



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

INTERIM ORDER PO-2909-I

Appeal PA08-375

University of Ottawa



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NATURE OF THE APPEAL:

The University of Ottawa (the University) received a four-part request under the *Freedom of Information and Protection of Privacy* (the *Act*) for access to all records about the requester. Part (d) of the request specifically sought access to:

Records sent and received by the Dean of Science, and by the Dean's office.

The University located four records responsive to part (d) and issued an access decision with respect to that part. It released Record 1 in full and denied access to Records 2, 3 and 4 in their entirety. The University cited the exclusionary provision in section 65(6) (employment/labour relations records) and the exemption in section 19 (solicitor-client privilege) as the basis for its denial with respect to Records 2, 3 and 4.

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

During mediation, the University issued a decision to the appellant with respect to parts (a), (b) and (c) of the appellant's request, in which it stated that:

Access to the above-referenced records is denied. The University of Ottawa does not have custody of these records and the [professors'] Union [the APUO], through the grievance/arbitration process, has alleged that the University of Ottawa does not have control over these records.

In response, the appellant indicated that he did not wish to pursue access to the records sent to or received from the two named professors (i.e. part (c) of request).

Furthermore, as the issue of custody or control of professor records at the University is the subject of another appeal, the adjudication of parts (a) and (b) of the appellant's request was placed on hold pending the final decision in that appeal. Concerning part (d) of the request, the University issued a revised decision in which it released Record 4 in its entirety and released the majority of Records 2 and 3, only withholding an email contained on page 1 of Record 2 and another email contained on page 1 of Record 3.

Also during mediation, the University conducted a further search for paper and electronic records in the Dean of Science's office and located additional records and issued a revised decision. The appellant also maintained that the University had not conducted a reasonable search for responsive records.

As mediation did not fully resolve this appeal, the file was transferred to me to conduct an inquiry. I decided to first adjudicate upon the issues of whether the University conducted a reasonable search for records responsive to part (d) of the request, whether Records 12 to 23 were responsive to part (d) of the request, and whether the information at issue in Records 2, 3 and 11 to 23 are excluded from the application of the *Act* by reason of section 65(6)3.

I sent a Notice of Inquiry, setting out the facts and issues in the appeal to the University, initially. I received representations from the University. I then sent a Notice of Inquiry to the appellant, along with a copy of the University's representations. Portions of these representations were withheld due to confidentiality concerns. The appellant did not provide representations, other than indicating his intentions to rely on the comments he made when he filed his Notice of Appeal. I then issued Order PO-2852-I, in which I upheld the University's search for responsive records and its decision that Records 12 to 23 are not responsive to the appellant's request. I also did not uphold the University's determination that portions of Records 2, 3 and 11 are excluded from the scope of the *Act* under section 65(6)3.

As a result of Order PO-2852-I, I sought representations from the University and the appellant concerning the application of the exemption in section 49(a), in conjunction with section 19 (solicitor-client privilege), with respect to the information at issue in Records 2, 3 and 11 and the personal privacy exemption at section 49(b) for portions of the information at issue in Record 11. I received representations from both parties. In his representations, the appellant advised that he had received disclosure in full of Records 2 and 11 in response to a different access to information request under the *Act*. Therefore, Records 2 and 11 are no longer at issue, as the issue relating to the non-disclosure of these records is moot.

After reviewing Record 3, I sent a Supplementary Notice of Inquiry seeking representations on the personal privacy exemption from the person named in this record (the affected person) and from the University. I then received the consent of the affected person to the release of his personal information in the record at issue.

RECORDS:

The sole remaining record is one email in an email chain in Record 3. The email at issue is from the Dean of Science to the University's legal counsel and other individuals. The University is claiming that the information at issue is subject to solicitor-client privilege (section 49(a) in conjunction with section 19).

DISCUSSION:

PERSONAL INFORMATION

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

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

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

- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

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

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

- (2) Personal information does not include information about an individual who has been dead for more than thirty years.
- (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
- (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be “about” the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225 and MO-2344].

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.)].

Neither party provided representations as to whether Record 3 contains personal information.

