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

ORDER PO-2975

Appeal PA09-393

University of Ottawa

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NATURE OF THE APPEAL:

The University of Ottawa (the University) received five separate requests from the same requester for access to information under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*). Appeal PA09-393, which resulted from one of the requests, is the subject of this Order. Two other appeals (assigned appeal file numbers PA09-392 and PA09-396), which also resulted from the requests, are addressed by separate orders.

This appeal addresses a request for access to all records about the requester that were "created by and/or communicated by/to [a named individual] and/or the Office of the Dean of the Faculty of Graduate and Postdoctoral studies to/by another person or persons". These included, but were not limited to:

- records naming the requester explicitly by the requester's given name, surname, and/or any name identifiable with the requester's person

- records wherein the requester is identified by "an alias" that includes, but is not limited to "an institutional student number, an e-mail address, abbreviated spellings of names identifiable with [the requester's] person, and substantive references to [the requester's] person"

The University identified records responsive to this request and in its initial decision letter granted partial access to them, upon payment of a fee. As set out in a detailed index attached to its initial decision letter, the University took the position that certain portions of the records were not responsive to the request and relied on the exemptions at section 21(1) of the *Act* (personal privacy) and 49(a) (discretion to refuse requester's own information) in conjunction with section 19 (solicitor-client privilege) to deny access to the responsive portions it withheld.

The requester (now the appellant) appealed the University's decision.

During mediation, the University reconsidered its position and issued a supplementary decision letter. The University granted access to the withheld portion of Record 7, but maintained its position with respect to Records 42 and 43. The letter was accompanied by a revised index of records. The appellant then decided to narrow the scope of her request to encompass Records 70 to 76 and 78 only. The appellant indicated that access was no longer being sought to the balance of the remaining records. Subsequently, the University issued a further supplementary decision letter disclosing Records 72 to 76 to the appellant. In response, the appellant further narrowed the request to include Record 70, in full and to the top portion of Record 78, only.

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

I commenced my inquiry by sending a Notice of Inquiry setting out the facts and issues in the appeal to the University, initially. The University provided representations in response. I then sent a Notice of Inquiry, along with a complete copy of the University's representations, to the appellant. The appellant provided representations in response. I determined that the appellant's

representations raised issues to which the University should be provided an opportunity to reply. Accordingly, I sent a copy of the appellant's representations to the University inviting its representations in reply. The University provided reply representations.

RECORD

The sole records remaining at issue in this appeal consist of Record 70 (being an email with an attachment) and the first email of the e-mail exchange in Record 78.

DISCUSSION:

PERSONAL INFORMATION

Under *FIPPA*, different exemptions may apply depending on whether a record at issue contains or does not contain the personal information of the requester.[1] Where records contain the requester's own personal information, either alone or together with the personal information of other individuals, access to the records is addressed under Part III of *FIPPA* and the exemptions at section 49 may apply. Where the records contain the personal information belonging to individuals other than the appellant, access to the records is addressed under Part II of *FIPPA* and the exemptions found at sections 12 to 22 may apply. In order to determine which sections of *FIPPA* apply, it is necessary to decide whether the records contains "personal information" as defined in section 2(1) of *FIPPA* and, if so, to whom it relates.

The University has withheld the information at issue in this appeal on the basis that its disclosure would constitute an unjustified invasion of another individuals' personal privacy under section 49(b). It has also withheld the information at issue in this appeal under the exemption at section 49(a), read in conjunction with 19. However, as the exemptions in section 49 only apply if the records contain the "personal information" of the appellant, before reviewing the possible application of the exemptions claimed, I must first determine if the record contains "personal information" and, if so, to whom it relates.

To satisfy the requirements of the definition in section 2(1) of *FIPPA*, the information must be "recorded information about an identifiable individual," and it must be reasonable to expect that an individual may be identified if the information is disclosed.[2] The definition of personal information in section 2(1) contemplates inclusion of the following types of information:

> (a) information relating to the race, national or ethic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

[1] Order M-352.

[2] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

> (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 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) of the definition of the term in section 2(1) may still qualify as personal information.[3]

Older orders of this office established that information associated with an individual in a professional, official or business capacity will not necessarily be considered to be "about" the individual.[4] On April 1, 2007, amendments relating to the definition of personal information in *FIPPA* came into effect. To some extent, the amendments formalized the distinction made in previous orders between personal and professional (or business) information for the purposes of *FIPPA*. Sections 2(3) and (4) 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.

