

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3089-F

Appeal PA10-152

University of Toronto

June 14, 2012

Summary: The appellant made a request for her complete Ontario Institute Studies in Education file at the University of Toronto. The university granted access, in part, claiming the application of the exemption in section 49(c.1)(ii) to deny access to portions of the records. This is the final order disposing of the remaining issues in the appeal, which are the application of the exemption in section 49(c.1)(ii), and the university's exercise of discretion. In this order, the adjudicator upholds the university's decision and exercise of discretion, and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 49(c.1)(ii).

OVERVIEW:

[1] This is my final order in this appeal. It addresses the application of the exemption in section 49(c.1)(ii) claimed to apply to certain portions of the responsive records by the University of Toronto (the university), and the university's exercise of discretion. Accordingly, this order disposes of the remaining issues raised as a result of an access decision made by the university following a request for access to the following information:

- Complete [Ontario Institute Studies in Education] (OISE) university file including all applications and letters of reference (see [named individual]);

- Access to all CAPA (Coalition Against Psychiatric Assault) tapes, cassettes and videos with me or my information on them; and
- Access to all written CAPA documentation referring to me.

[2] During the processing of the request, the university contacted the requester and clarified the request. In a letter dated April 21, 2010 to the requester, the university confirmed that the request was for:

- Entire 2005 and 2009 PhD Registrar's application file including all materials submitted and used, and all reasons for the decision; and
- Video of you or with your information on the video taken by a University of Toronto PhD or Masters student at a CAPA event at Nathan Philip's Square in 2004 or 2005. If the university has the video, you stated your desire that you would like it expunged.

[3] The university then located 150 pages of records responsive to the first part of the request and granted access to them, in part. The university granted access, in full, to 134 pages, but denied access to 10 pages of records, in part, and to six complete pages of records. The university claimed section 49(c.1)(ii) (evaluative material determining admission to an academic program) of the *Act* in denying access. The university also advised the requester that portions of some of the records that were withheld were not responsive to the request.

[4] The university further advised the requester that it did not have records in its custody or control that were responsive to the second part of the request. The university explained that CAPA is an independent organization that is not part of the university.

[5] The requester (now the appellant) appealed the university's decision to this office.

[6] During the mediation of the appeal, the appellant advised the mediator that she wished to pursue access to all of the withheld information contained within the responsive records and was also of the view that the university has custody and control of records relating to CAPA.

[7] The university subsequently agreed to disclose some of the withheld information contained in Records 7, 8, and 9 to the appellant. In addition, the university arranged for CAPA to send the appellant a copy of the video related to the second part of the request.

[8] The appellant then confirmed with the mediator:

- that she was pursuing access to all of the withheld portions of the records including the portions claimed by the university to be non-responsive;
- that she still wanted portions of the video containing her information expunged;
- that CAPA is part of the university and therefore, the university has custody and control of CAPA records;
- that she wanted access to all CAPA records containing her information; and
- that she wanted all CAPA documents containing her information expunged.

[9] In response, the university took the position that the request had been clarified as documented in its letter of April 21, 2010 to the appellant, and that the appellant had agreed not to pursue records relating to the third part of the original request, which was for all CAPA documents referring to her. The appellant disputed the university's position and continued to seek access to these records. Accordingly, scope of the request was added as an issue in this appeal. The university also took the position that the issues of custody and control and whether CAPA is part of the university were now moot, as the appellant has obtained a copy of the video that is responsive to the second part of the request.

[10] This appeal raised a number of issues. In order to simplify its processing, the adjudicator assigned to it issued a Notice of Inquiry that addressed only three preliminary issues, namely; scope of the request, responsiveness of certain portions of the records, and mootness of issues relating to CAPA.

[11] The adjudicator sought representations on the preliminary issues from both parties. The university's representations were shared with the appellant in accordance with the IPC's *Practice Direction 7*. The appeal was then transferred to me for final disposition.

[12] On February 28, 2012, I issued Interim Order PO-3057-I, and found that:

- the scope of the request did not include CAPA records relating to the appellant;
- portions of the records were non-responsive to the request; and

- the issues of whether CAPA is part of the university for purposes of the *Act* and whether the university has custody and control of the video were moot.

