

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3314

Appeal PA13-99-2

University of Ottawa

March 5, 2014

Summary: The appellant sought records from the university under the *Freedom of Information and Protection of Privacy Act (FIPPA or the Act)* about himself. The university denied access to two emails pursuant to the discretionary exemptions in sections 49(b) (personal privacy) and 13(1) (advice or recommendations). In this order, the adjudicator orders disclosure of one record under section 49(b) and upholds the university's decision to deny access to the other record under section 49(a), read in conjunction with section 13(1).

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, 49(a), 13(1), and 49(b).

OVERVIEW:

[1] The University of Ottawa (the university) received seven requests under the *Freedom of Information and Protection of Privacy Act (FIPPA or the Act)*, from the same requester. In this request, the requester sought access to the following information:

...

I hereby request from the University of Ottawa all documents and/or records related to [requester's name] University of Ottawa [specified student number], and, included to but not limited to, sent to/by and/or received to/by and/or in possession physically and/or electronically of:

1. Faculty of [name], [named Associate Professor]

...

[2] The requester specified the time period of the request as being from September 2007 to present.

[3] In response, the university located responsive records and issued a time extension decision which was subsequently appealed by the requester (now the appellant). As a result of mediation, Appeal PA13-99 was resolved as the university agreed to issue an access decision.

[4] The university then located responsive records and issued a decision denying access to portions of the records on the basis of the exemptions in section 13 (advice or recommendations) and sections 21 and 49(b) (personal privacy) of the *Act*. In addition, some information had been removed from Record 42 as non-responsive to the request.

[5] The requester, now the appellant, appealed the university's decision.

[6] During mediation, the appellant clarified that he takes issue with the application of the exemptions claimed for Records 19 and 24, and that in some of the disclosed emails, the dates and names of the persons sending and receiving the emails are missing.

[7] The mediator relayed the issues to the university which explained that some emails had been received without the contact information, however, it had been able to retrieve the original version of Records 46 and 47, which would be provided to the appellant.

[8] As Record 19 appeared to contain the personal information of the appellant and another individual (the affected person), the mediator discussed the notification process with the appellant who agreed to be identified as the original requester in this appeal.

[9] The mediator contacted the affected person to seek his feedback on the disclosure of the record at issue. The affected person objected to the disclosure of Record 19.

[10] No further mediation was possible and the file was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the university and the affected person, seeking their representations. I received representations from the university only, which I sent to the appellant along with a Notice of Inquiry. Portions of the university's representations were withheld due to confidentiality concerns. The appellant did not provide representations in response to the Notice of Inquiry.

[11] In this order, I order disclosure of one record under section 49(b) and uphold the university's decision to deny access to the other record under section 49(a), read in conjunction with section 13(1).

RECORDS:

[12] The records remaining at issue consist of one email in each of the email chains comprising Records 19 and 24.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary exemption at section 49(a), in conjunction with the discretionary advice or recommendations exemption in section 13(1), apply to the information at issue in Record 24?
- C. Does the discretionary personal privacy exemption at section 49(b) apply to the information at issue in Record 19?
- D. Did the institution exercise its discretion under section 49(a), read in conjunction with section 13(1), for Record 24? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[13] 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;

[14] 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.¹

[15] 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.

¹ Order 11.

[16] 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.²

[17] 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.³

[18] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁴

[19] The university states that Record 19 is an email sent from one professor to another professor that reveals something of a personal nature about one of the professors. It submits that this information has been shared between the professors with an expectation of explicit confidentiality. It states that the record contains personal information in accordance with paragraph (f) of the definition of that term in section 2(1), as it is correspondence sent by a professor to another professor.

[20] The university states that Record 24 contains information about the appellant.

Analysis/Findings

[21] The records are emails sent from a professor at the university to another professor about the appellant.

[22] I sent a Notice of Inquiry seeking representations from the professor who wrote the email in Record 19 (the affected person). This professor did not provide representations. This email contains the personal information of the appellant, as it contains his educational history. I find that two small portions of the email in Record 19 contain the personal information of the affected person, namely views or opinions in accordance with paragraphs (e) and (g) of the definition of personal information in section 2(1). This record does not contain the personal information of the recipient of this email. The remainder of the email is information about the affected person in his professional capacity, and does not reveal something of a personal nature about this individual.

[23] This email is not correspondence sent to an institution, but rather represents correspondence between two employees of the institution. Although the word confidential is contained in the record, it relates to one small sentence in this email. I

² Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

³ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁴ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

find that paragraph (f) of the definition of personal information in section 2(1) does not apply to Record 19, as it is not correspondence sent to the university that is of a confidential nature.

