Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3198

Appeal PA12-115

Carleton University

May 13, 2013

Summary: The appellant sought access to records relating to a fundraising event which took place in November 2011 at which the university's President served as an honorary co-chair. The university disclosed a large number of records and withheld others under the advice or recommendations exemption in section 13(1). In this order, the university's decision to deny access to the undisclosed portions of the records is upheld and the appellant's arguments in favour of the application of the public interest override provision in section 23 is dismissed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 13(1) and 23.

OVERVIEW:

[1] Carleton University (the university) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

> [a]ll records, memoranda or correspondence (including email) pertaining to the Jewish National Fund's (JNF) annual Negev fundraising gala.

[2] The requester identified 19 individuals whose record holdings are to be included in this request, as well as the University's Board of Governors. The date range for the request was from March 29, 2011 to November 21, 2011.

[3] The university located a large number of responsive records and issued a decision providing partial access to them, citing the discretionary exemptions in sections 13(1) (advice or recommendations) and 18(1)(c) (economic or other interests of an institution), as well as the mandatory personal privacy exemption in section 21(1) of the *Act*. The appellant appealed the decision to deny access to the undisclosed records.

[4] During mediation, the university withdrew its reliance on section 18(1)(c), but advised that it is applying section 13(1) to three records which it had originally claimed to be exempt only under section 18. Accordingly, the late raising of the section 13(1) exemption to these three emails is an issue in this appeal.

[5] The appellant advised the mediator that she was not interested in the non-responsive severances and those made under section 21(1), and these two issues have been removed from the scope of the appeal. However, as the appellant indicated that she believed that there was a compelling public interest in the disclosure of the records remaining in this appeal, the "public interest override" provision in section 23 has been identified as an issue.

[6] Further mediation was not possible and the appeal was moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. I sought and received the representations of the university, initially. A copy of the non-confidential portions of the university's submissions was provided to the appellant, who also provided representations, which were in turn shared with the university. Reply representations were solicited and submitted by the university to conclude the inquiry stage of the adjudication process.

RECORDS:

[7] The records at issue consist of the undisclosed portions of a series of email communications.

ISSUES:

A. Late raising of the discretionary exemption in section 13(1).

B. Does the discretionary exemption at section 13(1) apply to the records?

C. Did the institution exercise its discretion under section 13(1)? If so, should this office uphold the exercise of discretion?

D. Is there a compelling public interest in the disclosure of the records that clearly outweighs the purpose of the section 13(1) exemption?

DISCUSSION:

Issue A: Late raising of the discretionary exemption in section 13(1).

[8] As noted above, the university decided to withdraw its reliance on the discretionary exemption in section 18(1)(c) with respect to the email communications at issue in this appeal, instead relying on the discretionary exemption in section 13(1) for these records.

[9] The *Code of Procedure* (the *Code*) provides basic procedural guidelines for parties involved in appeals before this office. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal. Section 11.01 states:

> In an appeal from an access decision an institution may make a new discretionary exemption within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

[10] The purpose of the policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. Where the institution had notice of the 35-day rule, no denial of natural justice was found in excluding a discretionary exemption claimed outside the 35-day period.[1]

[11] In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must also balance the relative prejudice to the Ministry and to the appellant (Order PO-1832). The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period (Orders PO-2113 and PO-2331).

[12] In its representations, the university indicates that it had originally claimed the application of both sections 13(1) and 18(1)(c), though it did not apply section 13(1) to three emails contained in the records. As a result, the appellant was aware that the advice or recommendations exemption in section 13(1) was claimed for many of the

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[1] *Ontario (Ministry of Consumer and Correctional Services v. Fineberg)*, Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.). See also *Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).

records at issue, but not the three records originally claimed to be exempt under section 18(1), according to the university.

[13] The appellant argues that she has been prejudiced because she was required to take time researching the possible application of section 18(1)(c), rather than concentrating her efforts on preparing arguments respecting section 13(1) only. She also takes the position that the university is "putting the integrity of the FIPPA scheme in disrepute" as a result of its "misleading conduct or carelessness" in not claiming the correct exemption for these three records.