Analysis/Findings

Based upon my review of Record 3, I find that it contains the personal information of the appellant in his personal capacity. This record describes his educational history as contemplated by paragraph (b) of the definition of personal information in section 2(1). The record also contains the personal information of the affected person, namely, the views or opinions of another individual about him as contemplated by paragraph (g) of the definition of personal information in section 2(1). As I have received the consent of the affected person to the release of his personal information in the record at issue, the application of the personal privacy exemption in section 49(b) is not at issue.

RIGHT OF ACCESS TO ONE’S OWN PERSONAL INFORMATION/ SOLICITOR-CLIENT PRIVILEGE

I will now determine whether the discretionary exemption at section 49(a), in conjunction with the section 19 exemption, applies to the information at issue.

Section 47(1) gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

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 [my emphasis].

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].

Where access is denied under section 49(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information

In this case, the institution relies on section 49(a) in conjunction with section 19. Sections 19(a) and (c) of the *Act* states as follows:

A head may refuse to disclose a record,

- (a) that is subject to solicitor-client privilege;
- ...
- (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. Branch 1 arises from the common law and section 19(a). Branch 2 is a statutory privilege and arises in the case of an educational institution, from section 19(c). The University 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 [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)].

Branch 2: statutory privileges

Branch 2 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.

Representations

The University submits that Record 3 was sent to the law firm retained by the University about numerous grievance proceedings filed by a University professor that are related to ongoing labour relations disputes with the professor. It states that:

[The] undisclosed portion of Record 3 satisfies both branches of the privilege exemption as it consists of:

- a) written communication,
- b) intended to be confidential as indicated in the subject line (and the other recipients are University staff members),
- c) sent by the University (the client),
- d) to lawyers from the law firm of [named law firm] retained by the University ([two named lawyers]),
- e) for the purpose of keeping the University lawyers informed on an existing and ongoing labour relations matters (involving professor [name]) and for seeking legal advice.

The purpose of the undisclosed portion of Record 3 are part of the continuum of communications and sent to the lawyers hired by the University as part of the legal advice being sought.

The University relies on the case of *Balabel v. Air India*, [1988] 2 W.L.R. 1036 (Eng. C.A.) to establish that privilege applies to the information at issue as being part of “a continuum of communications” between a solicitor and client. It submits that this information relates to an existing and ongoing labour relations matter with the professor named in Record 3 and the confidential provision of information that is relevant to various stages of this matter.

The appellant did not provide representations as to whether Record 3 contains solicitor-client privileged information.

Analysis/Findings

The University claims that the information at issue consists of direct communications of a confidential nature between a solicitor and client, 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.)].

Based upon my review of the information at issue, I find that even though there may have existed a continuum of communication between the University and the law firm about an ongoing labour relations matter involving the professor named in the record, the record also concerns the appellant and his educational position at the University. Although two lawyers at the law firm were sent this email, the email was also sent to two other University officials and was copied to seven other individuals. There is no indication in this email that legal advice is being sought or given. Merely sending a copy of a record to a solicitor in and of itself does not automatically result in privilege being attached to it.

I find that this email is not part of a continuum of communication as described in the case of *Balabel*. The disclosed portion of this email is entitled "Privileged and confidential TR: New Grad. Student [appellant's name] arriving in [date]." The University has not provided me with evidence of how this email relates to the existing and ongoing labour relations matter with the named professor, nor is it apparent from a reading of this email how it relates to the existing and ongoing labour relations matter with the professor.

Therefore, I find that the information at issue in Record 3 is not subject to common law solicitor-client communication privilege under Branch 1. I also find that this information is not subject to the statutory solicitor-client communication privilege as being prepared by or for counsel for the University "for use in giving legal advice" under Branch 2.

Therefore, I find that section 49(a), in conjunction with section 19, does not apply to the information at issue in Record 3. As no other exemptions apply, I will order this information disclosed.

ORDER:

1. I order the information at issue in Record 3 disclosed to the appellant by **September 17, 2010**.
2. In order to verify compliance with this Order, I reserve the right to require a copy of the information disclosed by the University pursuant to order provision 1 to be provided to me.

Original signed by: _____

Diane Smith
Adjudicator

August 27, 2010 _____