[24] Record 19 contains the personal information of the appellant and the affected person. Only the personal privacy exemption in section 49(b) has been claimed for Record 19. I will consider below whether the information that I have found to be personal information of the affected person in Record 19 is subject to section 49(b).

[25] Record 24 contains the personal information of only the appellant. The discretionary exemption in section 49(a) (right of access to one's own personal information) applies to this email. I will consider whether section 49(a), along with the discretionary advice or recommendations exemption in section 13(1), applies to the information at issue in this record.

B. Does the discretionary exemption at section 49(a), in conjunction with the discretionary advice or recommendations exemption in section 13(1), apply to the information at issue in Record 24?

[26] 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.

[27] 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.

[28] 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.⁵

[29] 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.

[30] In this case, the institution relies on section 49(a) in conjunction with section 13(1), which states:

⁵ Order M-352.

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.

[31] 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.⁶

[32] Previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information.⁷

[33] "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.⁸

[34] 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.⁹

[35] 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.¹⁰

⁶ Orders 24 and 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.).

⁷ Order PO-2681.

⁸ Orders PO-2028 and 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.

⁹ Orders PO-2028 and 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).

¹⁰ *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, 2012 ONCA 125 (C.A.).

[36] 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.¹¹

[37] 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.¹²

[38] The university provided both confidential and non-confidential representations on this issue. In its non-confidential representations, it states that the specific advice and recommendation contained in Record 24 has been given by a person employed in the service at the university on the request of another university employee. It further states that the professors of an institution have to deal with many students and many different situations and that disclosure of the advice or recommendations contained in Record 24 will reasonably be expected to inhibit the free flow of advice or recommendations to the institution, especially in a case such as the one contained in this record.

Analysis/Findings

[39] Based on my review of the information at issue in Record 24 and the confidential and non-confidential representations of the university, I find that the disclosure of the information at issue in this record would reveal the advice or the recommendation of a university employee communicated to another university employee. This advice or recommendation was provided in response to an email sent by the appellant to a university employee. This advice or recommendation is more than mere factual

¹¹ *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, (cited above).

¹² 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).

information. Therefore, I find that section 13(1) of the *Act* applies, and that none of the exceptions to section 13(1) in section 13(2) apply, to the information at issue in Record 24.

[40] Accordingly, subject to my review of the university's exercise of discretion, the information at issue in Record 24 is exempt by reason of section 49(a), taken in conjunction with section 13(1) of the *Act*.

C: Does the discretionary personal privacy exemption at section 49(b) apply to the information at issue in Record 19?

[41] Section 47(1) of the *Act* 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.

[42] Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. Since the section 49(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.

[43] Only the personal privacy exemption in section 49(b) has been claimed for Record 19. Section 49(b) can only apply to personal information of another individual other than the requester. I will order disclosure of the information in this email that relates to the appellant only or that contains the information of the affected person in his professional capacity. I will consider whether the information that I have found to be personal information of the affected person in Record 19 is subject to section 49(b).

[44] Sections 21(1) to (4) provide guidance in determining whether disclosure of the information would be an unjustified invasion of personal privacy under section 49(b).

[45] If the information fits within any of paragraphs (a) to (e) of section 21(1) or if paragraphs (a) to (d) of section 21(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b). In this appeal none of these sections apply.

[46] In determining whether disclosure of the personal information in a record would be an unjustified invasion of personal privacy under section 49(b), this office will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties.¹³

¹³ Order MO-2954.

[47] If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 49(b).

[48] The institution relies on the presumption in section 21(3)(g). This section reads:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

consists of personal recommendations or evaluations, character references or personnel evaluations.

[49] Based on my review of Record 19, I find that the personal information at issue does not consist of personal recommendations or evaluations, character references or personnel evaluations within the meaning of section 21(3)(g). The professor who wrote the email did not provide representations in this appeal. The university relies on the personal evaluation component of section 21(3)(g).

[50] The terms "personal evaluations" or "personnel evaluations" refer to assessments made according to measurable standards.¹⁴

[51] The thrust of section 21(3)(g) is to raise a presumption concerning recommendations, evaluations or references about the identified individual in question rather than evaluations by that individual.¹⁵

[52] According to the university, the information at issue in Record 19 contains opinions of the sender of the email about himself. It is not an assessment according to measurable standards, nor is it an evaluation about the individual identified in this record, which is the appellant.¹⁶

[53] As such, I do not have sufficient evidence to determine that the presumption in section 21(3)(g) applies to the information that I have found to be personal information in Record 19.

