Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3549

Appeal PA14-385

University of Ottawa

November 26, 2015

Summary: The appellant made a request to the university under the *Act* for the reports of an independent investigator into alleged misconduct on the part of the men's varsity hockey team. The university identified two reports and three covering memoranda as responsive to the request, but denied access to the records on the basis that they are excluded from the *Act* pursuant to the exclusion for certain employment and labour relations records at section 65(6). It also relied on the discretionary exemption at section 19 of the *Act* for records subject to solicitor-client privilege. The appellant appealed and raised the possible application of the public interest override at section 23 of the *Act*. In this order, the adjudicator finds that the two investigation reports are excluded from the *Act* by section 65(6). She finds that the three cover memoranda from the university's counsel are not excluded from the *Act* under section 65(6), but that they are subject to solicitor-client privilege and are, therefore, exempt from disclosure pursuant to section 19 of the *Act*. Finally, she notes that the public interest override at section 23 is not available in respect of records to which the section 19 exemption applies.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 19, 23 and 65(6).

Orders and Investigation Reports Considered: Orders M-927, MO-2131, MO-2504, MO-2537, MO-2556, MO-2589, and PO-2095.

Cases Considered: *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner,* 2010 ONSC 991 (Div. Ct.); *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.); *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.),

leave to appeal refused [2001] S.C.C.A. No. 507; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23.

INTRODUCTION:

[1] The University of Ottawa men's varsity hockey team traveled to Thunder Bay between January 31 and February 2, 2014 to play against Lakehead University's team. During their stay, two incidents occurred involving the University of Ottawa's team, leading to allegations of sexual misconduct and excessive alcohol consumption by some of the players on the team. The two incidents are referred to collectively in this order as the men's hockey team matter.[1]

[2] The University of Ottawa (the university) retained a law firm, which in turn retained an independent investigator who conducted an investigation and prepared two reports: one on sexual activity involving the men's hockey team (the sexual activity report), and one on excessive alcohol consumption involving the men's hockey team (the excessive alcohol report). The university also reported the sexual misconduct allegations to the Thunder Bay Police, which led to a separate police investigation. Ultimately, criminal charges were laid against two players on the team.

[3] The appellant, a journalist, made a request to the university under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

> A report led by independent investigator [name] on alleged misconduct by the men's varsity hockey team.

[4] The university identified the two above-noted investigation reports as records responsive to the request, along with three covering memoranda from the law firm to the university. It denied access to the records on the basis that they are excluded from the *Act* pursuant to the exclusion for certain employment and labour relations records at section 65(6) of the *Act*. The university also relied on the discretionary exemption at section 19 of the *Act* for records subject to solicitor-client privilege, as well as the discretionary exemptions for advice and recommendations (section 13) and law enforcement (section 14), and the mandatory personal privacy exemption at section 21.

[5] The appellant appealed the university's decision to this office. During the course of mediation, the appellant raised the possible application of the public interest override at section 23 of the *Act*. No mediated resolution was reached, and the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry. I sought and received representations from the university and the

---

1 This is consistent with the use of the term "men's hockey team matter" throughout the university's representations.

appellant on the issues in this appeal.

[6] In this order, I find that the investigation reports are excluded from the *Act* under section 65(6). As a result, I do not have the jurisdiction to make an order for their disclosure or non-disclosure. I find that the three cover memoranda from the law firm to the university are not excluded from the *Act* under section 65(6). I find, further, that they are subject to solicitor-client privilege and are, therefore, exempt from disclosure pursuant to section 19 of the *Act*.

RECORDS:

[7] The records at issue are the sexual activity report (including a redacted copy thereof), the excessive alcohol report, and three covering memoranda from the university's law firm to the university.

[8] In this order, when referring collectively to both the sexual activity report and the excessive alcohol report, I use the term "the investigation reports".

ISSUES:

A. Does section 65(6) exclude the records from the *Act*?

B. Does the discretionary exemption at section 19 of the *Act* (solicitor-client privilege) apply to the records?

C. Did the institution exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: Does section 65(6) exclude the records from the *Act*?

[9] The first issue to be decided in this appeal is whether the *Act* applies to the records at issue. Pursuant to section 65 of the *Act*, the *Act* does not apply to certain classes of records. If I find that the *Act* does not apply to the records at issue in this appeal, that is the end of the matter before me. It is worth stressing that an institution may still exercise its discretion to disclose records outside of the access regime established by the *Act*.[2] However, the Commissioner does not have the jurisdiction to make any order concerning the disclosure or non-disclosure of records to which the *Act* does not apply.

---

[2] See, for example, Order PO-2639.

[10] One class of records excluded by section 65 is records concerning certain employment-related matters. Specifically, section 65(6) states in part:

> Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> > 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution….
> >
> > 3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

[11] If section 65(6) applies to the records, and none of the exceptions found in section 65(7) applies, the records are excluded from the scope of the *Act*.

[12] The university argues that both paragraphs 65(6)1 and 65(6)3 apply to the investigation reports. Below I address paragraph 65(6)3 first, and given the conclusion I have reached on that paragraph, it is not necessary for me to address paragraph 65(6)1.

[13] I will begin by addressing the investigation reports, and will consider the covering memoranda separately.

Representations

[14] The university submits that its legal counsel retained the independent investigator to probe the facts underlying the allegations of sexual misconduct and excessive alcohol consumption. It submits that the investigation reports contain the law firm's instructions to the investigator (i.e. his mandate), the investigation protocol, a list of witnesses, the evidence and documents collected during the investigation, and the investigator's determinations of fact and findings in connection with the men's hockey team matter.