[14] In my view, the appellant was aware that the university intended to claim the application of section 13(1) for the majority of the records at issue in this appeal and was put on notice of this claim from the time the original decision letter was issued. If, when it became apparent that the university was no longer relying on the section 18(1)(c) exemption, the appellant had required additional time to conduct the research necessary for her to properly prepare her arguments respecting section 13(1), she could have requested additional time to do so. I find that any prejudice to the appellant that would result from this change to the university's position was minimal and did not significantly impact her ability to either make representations to this office or better evaluate her position regarding her participation in the appeal process.

[15] As a result, I will allow the university to claim the application of the discretionary exemption in section 13(1) for the three emails it had originally claimed to be exempt under section 18(1)(c) only.

Issue B: Does the discretionary exemption at section 13(1) apply to the records?

General principles

[16] 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.

[17] 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.[2]

[2] 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.).

[18] Previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information [Order PO-2681]. "Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must reveal a course of action that will ultimately be accepted or rejected by its recipient.[3]

[19] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.[4]

[20] It is implicit in the various meanings of "advice" or "recommendations" considered in *Ministry of Transportation* and *Ministry of Northern Development and Mines* (cited above) that section 13(1) seeks to protect a decision-making process. If the document actually suggests the preferred course of action it may be accurately described as a recommendation. However, advice is also protected, and advice may be no more than material that permits the drawing of inferences with respect to a suggested course of action but does not recommend a specific course of action.[5]

[21] There is no requirement under section 13(1) that the [institution] be able to demonstrate that the document went to the ultimate decision maker. What section 13(1) protects is the deliberative process.[6]

[22] 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
- a supervisor's direction to staff on how to conduct an investigation.[7]

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[3] 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.

[4] 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).

[5] *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, 2012 ONCA 125 (C.A.).

[6] *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, (cited above).

Analysis and findings

[23] The university has provided a useful overview describing the circumstances surrounding the creation of the records which are the subject of this request. The President of the university was invited by representatives of the Jewish National Fund to serve as honorary co-chair of "the annual Negev fundraising gala/dinner", held on November 8, 2011. In addition, the university was asked to act as a sponsor of the event. The participation of the university and its President at this event was controversial and groups within the university community objected to its sponsorship of the event.

[24] The university submits that the emails or portions of emails which are at issue in this appeal can be categorized into the following four groups:

- the initial email communications dating from June 2011 passing between the President and the members of the university's executive committee and administration concerning the propriety of her participation, along with that of the university, in the event;
- email communications from members of the university's administration in October 2011 in response to the criticism of the President's decision to proceed with the event on behalf of the university;
- email communications from the university's executive committee regarding the university's response to the protest campaign against the event; and
- communications from the university's communications staff regarding the President's public statement in response to the protest campaign.

Group A records

[25] The emails categorized in this group reflect the discussion which began in June 2011 when the President was first approached to serve as the co-chair of the event. After receiving the invitation, the President contacted senior members of the university's administration, seeking their views on whether she ought to accept the invitation. The President received responses from three senior staff within the university's administration, expressing their views on the propriety of her participation in the event. I have carefully reviewed the email correspondence reflected in the Group A records and am satisfied that their disclosure would reveal not only the advice or recommendations given by the university administrators but also the nature of the question posed to them by the President. In my view, the disclosure of these

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[7] 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).

communications would permit the drawing of accurate inferences with respect to the suggested course of action because of the nature of the information and the manner in which the question was posed by the President. Accordingly, I find that the undisclosed portions of the Group A records qualify for exemption under section 13(1) as they represent advice or recommendations about a specific course of action that will ultimately be taken by the President with respect to the questions posed in her email communication to the senior staff within the university administration or would reveal the advice or recommendations provided.

