

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3398

Appeal PA12-532

University of Ottawa

September 19, 2014

Summary: The appellant made a request to the University of Ottawa (the university) for records relating to her which might be found within the offices of identified university staff. The university denied access to some of the information, claiming the application of the discretionary exemptions in section 49(a), in conjunction with section 19 (solicitor-client privilege), and section 49(b), in conjunction with section 21(1) (personal privacy). In this order, the adjudicator upholds the discretionary exemption in section 49(a), in conjunction with section 19, in part and orders the university to disclose some records to the appellant. The adjudicator also upholds the university's exercise of discretion.

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), 19 and 49(a).

OVERVIEW:

[1] This order disposes of the issues raised as a result of an access request made by the requester under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the University of Ottawa (the university) for all documents and/or records about her, over a seven year period, found within the offices of identified university staff. The requester also sought access to all records found in her academic record, both in hard copy and electronic form, including all letters of appeal or petitions filed with the university and all supporting documents therein.

[2] The university located responsive records and issued a decision granting access, in part, advising the requester that the search time frame was modified to avoid overlapping with previous access requests, and that some of the information in the records was non-responsive. With respect to the information that the university denied, it claimed the application of the discretionary exemptions in section 49(a), in conjunction with section 19 (solicitor-client privilege), and section 49(b), in conjunction with section 21(1) (personal privacy).

[3] The requester (now the appellant) appealed the university's decision to this office. During the mediation of the appeal, the appellant advised that she was not seeking the information that the university indicated was non-responsive, but that she sought all of the responsive information withheld by the university.

[4] The appeal was then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. I provided both parties with the opportunity to provide representations, but received representations from the university only.

[5] For the reasons that follow, I uphold the university's decision, in part. I find that section 49(a) in conjunction with section 19 applies to exempt most of the records from disclosure. I order the university to disclose some records to the appellant and I uphold the university's exercise of discretion.

RECORDS:

[6] The records at issue consist of email correspondence, email attachments, a human rights complaint and drafts of the response to the complaint.

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 section 19 exemption apply to the information at issue?
- C: Did the institution exercise its discretion under section 49(a)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

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

[7] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain "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;

[8] 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.

[9] 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.¹

[10] 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.² To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.³

[11] The university submits that all of the records at issue contain the appellant's personal information and that records 74 and 75 also contain the personal information of other individuals, as they include the personal views and opinions of those individuals as contemplated by paragraph (e) of the definition of personal information contained in section 2(1).

[12] I have reviewed the records and find that all of them contain the appellant's personal information as defined in section 2(1) of the *Act*. Specifically, the records contain information relating to the education and medical history of the appellant (paragraph (b) of the definition), as well as the appellant's name where it appears with other personal information relating to her (paragraph (h) of the definition). In addition, records 74 and 75 contain another individual's personal information (not the appellant), as these records reveal the views or opinions of other individuals about that individual (paragraph (g) of the definition).

¹ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

² Orders P-1409, R-980015, PO-2225 and MO-2344.

³ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[13] Consequently, I am satisfied that the records contain the appellant's personal information, as defined by section 2(1) of the *Act*, and that two of the records contain the personal information of another individual.

Issue B: Does the discretionary exemption at section 49(a) in conjunction with the section 19 exemption apply to the information at issue?

[14] 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.

[15] 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.

[16] 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.⁴ Where access is denied under section 49(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information. In this case, the institution relies on section 49(a) in conjunction with section 19, which states:

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 or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

[17] 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

⁴ Order M-352.

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

[18] 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.⁵ 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.⁶ The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.⁷

[19] 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.⁸

[20] 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.⁹

[21] Under branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege. Waiver of privilege is ordinarily established where it is shown that the holder of the privilege: knows of the existence of the privilege; and voluntarily evinces an intention to waive the privilege.¹⁰

[22] Branch 2 is a statutory exemption that is available in the context of Crown counsel giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons. Branch 2 applies to a record that was prepared by or for Crown counsel, or counsel for an educational institution or hospital, “for use in giving legal advice.”

[23] Branch 2 applies to a record that was prepared by or for Crown counsel, or counsel for an educational institution or hospital, “in contemplation of or for use in

⁵ 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).

⁶ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

⁷ Orders PO-2441, MO-2166 and MO-1925.

⁸ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

⁹ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

¹⁰ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

litigation.” Termination of litigation does not affect the application of statutory litigation privilege under branch 2.¹¹

[24] The application of branch 2 has been limited on the following common law grounds as stated or upheld by the Ontario courts: waiver of privilege by the *head of an institution*,¹² and the lack of a “zone of privacy” in connection with records prepared for use in or in contemplation of litigation.¹³

[25] The university submits that the records at issue are exempt under branch 1, arising from the common law and section 19(a), as well as branch 2, arising from section 19(c). According to the university, two legal counsel were involved in responding to the human rights complaint filed by the appellant; one was the university’s in-house counsel and the other was outside counsel retained by the university (collectively referred to as “counsel for the university”). The records, the university states, relate to legal advice being sought from and given by counsel for the university in relation to the appellant’s legal proceeding before the Human Rights Tribunal of Ontario (HRTO).

