

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3022

Appeal PA09-184

Ontario Human Rights Commission

December 14, 2011

Summary: The appellant sought access to records relating to his human rights complaint against York University. The commission granted access to 1100 pages of records and denied access, in whole or in part to the remaining seven records on the basis of sections 49(a), 13(1) and 19. The records at issue contain the appellant's personal information only. The withheld portions are exempt under sections 49(a), in conjunction with sections 13(1) and 19. Although the appellant expressed his belief that additional records should exist, he did not provide any evidence in this regard, and I declined to deal with the issue.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) definition of personal information, 13(1), 19, 49(a).

Orders and Investigation Reports Considered: Orders PO-2202 and PO-2572.

OVERVIEW:

[1] The appellant submitted the following request to the Ontario Human Rights Commission (the commission) pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*):

Please make available for immediate inspection and copying all documents, correspondence and information, including all electronic media and tape recordings, produced by, received by, or in the possession

of [the Commission] or anyone acting directly or indirectly under any color of right for or in conjunction with the Ontario Human Rights Commission, that identify, relate or pertain to [the appellant].

Please also produce full for inspection and copying complete unredacted, original documents, communications and correspondence, including any and all electronic media and tape recordings, created or received by any members of [the Commission] including but not limited to all files, documents electronic media and tape recordings created in conjunction with or submitted by the parties in the matter of [the appellant] and York University File No. [specified number]. The documents shall include all files, correspondence, information, tape recordings and electronic media pertaining to or made during any and all 1992 through 1998 appearances made by me before the Osgoode Hall Law School Grades Review Committee and/or Academic Standing Committee.

[2] The commission issued a decision in which it grouped the responsive records into three general categories: 1. records submitted by the appellant or the appellant's counsel; 2. records submitted by the respondent; and 3. records generated internally by commission staff during the course of case processing.

[3] The commission provided full access to the records in category 1, and partial access to the records in categories 2 and 3, citing the discretionary exemptions in section 49(b) (personal privacy), with reference to section 21(3)(b), sections 20 (danger to safety or health), 13(1) (advice or recommendations) and 49(a) (discretion to refuse requester's own information) of the *Act* to withhold 11 records, in whole or in part. The commission subsequently added section 19 (solicitor-client privilege) as a basis for withholding two records from disclosure.

[4] The appellant appealed this decision, and expressed his belief that there should be additional records.

[5] During mediation, the appellant indicated that he was not interested in the severances made under section 21 and 49(b) (personal information of other individuals), and accordingly sections 21 and 49(b) and records 6, 9 and 10 were removed from the appeal. In addition, it was determined that record 4 is a duplicate of record 3, and it was also removed from the appeal.

[6] The appellant indicated that he believed there were a number of records missing. He proposed that he would provide the mediator with a list of these records to assist the commission in undertaking another search; however, he did not do so during the mediation stage of the appeal.

[7] Further mediation could not be effected and this file was forwarded to the

adjudication stage of the appeal process. I sought and received representations from the commission, initially.

[8] I then sought representations from the appellant and attached the complete representations of the commission to the copy of the Notice of Inquiry that I sent to him. The appellant did not submit representations in this appeal.

[9] In its representations, the commission indicated that it has provided the appellant with all the records to which it believes he is entitled and that no other records exist. The commission adds that if the appellant believes that particular records should exist, he should provide information that would assist in locating them. As I noted above, the appellant did not submit representations and, although he indicated that he would provide a list of records he believes should be included in response to his request, he did not do so. Since the appellant has not provided a reasonable basis for concluding that additional records should exist, I will not review this issue further.

[10] In the remaining discussion that follows, I find that the records contain the appellant's personal information, but that the withheld portions are exempt under section 49(a), in conjunction with sections 13(1) and 19.

RECORDS:

[11] The records remaining at issue consist of the withheld portions of:

- record #1, case disposition sheet
- record #2, recon extension disposition
- record #3, case disposition sheet
- record #7, case disposition sheet
- record #8, OHRC form

and the following records in their entirety:

- record #5, legal opinion
- record #11, policy opinion

ISSUES:

- A. Does the record contain "personal information" as defined in section 2(1)?
- B. Does the discretionary exemption at section 49(a) in conjunction with sections 13 and/or 19 apply to the information?

