

Information and Privacy Commissioner,
Ontario, Canada



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

RECONSIDERATION ORDER PO-3419-R

Appeal PA12-532

University of Ottawa

November 5, 2014

Summary: This is a reconsideration of Order PO-3398 in which the adjudicator found that portions of three records at issue were not exempt under either branch of section 19 (solicitor-client privilege) of the *Freedom of Information and Protection of Privacy Act* (the *Act*). In this reconsideration order, the adjudicator allows the reconsideration request and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, s. 19.

OVERVIEW:

[1] The requester made an access request 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. In Order PO-3398, I upheld the university's decision, in part. I found that section 49(a) in conjunction with section 19 applied to exempt all of the records from disclosure, with the exception of portions of three records. I ordered the university to disclose those portions to the appellant and I upheld the university's exercise of discretion.

[5] In this decision, for the reasons that follow, I reconsider my finding in Order PO-3398 that portions of three records are not exempt under either branch of section 19. Accordingly, I find that these portions are exempt and I dismiss the appeal.

RECORDS:

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

DISCUSSION:

Are there grounds under Section 18.01 of the *Code of Procedure* to reconsider Order PO-3398?

The Reconsideration Process

[7] Section 18 of the IPC's *Code of Procedure* sets out the grounds upon which the Commissioner's office may reconsider an order. Sections 18.01 and 18.02 of the *Code of Procedure* state as follows:

18.01 The IPC may reconsider an order or other decision where it is established that there is:

- (a) a fundamental defect in the adjudication process;
- (b) some other jurisdictional defect in the decision; or

- (c) a clerical error, accidental error or omission or other similar error in the decision.

18.02 The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.

Grounds for the Reconsideration Request

[8] As set out in paragraph (c) to section 18.01, this office may reconsider an order where it is established that there has been a clerical error, accidental error or omission or other similar error in the decision.

[9] The university submits that the grounds for reconsideration are that I made an accidental error in the decision in connection with the application of the solicitor-client privilege. In particular, the university argues that in finding that records 47, 89 and 93 satisfy the exemption in section 19 of the *Act* and are solicitor-client privileged, the entirety of these records must remain solicitor-client privileged. The university goes on to submit that the entire communication between a solicitor and a client is privileged, not merely the portion that involves the advice itself. In other words, the university argues, solicitor-client privilege is a "class-based" privilege that protects the entire communication.¹

[10] In addition, the university submits that the records do not contain communications for other purposes which are clearly unrelated to legal advice, and it is only where records combine communications to counsel with communications for other purposes which are unrelated to the legal advice that severance may apply.²

[11] The appellant was notified of the request for a reconsideration of Order PO-3398. She contacted staff of this office and advised them that any record containing her name or that relates to her, she is entitled to receive under "access laws."

[12] I have carefully considered the university's representations and I agree with it that I made an accidental error in not finding portions of records 47, 89 and 93 exempt under either branch of section 19 of the *Act*. Although these portions consist of a record written by the appellant or email exchanges between the appellant and the university, they form part of the communication between the university and its legal counsel. As pointed out by the university, the solicitor-client privilege in section 19 is a

¹ In support of its position, the university cites *Ontario (Ministry of Finance) v. Ontario (Assistant Information and Privacy Commissioner)*, [1997] O.J. No. 1465 (Div. Ct.), as well as Orders PO-3287 and PO-3298.

² Relying on Order MO-2198.

"class-based" privilege that protects the entire communication. I find, therefore that records 47, 89 and 93 are exempt in their entirety under section 19 of the *Act*.

[13] Lastly, I find that the university did not take any action which would constitute waiver of its privilege. The records have not been disclosed to outsiders either by legal counsel, the university, or university staff, nor has the university voluntarily evinced an intention to waive its privilege.

ORDER:

1. I find that records 47, 89 and 93, in their entirety, are exempt under section 19 of the *Act*.
2. I rescind order provisions one and two in Order PO-3398, and dismiss the appeal.

Original signed by: _____
Cathy Hamilton
Adjudicator

November 5, 2014