[54] Section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.¹⁷

[55] The university states that the factor in section 21(2)(h) applies. This section reads:

¹⁴ Orders PO-1756 and PO-2176.

¹⁵ Order P-171.

¹⁶ Order PO-1756.

¹⁷ Order P-239.

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

the personal information has been supplied by the individual to whom the information relates in confidence.

[56] The university states that in Record 19, the individual supplying the information explicitly stated that he shared his personal information in confidence. The university also submits that a presumption exists that the recipient of this email also had an expectation of confidentiality.

[57] The factor in section 21(2)(h) applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 21(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.¹⁸

[58] Based on my review of the information at issue in Record 19, I agree with the university that it was supplied by the professor who wrote the email in confidence. Accordingly, I find that this information is subject to the factor favouring privacy protection in section 21(2)(h). As no factors favouring disclosure have been raised by the appellant, subject to my review of the Absurd Result principle, the information qualifies for exemption under section 49(b).

Absurd Result

[59] Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may not be exempt under section 49(b), because to withhold the information would be absurd and inconsistent with the purpose of the exemption.¹⁹

[60] The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement²⁰
- the requester was present when the information was provided to the institution²¹
- the information is clearly within the requester's knowledge.²²

¹⁸ Order PO-1670.

¹⁹ Orders M-444 and MO-1323.

²⁰ Orders M-444 and M-451.

²¹ Orders M-444 and P-1414.

[61] However, if disclosure is inconsistent with the purpose of the exemption, the Absurd Result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.²³

[62] Based on my review of the information in Record 19, which I have found to be the personal information of the professor who sent the email, I find that the Absurd Result principle applies as it is information that the professor told the appellant or the appellant told this professor. The information is clearly within the appellant's knowledge. I find that this information is not exempt under section 49(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption. Accordingly, I will order the remaining information in Record 19 disclosed.

C: Did the institution exercise its discretion under section 49(a), read in conjunction with section 13(a), for Record 24? If so, should this office uphold the exercise of discretion?

[63] The section 49(a) 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.

[64] 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.

[65] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.²⁴ This office may not, however, substitute its own discretion for that of the institution.²⁵

[66] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:²⁶

- the purposes of the *Act*, including the principles that

²² Orders MO-1196, PO-1679 and MO-1755.

²³ Orders M-757, MO-1323 and MO-1378.

²⁴ Order MO-1573.

²⁵ Section 54(2).

²⁶ Orders P-344 and MO-1573.

- 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.

[67] The university states that when exercising its discretion it took into consideration the purpose of the *Act*, whether the appellant was seeking his own personal information, whether he had a sympathetic or compelling need to receive the information, the nature of the information and the extent to which it is significant and/or sensitive to the appellant or any affected person, and the need to protect the free flow of advice or recommendations.

[68] Concerning its exercise of discretion for Record 24, the university states that:

...the appellant is seeking his own personal information and might have a general sympathetic or compelling need to receive the information requested. Under this consideration, almost all records had been released or partially released to the appellant. On the other hand, the professors of

an institution have to deal with many students and various different situations.

It is submitted that it is important to protect the free flow of advice or recommendation as they must feel free to consult on different matters to be reassured on the way to respect the practices of the institution. The disclosure of the advice or recommendation will reasonably expected to inhibit the free flow of advice or recommendation to the institution...

Hence, in an attempt to protect the confidential nature of personal information shared to protect the privacy of individuals and to protect the free flow of advices and recommendations the university sought to exercise its discretion and not disclose the information at issue.

Analysis/Findings

[69] Based on my review of the university's representations and the information I have found subject to section 13(1) in Record 24, I find that the university, in denying access to the record, exercised its discretion in a proper manner, taking into account relevant factors and not taking into account irrelevant factors. Accordingly, I will uphold the university's exercise of discretion to deny access to the remaining information at issue in Record 24 under section 49(a), read in conjunction with section 13(1).

ORDER:

1. I uphold the university's decision to deny access to the remaining information at issue in Record 24.
2. I order the university to disclose the remaining information at issue in Record 19 to the appellant by **April 9, 2014** but not before **April 4, 2014**.
3. In order to verify compliance with provision 2 of this order, I reserve the right to require the university to provide me with a copy of Record 19 as disclosed to the appellant pursuant to provision 2.

Original Signed By:
Diane Smith
Adjudicator

March 5, 2014