in deciding to exercise its discretion not to disclose the records remaining at issue under section 49(a), in conjunction with section 19, and under section 19 alone. The University states that weighed its obligation to make information available to the public and to limit the application of exemptions against the nature of solicitor-client communications.

The University adds:

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 of Ottawa 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 [records at issue] are disclosed.

The appellant does not provide representations that specifically address the University's exercise of discretion. However, the appellant states that the records at issue are of importance to him and should be disclosed.

On my review of the positions of the parties and the records remaining at issue, and given the nature of the information in the records I have found to be exempt, as well as all of the circumstances of this appeal, I am satisfied that the University properly exercised its discretion in refusing to disclose the records withheld under sections 19 and 49(a). Accordingly, I uphold the University's decision to deny access to the records which I have found qualify for exemption under those sections.

ORDER:

I uphold the University's decision that the records at issue qualify for exemption under sections 19 and/or 49(a) of the *Act*.

Original signed by: _____
Bernard Morrow
Adjudicator

_____ May 26, 2011