[13] I then continued the inquiry, and received representations from the university on the remaining issues in this appeal, which are the application of the exemption in section 49(c.1)(ii) and the university's exercise of discretion. I did not receive representations from the appellant, despite providing her with the opportunity to provide representations.

[14] For the reasons that follow, I uphold the university's decision and dismiss the appeal.

RECORDS:

There are 10 records at issue, consisting of letters, assessment reports and a table.

ISSUES:

- A: Does the discretionary exemption at section 49(c.1)(ii) apply to the information at issue?
- B: Did the institution exercise its discretion under section 49(c.1)(ii)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: Does the discretionary exemption at section 49(c.1)(ii) apply to the information at issue?

[15] 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(c.1) appears in section 49, which is intended to address requests for one's own personal information, and in order to be exempt, the undisclosed information must, itself, qualify as "personal information."

[16] Under section 49(c.1), the institution may refuse to disclose evaluative or opinion material in certain circumstances. The university has claimed the application of section 49(c.1)(ii), which states:

A head may refuse to disclose to the individual to whom the information relates personal information,

if the information is supplied explicitly or implicitly in confidence and is evaluative or opinion material compiled solely for the purpose of,

determining suitability, eligibility or qualifications for admission to an academic program of an educational institution or a hospital . . .

[17] I will therefore begin my consideration of the application of section 49(c.1)(ii) with an analysis of whether the records as a whole contain personal information, whether the information at issue qualifies as personal information, and if so, whose personal information it is.

[18] "Personal information" is defined in section 2(1), in part, 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,
- (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;

[19] I have reviewed the records, including the withheld portions, and I find that they contain the appellant's personal information, including:

- her family status, which falls within the ambit of paragraph (a) of the definition of personal information in section 2(1) of the *Act*;

- information relating to her education, which falls within the ambit of paragraph (b) of the definition;
- the views or opinions of other individuals about the appellant, which falls within the ambit of paragraph (g) of the definition; and
- the appellant's name where it appears with other personal information relating to her, which falls within the ambit of paragraph (h) of the definition.

[20] Having found that the withheld information contains the appellant's personal information, I will now determine whether the exemption in section 49(c.1)(ii) applies to exempt the records from disclosure.

[21] The university submits that the exemption in section 49(c.1)(ii) applies to all of the withheld information. By way of background, the university states that the OISE is part of the university and is:

[A]n international leader in the teaching of teachers, research, graduate studies and the study of issues regarding education. OISE grants degrees, including the PhD degree. OISE's PhD program is an academic program of an educational institution.

[22] In addition, the university submits that the records, which are evaluative or contain opinions, were compiled solely for the purpose of determining the appellant's suitability, eligibility or qualifications for admission to an academic program of an educational institution, namely OISE's PhD program.

[23] Further, the university states that all of the exempt information was provided to the university in confidence by referees and faculty readers as part of OISE's PhD admission process. This process, the university indicates, includes references about the PhD candidate from academic and professional referees, and evaluations provided by faculty readers regarding the candidate's suitability, eligibility or qualifications for admission to an academic program.

[24] The university also states that these types of records are treated as highly confidential, a practice which is consistent with that of other universities. The university states:

Referees and Faculty Readers understand this long standing practice and candidly provide their evaluative or opinion material on this basis. The expectations of the Referees, the Faculty Readers and the University at the time the information was supplied to the University, was that the

information would be confidential and, in particular, that it would not be disclosed to the appellant.

PhD applicants are informed that they are required to supply confidential information from referees as part of the application process. Thus, it is also the expectation of the applicants that the information is supplied explicitly in confidence. . .

[25] The university goes on to describe the records, as follows:

- Records 1 through 4 are letters of reference provided in support of the appellant's application. They contain the confidentially supplied evaluations and opinions of referees about the appellant;
- Records 5 and 6 are assessments by faculty readers, which contain the readers' confidential opinions, evaluations and assessments of the appellant's application;
- Records 7, 8 and 9 contain evaluations and opinions of departmental readers, compiled for determining the appellant's suitability, eligibility or qualifications to the PhD program at OISE; and
- The portion of record 10 that was withheld contains numerical evaluations of the appellant's application to the PhD program at OISE.