DISCUSSION:

A. Do the records contain personal information?

[12] 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 part, in section 2(1) as "recorded information about an identifiable individual."

[13] 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.

[14] 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].

[15] 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].

[16] 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.)].

[17] The commission did not address this issue in its representations. From my review of the records it is clear that the records at issue contain the appellant's personal information. They all relate to a complaint he made to the commission against York University. I find further that any other references to individuals in the records remaining at issue are made in their professional capacities, as employees of the commission, and do not constitute their personal information for the purposes of the *Act*.

B. Does the discretionary exemption at section 49(a) in conjunction with sections 13 and/or 19 apply to the information?

[18] Under section 49(a) of the *Act*, the institution has the discretion to deny an individual access to their own personal information in instances where the exemptions in sections 12, 13, 14, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that information.

[19] The commission takes the position that sections 13 and/or 19 apply to the records or portions of records remaining at issue. Because I have found that all of the records remaining at issue contain the personal information of the appellant, I will examine the application of these exemptions in the context of section 49(a). I will begin by reviewing the application of the exemption in section 13.

Section 13(1)

[20] 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.

[21] The purpose of section 13 is to ensure that persons employed in the public service 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.)].

[22] 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].

[23] "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].

[24] 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)]

[25] 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
- draft documents
- 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)].

Records 1, 2, 3, 7 and 8

[26] The commission indicates that the severances made to these pages "outline a staff's recommendation regarding the disposition of a case."

Record 11

[27] According to the commission, this record "contains advice and a recommendation provided by the Mediation Manager to a human rights officer in the investigation of the complaint."

Analysis and findings

[28] At the outset it is important to note that the majority of records 1, 2, 3, 7 and 8 have been disclosed to the appellant. Only one line on each page has been withheld. Records 5 and 11 have been withheld in their entirety. Previous orders of this office have addressed the types of records at issue in this appeal.

[29] With respect to records 1, 2, 3, 7 and 8, in Order PO-2202, Senior Adjudicator David Goodis outlined the representations that the commission made in that appeal, and made his findings regarding similar records at issue as follows:

The OHRC submits:

[The records] all contain references to advice made by Commission staff with respect to the disposition of the appellant's complaint.

During the course of processing a human rights complaint, [OHRC] staff are required to make certain recommendations to the Commissioners of the [OHRC], regarding the disposition of the cases assigned to them. The Records at issue contain staff recommendations regarding the disposition of the complaints at various stages of the [OHRC's] process.

Section 34(1) of the Code provides the Commissioners with the discretion, in limited circumstances, to decide to "not deal with" a complaint. A section 34(1) "not deal with" decision may be recommended through the initiation of [OHRC] staff. As part of a staff initiated section 34(1) recommendation, [OHRC] staff will review the complaint file and make a recommendation to the Commissioners that the complaint should "not be dealt with" pursuant to section 34(1) of the Code.

Once the Commissioners have decided to "not deal with" a complaint under section 34(1) of the Code, the complainant can file an appeal of this decision with the [OHRC's] Reconsideration department. Upon completion of a reconsideration analysis, Reconsideration staff are required to make a recommendation to the Commissioners as to whether the Commissioners should "uphold" or "reverse" their original decision.

...

I agree with the OHRC that in Order P-363, this office found that a record indicating OHRC staff advice to Commissioners as to how a specific case should be disposed of (in that case, whether or not it should refer a complaint to a Board of Inquiry (now the Human Rights Tribunal of Ontario)), was exempt, to the extent that it revealed the suggested course of action. I agree with the approach taken in Order P-363 (which was upheld in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.)). Accordingly, I find that any information in the records that reveals how the OHRC Commissioners should dispose of the appellant's case is exempt under section 49(a)/13.

[30] I agree with the analysis and findings in Order PO-2202 and adopt it for the purposes of this appeal. I find that disclosure of the information at issue in records 1, 2, 3, 7 and 8, which indicates the advice of commission staff as to how a specific case should be disposed of, would reveal the suggested course of action and thus qualifies for exemption under sections 49(a) and 13(1).