Group B records

[26] During the month of October 2011, the President was contacted by the university's campus news publication and asked about the involvement of the university in the event and its sponsor. The President communicated by email with the university's Chief Development Officer and its Manager of Public Affairs requesting their assistance in formulating a response to this query. The initiating emails from the President seek the input of the staff persons and the responses which she received provide direction and the language to be incorporated into a response to the publication by the President. In my view, these communications are directly related to the seeking and providing of advice or recommendations to the ultimate decision maker, in this case, the university President, by two of her senior staff on an issue before her. I find that the undisclosed information contained in those records relating to the query by the university publication is properly exempt from disclosure under section 13(1).

[27] Shortly thereafter, the university began receiving protest letters respecting the President's participation in the November 8th event. Again, the President contacted five senior communications and public relations staff within the university, seeking their views on the appropriate response to take with respect to these communications, and received replies from them setting out their suggestions on a course of action for the President to follow. Again, I find that the email communications describing these interactions constitute advice or recommendations for the purposes of section 13(1). In my view, the disclosure of the advice being sought would reveal the nature of the recommended course of action received by the President and both types of communications are properly exempt, as a result.

[28] The emails which comprise Group B represent communications between the President and members of the university's senior staff on these two issues. I find that all of these communications contain advice or recommendations about a particular course of action for the President to take in addressing these issues. They are, therefore, exempt from disclosure under section 13(1).

Group C records

[29] On October 31, 2011, the President wrote an email to members of the university's executive committee seeking their views on whether or not she ought to participate in the November 8, 2011 event. Five members of the executive committee responded to her request, expressing their opinions on the appropriateness of her participation and giving their own suggestions on how to proceed in the face of opposition from some members of the public and the university community. I find that the responses received from the executive committee members qualify as "advice or recommendations" for the purposes of section 13(1). Based on my careful review of their content, I find that they contain explicit suggestions on a course of action to be taken by the President in addressing the question of whether or not to attend the event to be held on November 8, 2011. As such, I find that these undisclosed communications are properly exempt under section 13(1).

Group D records

[30] The records which comprise the undisclosed portions of Group D represent a series of emails passing between the university President and the Director, University Communication. These emails include various drafts of a response from the President to a group of faculty who objected to the university's involvement in the November 8th event. The email exchange which comprises the Group D records reflects the decision making process around the appropriate communication strategy to be employed by the university, through the office of the President, in response to queries from members of its faculty.

[31] In my view, the records which make up Group D also fall within the ambit of the section 13(1) advice or recommendations exemption. The information reflects the formulation of a response to certain sensitive communication issues passing between the Director, University Communication and the President during the debate on the participaton of the university in the November 8, 2011 event. I find that the records reflect the advice or recommendations given to the President during the course of the decision-making process when determining how to respond to the organizations objecting to the university's participation in the event in question. As a result, these records are exempt under section 13(1).

[32] Based on my review of the mandatory exceptions to the section 13(1) exemption that are contained in section 13(2), I find that none apply to the undisclosed information.

Issue C: Did the institution exercise its discretion under section 13(1)? If so, should this office uphold the exercise of discretion?

[33] The section 13(1) 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.

[34] 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.

[35] 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)].

Relevant considerations

[36] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- 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
    - 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
- 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
- the historic practice of the institution with respect to similar information.

Findings

[37] The university submits that it acted in good faith and has taken into account only relevant factors in exercising its discretion to deny access to the requested records. It argues that it disclosed a great deal of responsive information to the appellant in addition to the wealth of information made public through statements to the media on the subject of the November 8, 2011 event. It argues that only those records which fall within what it describes as a "zone of protection" were not disclosed in order to ensure that its administration and staff are "willing to freely share their views and opinions on the appropriate course of action."

[38] The university goes on to argue that the withheld information falls squarely within the scope of the section 13(1) exemption and that there is little public interest in the disclosure of the redacted portions of the records because the final decisions and their rationales have been publicly stated by the President and university administration. It further indicates that the public's interest in these issues has been addressed through its disclosure of many other responsive records and portions of records.