[3] Order 11.

[4] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

> (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.

However, it remains true that 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.[5]

The University submits that the records at issue contain the personal information of the appellant, as well as that of other identifiable individuals.

Based on my review of the records at issue, I find that they contain personal information of the appellant and, with respect to Record 78, another identifiable individual within the scope of the definition of personal information set out at section 2(1) of the *Act*.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION

Section 47(1) of *FIPPA* gives individuals a general right of access to their own personal information held by an institution. Section 49 of *FIPPA* provides a number of exemptions from this right. Sections 49(a) and 49(b) are relevant in this appeal. Those sections state:

> 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];
>
> (b) where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

I will first address the possible application of the exemption at section 49(a), in conjunction with sections 19(a) and (c).

SOLICITOR-CLIENT PRIVILEGE

Sections 19(a) and (c) of the *Act* read:

> A head may refuse to disclose a record,
>
> (a) that is subject to solicitor-client privilege; 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.

[5] Orders P-1409, R-980015, PO-2225 and PO-2435.

Section 19 contains two branches as described below. Branch 1 arises from the common law and section 19(a). Branch 2 is a statutory privilege and arises in the case of counsel employed or retained by an educational institution, from section 19(c). The institution must establish that at least one branch applies.

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.[6]

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.[7] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[8]

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.[9]

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[10]

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.[11]

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[6] 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).

[7] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

[8] Orders MO-1925, MO-2166 and PO-2441.

[9] *Balabel v. Air India, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).*

[10] *Susan Hosiery Ltd. v. Minister of National Revenue, [1969] 2 Ex. C.R. 27.*

[11] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

Litigation privilege

Litigation privilege protects records created for the dominant purpose of litigation, actual or reasonably contemplated.[12]

In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver,[13] pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

> The "dominant purpose" test was enunciated [in *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169] as follows:
>
> > A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.
>
> It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both.
>
> . . . . .
>
> [For this privilege to apply], there must be more than a vague or general apprehension of litigation.

Branch 2: statutory privileges

Branch 2 applies to a record that was prepared by or for counsel for an educational institution, "for use in giving legal advice" or "in contemplation of or for use in litigation." The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

Termination of litigation does not affect the application of statutory litigation privilege under branch 2.[14]

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[12] Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (cited earlier); see also *Blank v. Canada (Minister of Justice)* (cited earlier).

[13] *Butterworth's: Toronto, 1993*.

[14] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).

The Representations of the University

The University submits that Record 70 and the first email of the e-mail exchange in Record 78 are subject to both the common law and statutory solicitor-client communication and litigation privilege.

The University submits that Records 70 and 78 are communications between University employees and the University's legal counsel (counsel). The University submits that Record 70 is a communication between counsel, the Dean of the Faculty of Graduate Studies (FGSPS) and the Assistant Dean and secretary of FGSPS. The University submits that Record 70 was prepared "in the context of the contemplation of legal proceedings against the University." The University further submits that the initial email of the e-mail exchange in record 78 was sent to counsel as part of the "continuum of communications" between a solicitor and their client.

The University submits that it has not taken any action that constitutes a waiver of solicitor-client privilege either implicitly or explicitly.

The appellant's representations

The appellant takes the position that the University has improperly relied on section 19 of the *Act* to prevent disclosure of the information at issue. The appellant refers to certain documents that were designated as Records 86, 87, and 112 at issue in Appeal PA09-396 as examples of where the University "misused" the section 19 exemption. The appellant explains that while the University initially claimed that those records were exempt under section 19 of the *Act* "on the sole ground that they contained communications involving the Institution's legal counsel," they were subsequently disclosed in their entirety to the appellant during mediation. The appellant submits therefore that she "has reasonable grounds to believe that the Institution is misusing section 19 of the *Act* to prevent from disclosure records that further incriminate the Institution in its mistreatment of the Appellant."

The University's reply submissions

In reply the University denies that it misused the solicitor-client privilege exemption, and repeats and relies on its earlier submissions.

Analysis and finding

I have reviewed the information at issue and carefully considered the submissions of the parties. Whether or not other records at issue in another appeal were subject to section 19 of the *Act*, is not the issue before me. I must consider only whether the information at issue in this appeal falls within the scope of section 19.