[26] The university argues that some of the records consist of emails between or among counsel for the university and employees of the university for the purpose of seeking and/or giving legal advice in preparation of its response to the appellant’s human rights complaint and subsequent reply to the university’s response. Other records, the university submits, consist of emails that form part of the “continuum of communications” that were exchanged for the purpose of keeping the university employees informed of the legal advice that may be sought or given. The university goes on to submit that if these records were disclosed, they would reveal legal advice originally provided by counsel for the university.

[27] The university states:

The solicitor-client privilege is crucial to University employees, as it allows them to freely make requests for and obtain legal advice, knowing it will remain confidential. In order to protect the integrity of the University’s Legal Services, including the continuum of communications between the counsel for the University [and] University employees, the records must be exempt from disclosure.

[28] Lastly, the university submits that it did not take any action that constitutes a waiver of its common law and statutory solicitor-client privilege either implicitly or

¹¹ *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, (cited above).

¹² See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.).

¹³ *Ibid.*

explicitly. It goes on to state that the records have not been disclosed to outsiders, nor has the university voluntarily evinced an intention to waive the privilege.

[29] Having reviewed the records for which this exemption is claimed, I uphold the university's decision with respect to section 19 with the exception of portions of three records, subject to my findings on the university's exercise of discretion.

[30] I am satisfied that the majority of the records are exempt under branch 1 of section 19, because they are subject to the common law solicitor-client communication privilege. These records consist of:

- Emails sent to legal counsel by university staff, seeking a legal opinion or legal advice on a particular issue, specifically, the human rights complaint; and
- Emails sent to university staff from both internal and external legal counsel, providing legal advice and attaching written materials drafted and reviewed in conjunction with university staff. These materials consist of background information and drafts of the university's response to the human rights complaint.

[31] I find that these records form part of the "continuum of communications," as they reflect confidential communications between a solicitor and his client and they are, therefore, exempt from disclosure under section 19 of the *Act*.

[32] Conversely, I find that the following records, or portions thereof, are not exempt from disclosure under either branch of section 19:

- Record 47, with the exception of the covering email and covering letter. This record is the appellant's human rights complaint to the HRTO;
- Page 3 of record 89, which is an email from the appellant to the university; and
- Page 3 of record 93, which is an email exchange between the appellant and the university.

[33] These records were written by or received by the appellant, and were not prepared by or for the university's legal counsel. In my view, there is neither the seeking nor giving of legal advice on the face of these records. In addition, there is nothing privileged about these records, as they would already be known to the appellant. As no other exemptions were claimed with respect to these records, I order the university to disclose them to the appellant. In addition, the university claimed the

application of the discretionary exemption in section 49(b) in conjunction with the exemption in section 21(1) to withhold the personal information of another individual, contained in two records. As I have found these records to be exempt under section 19, it is not necessary to consider the application of sections 49(b) and 21(1) to them.

Issue C: Did the institution exercise its discretion under section 49(a)? If so, should this office uphold the exercise of discretion?

[34] 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.

[35] 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.

[36] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁴ This office may not, however, substitute its own discretion for that of the institution.¹⁵

[37] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹⁶

- 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;

¹⁴ Order MO-1573.

¹⁵ Section 54(2) of the *Act*.

¹⁶ Orders P-344 and MO-1573.

- whether the requester has a sympathetic or compelling need to receive the information;
- whether the requester is an individual or an organization;
- 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; and
- the historic practice of the institution with respect to similar information.

[38] The university submits that, in exercising its discretion, it took into consideration: the purpose of the *Act*; the fact that the appellant was seeking her own personal information; whether the appellant had a sympathetic or compelling need to receive the information; and whether disclosure of the records would increase public confidence in the operation of the university. In addition, it argues that it did not act in bad faith or for an improper purpose in exercising its discretion not to disclose the records.

[39] Further, the university submits that there is no sympathetic or compelling need for the appellant to receive the records. Conversely, the university argues, the protection of the confidentiality of the legal advice is important, as it provides the university with assurances that it will be able to seek legal advice that will be kept confidential. This, in turn, will protect the integrity of the university's legal services department. Lastly, the university states that historically, it has never disclosed privileged solicitor-client communications, thereby increasing public confidence in its operation.

[40] I have reviewed the circumstances surrounding this appeal and the university's representations on the manner in which it exercised its discretion. I am satisfied that the university weighed the appellant's interest in obtaining access to her personal information against the protection of sensitive institutional information that is subject to solicitor-client privilege. Accordingly, I am satisfied that the university did not err in the exercise of its discretion in applying the exemption in section 19 to the records for which I upheld the university's decision.

ORDER:

1. I order the university to disclose: record 47, with the exception of the covering email and letter; page 3 of record 89; and page 3 of record 93 to the appellant by **October 27, 2014** but not before **October 21, 2014**.
2. I reserve the right to require the university to provide me with copies of the records it discloses to the appellant.

Original Signed By: _____
Cathy Hamilton
Adjudicator

_____ September 19, 2014