[26] As previously indicated, the appellant did not provide representations in this appeal.

[27] Having reviewed the records, I find that all of the information relates to the evaluation and assessment of the appellant's suitability, eligibility and qualifications for admission to the PhD program at OISE, as described by the university in its representations. Therefore, I find that the records are exempt from disclosure under the exemption in section 49(c.1)(ii), subject to my finding in regard to the university's exercise of discretion.

[28] In reaching this conclusion, I find that evaluations and assessments such as the information the appellant seeks in this appeal is precisely the type of information at which section 49(c.1)(ii) is aimed, and that this exemption is clearly related to the legislative objectives of allowing frank, candid and complete information about a candidate's suitability, eligibility and qualifications for admission to an academic program of an educational institution to be reviewed and held in confidence.

Issue B: Did the institution exercise its discretion under section 49(c.1)(ii)? If so, should this office uphold the exercise of discretion?

[29] The section 49(c.1)(ii) exemption 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.

[30] 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 or it fails to take into account relevant considerations.

[31] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹ This office may not, however, substitute its own discretion for that of the institution.²

[32] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:³

- the purposes of the *Act*, including the principles that information should be available to the public, individuals should have a right of access to their own personal information, exemptions from the right of access should be limited and specific, and the privacy of individuals should be protected;
- the wording of the exemption and the interests it seeks to protect;
- whether the requester is seeking his or her own personal information;
- whether the requester has a sympathetic or compelling need to receive the information;
- whether the requester is an individual or an organization;
- the relationship between the requester and any affected persons;
- whether disclosure will increase public confidence in the operation of the institution;

¹ Order MO-1573.

² Section 54(2).

³ Orders P-344, MO-1573.

- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person;
- the age of the information; and
- the historic practice of the institution with respect to similar information.

[33] The university submits that it exercised its discretion in good faith and for a proper purpose, based on a careful consideration of all relevant factors and no irrelevant factors.

[34] The university submits that it considered the following relevant factors in the exercise of its discretion:

- the purposes of both the *Act* and the exemption;
- the expectation of confidentiality that referees and faculty readers have when supplying evaluative or opinion material regarding a candidate's application to an academic program;
- the chilling effect disclosure of this type of information would have on the completeness and frankness of materials provided for admissions purposes, resulting in serious harm to the university's ability to select the best candidates for its academic programs;
- the appellant has no sympathetic or compelling need to receive the information;
- the appellant is an individual;
- the application for the PhD program indicates that referees and faculty readers' evaluative materials are kept confidential;
- disclosure of the information at issue will not increase public confidence in the university, as there is no demand from the public to have this information and no public good would be served through its disclosure;
- the age of the information, which is relatively recent;
- the historic practice of the university, which is to treat this type of information as highly confidential;
- the evaluative and opinion material supplied to the university is essential to the integrity of the university's and OISE's admissions process; and

- the significance and sensitivity of the information to the referees and faculty readers, who require confidentiality in order to provide frank evaluative and opinion material to the university.

[35] In addition, the university submits that on two occasions, it disclosed as much of the appellant's personal information as possible,⁴ except for the records that fall under the limited and specific exemption in section 49(c.1)(ii).

[36] I have reviewed the circumstances surrounding this appeal and the university's representations on the manner in which it exercised its discretion. I note that the majority of the appellant's file at OISE was disclosed to her and that only small portions of the appellant's personal information were withheld because it consisted of evaluative and opinion material that had been supplied to the university in confidence.

[37] I am satisfied that that university weighed the appellant's interest in obtaining access to the requested information against the protection of confidential evaluative or opinion material supplied to it. Accordingly, I am satisfied that the university did not err in the exercise of its discretion to refuse to disclose the remaining information contained in the records to the appellant.

ORDER:

I uphold the university's decision and dismiss the appeal.

Original signed by: _____
Cathy Hamilton
Adjudicator

_____ June 14, 2012

⁴ The university also waived the applicable fees which it may have charged the appellant.