[39] I find that the university has exercised its discretion not to disclose the records based on its review of all of the relevant considerations present. I place particular emphasis on the fact that a great deal of public disclosure of information about the university's involvement in this event has taken place as a result of the public statements and media releases from the university. I agree with the university that its decision not to disclose the remaining portions of the records which are at issue in this appeal was made taking into account only relevant considerations and did not reflect

bad faith on its part. As a result, I uphold the university's decision to exercise its discretion in the manner it did and will not disturb it on appeal.

Issue D: Is there a compelling public interest in the disclosure of the records that clearly outweighs the purpose of the section 13(1) exemption?

General principles

[40] The appellant submits that there exists a compelling public interest in the disclosure of the records which clearly outweighs the purpose of the section 13(1) exemption, pursuant to section 23 of the *Act*, which states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[41] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[42] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption. [Order P-244]

Compelling public interest

[43] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Orders P-984, PO-2607]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Orders P-984 and PO-2556].

[44] A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347 and P-1439]. Where a private interest

in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

[45] The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

[46] Any public interest in *non*-disclosure that may exist also must be considered.[8] If there is a significant public interest in the non-disclosure of the record then disclosure cannot be considered "compelling" and the override will not apply [Orders PO-2072-F and PO-2098-R].

[47] A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation[9]
- the integrity of the criminal justice system has been called into question [Order P-1779]
- public safety issues relating to the operation of nuclear facilities have been raised[10]
- disclosure would shed light on the safe operation of petrochemical facilities [Order P-1175] or the province's ability to prepare for a nuclear emergency [Order P-901]
- the records contain information about contributions to municipal election campaigns[11]

[48] A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations [Orders P-123/124, P-391 and M-539]
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568, PO-2626, PO-2472 and PO-2614].

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[8] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[9] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).
[10] Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805.
[11] *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter [Order P-613]
- the records do not respond to the applicable public interest raised by appellant [Orders MO-1994 and PO-2607].

[49] The appellant has submitted material to support her position that the involvement of the university President in acting as an honorary co-chair of the November 8, 2011 event was the subject of much discussion and protest at the university. This is demonstrated through the submission of a number of letters to the President that were critical of her actions, as well as other references in the records to the reaction of some elements of the university community to the President's decision to participate.

[50] It is clear from the evidence tendered that there was a great deal of interest within the university community about the President's decision to take part in the event. This is further reinforced by the fact that the President felt compelled to issue a public statement on this issue in October 2011 in response to the protests which followed her decision to serve as co-chair of the event. In my view, the appellant has demonstrated that there was public interest within the university in the President's decision to be involved in the November 8, 2011 event. A number of individuals and groups took public positions both in favour of and against her decision. I further find that the public interest in this matter could be described as "compelling", at least as far as it concerned the university community. The public interest focused on the fact that the event was taking place with the participation of the university and its President serving as an honorary co-chair.

[51] I must, however, determine whether the subject matter of the withheld records relate to the public interest in disclosure. In my view, they do not. The records themselves set out the internal conversations taking place within the university's executive committee and senior administration on the propriety of the President's taking part in this event. The records reflect discussion from the university's administration and executive committee on the subject of the President's role, as opposed to their views on the controversy surrounding the organization which was the beneficiary of the fund-raising event. The discussion in the records is limited to the impact which the President's actions may have on the university community; it does not discuss the activities of the organization or its methods or goals, nor do they express the approval or disapproval of the organization by the authors of the emails. Rather, the emails more generally address the authors views on the possible impact which may result from various proposed actions by the President, confined to the context of the university community.

[52] I find that the President's participation in the event in question was a polarizing one for many elements within the university, and engendered a great deal of discussion and debate around the goals and methods of the sponsored organization. I agree that there exists a compelling public interest in that subject and in any records that may have related to the organization and its relationship to the university. In the present appeal, however, the responsive records do not discuss these issues. Rather, as noted above, they are concerned more with the President's decision to participate in this single event or not. I find that there does not exist a sufficiently compelling public interest in the subject matter of these records to bring the records within the ambit of the application of section 23.

[53] As the appellant has not established the first requirement of the test under section 23, I find that it has no application to the records at issue.

ORDER:

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

Original Signed By: May 13, 2013
Donald Hale
Adjudicator