[31] Regarding record 11, which is identified in the index of records as a "policy opinion", I previously addressed a similar type of record in Order PO-2572. In that decision, I set out the commission's description of this type of record and concluded that the records at issue in that case were exempt under section 13(1), as follows:

The OHRC submits that these records comprise Policy Responses that were drafted by OHRC policy analysts and that they contain specific advice on issues relating to the processing of the complaints and on the drafting of the Case Analysis Reports.

The OHRC submits further that these three records contain specific recommended courses of action regarding the information to be included in the Case Analysis Reports, whether the Case Analysis Report should recommend that the complaint be referred to the Human Rights Tribunal and whether or not the complaints are dealing primarily with evidentiary issues or whether they also include policy issues.

The OHRC takes the position that its policy branch must be able to freely and frankly advise other staff on the processing of complaints and that regular consultations are held between them in order to obtain advice on how to apply the OHRC's policies or to determine whether any policy issues arise in particular complaints.

...

I have reviewed the information in the records listed above and find that the records, in their entirety, qualify for exemption under section 13(1) of the *Act* because they set out a suggested course of action with respect to the OHRC's decision-making mandate as established in the *Ontario Human Rights Code*. The records are Policy Responses, the purpose of which is to set out the concerns of the author raised by his or her review of the Case Analysis Report and suggested ways of addressing these concerns and/or to provide comments directed at advising the recipient of issues, potential issues and/or affirming an approach taken in the Cases Analysis Report.

[32] Record 11 is a policy response, the purpose of which is to document the concerns raised by the author following his or her review of a recommended course of action. It is apparent on the face of the record that the comments contained in it are directed at advising the recipient of the policy response of the approach to take in regard to the matter before the commission. Accordingly, I am satisfied that the record contains advice and recommendations, and thus qualifies for exemption under sections 49(a) and 13(1).

[33] Section 13(2) creates 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. I have considered the application of these exceptions to those records which I have found qualify for exemption pursuant to section 13(1). In my view, none of the exceptions apply to them.

Section 19

[34] The commission claims that section 19 applies to exempt records 5 and 11. Because I have found that record 11 qualifies for exemption under section 13(1), I will only consider the application of section 19 to record 5.

[35] Section 19 of the *Act* states 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.

[36] 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 from section 19(b), or in the case of an educational institution, from section 19(c). The institution must establish that at least one branch applies.

Branch 1: common law privilege

[37] 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)].

Solicitor-client communication privilege

[38] 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.)].

[39] 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].

[40] 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.)].

[41] 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].

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

[43] The commission states that record 5:

[I]s a legal opinion and it is subject to common law solicitor client privilege. Counsel provided legal advice to the Chief Commissioner on how to proceed with a complaint and the legal opinion was drafted by [commission] Counsel in response to the request for legal advice.

[44] I have reviewed record 5 and agree that, on its face, the record is identified as and contains the confidential legal opinion of commission counsel to the Chief Commissioner. I have no evidence before me that privilege has been waived. Accordingly, I find that record 5 qualifies for exemption under section 19(a) of the *Act*.

Exercise of Discretion

[45] The section 13, 19 and 49(a) exemptions are discretionary, and permit 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.

[46] 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.

[47] 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)].

[48] The commission indicates that in exercising its discretion to withhold the records at issue it considered that information should be available to the public and that individuals should have a right of access to their own information. The commission states that it also considered the nature of the information at issue and its significance and sensitivity to the institution, as well as its historic practice with respect to similar information.

[49] Based on my review of the circumstances of this access request, including the fact that the appellant has received the vast majority of records responsive to his request (approximately 1100 pages) at no cost, the nature of the information at issue and its importance to the integrity of the commission's processes, I am satisfied that

the commission has exercised its discretion to withhold the records at issue in good faith, taking into account relevant considerations and not taking into account irrelevant considerations.

[50] Accordingly, I find that the records at issue in this appeal are exempt under section 49(a), in conjunction with sections 13(1) and 19.

ORDER:

I uphold the commission's decision.

Original signed by: _____
Laurel Cropley
Adjudicator

_____ December 14, 2011