I find that disclosing Record 70 and the first two sentences of the first email of the email exchange in Record 78 would reveal the substance of confidential communications passing between a solicitor and client directly relating to the provision or seeking of legal advice. In my view, this information qualifies for exemption under section 19(a) of the *Act*. I am also satisfied

that there has been no waiver of privilege with respect to this information. I have highlighted the information that I have found to be exempt under section 49(a), in conjunction with section 19(a), on a copy of Record 78 provided to the University along with this order.

That said, the balance of the portion of the first email of the email exchange in Record 78 does not reveal any advice. The balance of the portion of the email is simply factual background information, the disclosure of which would not reveal any information that falls within the scope of section 19(a) or (c).

Accordingly, Record 70 and only the first two sentences of the portion of the first email of the email exchange in Record 78 qualify for exemption under section 49(a) of the *Act*, in conjunction with section 19(a).

PERSONAL PRIVACY

The University also claimed that the balance of the information in the first email at issue in Record 78 is subject to exemption under section 49(b) of the *Act*.

Under section 49(b), where a record contains personal information of the appellant and another identifiable individual, and disclosure of that information would constitute an unjustified invasion of the other individual's personal privacy, the University may also refuse to disclose it to the appellant.

I have reviewed the balance of the portion of the first email of the email exchange in Record 78. In my view it contains information that qualifies as the personal information of the appellant and another identifiable individual. To the extent that any of this information is the personal information of the appellant only, disclosing it to the appellant would not constitute an unjustified invasion of any other individual's personal privacy. To the extent that it is the personal information of another identifiable individual, in the unique circumstances of this appeal, it is of such a nature that it would be absurd to withhold it. [15] Accordingly, disclosing the balance of the first email of the email exchange in Record 78 would not result in an unjustified invasion of personal privacy or it would otherwise be absurd to find it exempt under section 49(b).

Accordingly, I will order that this information be disclosed to the appellant.

SEVERANCE

Where a record contains exempt information, section 10(2) requires the University to disclose as much of the record as can reasonably be severed without disclosing the exempt information. This office has held, however, that a record should not be severed where to do so would reveal only "disconnected snippets", or "worthless", "meaningless" or "misleading" information.

[15] Where the requester originally supplied the information or the requester is otherwise aware of it, the information may be found not exempt under section 49(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption. See in this regard Orders M-444, M-451, M-613, MO-1323, PO-2498 and PO-2622.

Further, severance will not be considered reasonable where an individual could ascertain the content of the withheld information from the information disclosed.[16]

Based upon my review of Record 70 and the portion of the first email of the email exchange in Record 78 that I have found to fall within section 19(a) of the *Act*, any potential severance would either reveal exempt information or result in disconnected snippets of information being revealed.

EXERCISE OF DISCRETION

I must now determine whether the University exercised its discretion in a proper manner in applying section 49(a) of the *Act* to all of Record 70 and the portion of the first email of the email exchange in Record 78 that I have found to fall within section 19(a) of the *Act*.

The exemption at section 49(a), in conjunction with section 19(a), 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 any of these cases, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[17] However, pursuant to section 54(2) of the *Act*, this office may not substitute its own discretion for that of the institution.

In its representations on the exercise of discretion, the University sets out the factors and circumstances it considered in its exercise of discretion.

I am satisfied that the University applied section 49(a) (read in conjunction with section 19(a)), appropriately to Record 70 and the portion of Record 78 that I have not ordered to be disclosed. The fact that the University ultimately decided not to rely on section 49(a) (in conjunction with section 19) with respect to other records in another appeal, does not lead inevitably to a conclusion that it improperly exercised its discretion to apply section 49(a) (in conjunction with section 19) to Record 70 and the portion of Record 78 that I have found to fall within section 19(a) of the *Act*.

Accordingly, I find that the information for which I have found section 49(a) (read in conjunction with section 19) applies is properly exempt from disclosure under the *Act*.

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[16] Orders PO-1663 and *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.).

[17] Order MO-1573

ORDER:

1. I order the University to disclose to the appellant the non-highlighted withheld portion of the first email in the email exchange in Record 78 by sending it to the appellant by no later than **July 4, 2011**.

2. I uphold the University's decision to deny access to Record 70 and the withheld portion of the first email of the email exchange in Record 78 that I have highlighted on a copy of the record that I have provided to the University along with this order.

3. In order to verify compliance with this order, I reserve the right to require the University to provide me with a copy of Record 78 as disclosed to the appellant pursuant to this order.

Original signed by: May 27, 2011
Steven Faughnan
Adjudicator