[15] The university submits that as a result of the findings in the investigation reports, it decided to suspend the men's varsity hockey team program for the 2014-2015 season. It also terminated the employment of the head coach of the team.

[16] The university submits that a primary purpose of the reports was to review the reasonableness of the coach's actions in view of the circumstances surrounding the men's hockey team matter. It submits that the investigation was specifically described in the mandate as being a "workplace investigation". It notes that, as a result of the reports, the university terminated the coach's employment for cause.

[17] I wish to stress that the university does not submit that the coach was directly involved in the men's hockey team matter. I cannot be specific about the nature of the coach's "actions" referred to in the university's representations without revealing the content of the records, but those "actions" do not implicate the coach directly in either the sexual misconduct or excessive alcohol consumption allegations.

[18] While the appellant did not provide representations on the section 65(6) issue specifically, she takes the position elsewhere in her representations that, while the investigator was retained by the law firm, he was engaged in work for the university. She has appended to her representations several news articles and media releases which indicate that the university's President publicly referred to the investigation reports in reference to the university's decision to terminate the hockey coach's employment.

Analysis and findings

[19] For section 65(6)3 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

Part 1: collected, prepared, maintained or used by an institution or on its behalf

[20] It does not appear to be contentious that the investigation reports were prepared on behalf of the university who, though counsel, commissioned the reports. I find that the reports were also used by the university in making decisions relating to the hockey program and the head coach. As a result of the findings in the investigation reports, the university decided to suspend the men's varsity hockey program for the 2014-2015 season, and terminated the employment of the head coach. In addition to the university's representations, public reports of these events refer to the results of the investigation as being the basis for the program's suspension and the coach's dismissal.3

3 See, for example, http://www.uottawa.ca/media/media-release-3010.html.

Parts 2 and 3: in relation to meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest

[21] I also find that the investigation reports were prepared and used "in relation to meetings, consultations, discussions or communications" about a variety of topics. While I cannot disclose the details of the mandate of the reports because to do so would reveal the content of the records, I find that those details clearly contemplate further communications within the university. As indicated above, at least two particular decisions were taken by the university as a result of the reports: the decision to suspend the hockey program and the decision to terminate the coach's employment. I find that these types of decisions would only be taken following consultations, discussions or communications on the part of the university.

[22] The remaining issue is whether the records were prepared and used in relation to consultations, discussions or communications "about labour relations or employment-related matters in which the institution has an interest".

[23] The term "in relation to" in the context of section 65 has been the subject of some judicial interpretation. In *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*,4 the Divisional Court considered the exclusion found at section 65(5.2), which provides that the *Act* does not apply to a record "relating to" a prosecution if all proceedings in respect of the prosecution have not been completed. The court rejected an interpretation that would require there to be a "substantial connection" between the records and the prosecution, finding instead that the words "relating to" in s. 65(5.2) require only "some connection" between a record and a prosecution.

[24] Orders of this office have applied this reasoning in the context of the exclusion found at section 65(6), holding that for the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 1, 2 or 3 of section 65(6), it must be reasonable to conclude that there is "some connection" between them.[5] For paragraph 65(6)3 to apply, therefore, there need only be "some connection" between "a record" and "meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest."6

[25] The term "employment-related matters" (as opposed to labour relations matters) has been held to refer to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective

---

4 2010 ONSC 991 (Div. Ct.).
5 Order MO-2589.
6 See Orders MO-2537 and MO-2589.

bargaining relationship.[7] Examples of contexts in which the phrase "labour relations or employment-related matters" has been found to apply include a job competition,[8] an employee's dismissal,[9] and disciplinary proceedings under the *Police Services Act*.[10]

[26] However, the Divisional Court has held that the exclusion in section 65(6) does not exclude from the *Act* all records concerning the actions or inactions of an employee simply because the employee's conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees.[11] In *Ontario (Ministry of Correctional Services) v. Goodis*,12 a request was made to the Ministry of Correctional Services for "any and all records related to any and all allegations of misconduct or sexual, physical or other abuse between 1975 and 1995 by [certain individuals] in your Cornwall, Ontario office". At the time of the request, there was past, ongoing and anticipated litigation against the Crown and some of its employees and former employees respecting these allegations. In each case, it was alleged that the Crown was vicariously liable for torts committed by its employees in the course of their employment. The ministry claimed that the requested records were employment-related records that fell outside the scope of the *Act* pursuant to s. 65(6). The requester appealed to this office, which rejected the ministry's interpretation and found that the records were not excluded pursuant to section 65(6).

[27] The ministry applied for judicial review. In dismissing the ministry's application on this point,13 Swinton J., on behalf of the Divisional Court, stated:

> In my view, the language used in s. 65(6) does not reach so far as the Ministry argues. Subclause 1 of s. 65(6) deals with records collected, prepared, maintained or used by the institution in proceedings or anticipated proceedings "relating to labour relations or to the employment of a person by the institution". The proceedings to which the paragraph appears to refer are proceedings related to employment or labour relations *per se* -- that is, to litigation relating to terms and conditions of employment, such as disciplinary action against an employee or grievance proceedings. In other words, it excludes records relating to matters in which the institution has an interest as an employer. It does not exclude records where the Ministry is sued by a third party in relation to actions taken by government employees.

---

7 Order PO-2157.
8 Orders M-830 and PO-2123.
9 Order MO-1654-I.
10 Order MO-1433-F.
11 *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).
12 *Ibid.*
13 The Divisional Court allowed the ministry's application in part, on other issues.

[28] The Divisional Court's reasoning has been adopted and applied in subsequent orders of this office. Hence, the type of records excluded from the *Act* by section 65(6) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions for which their employer may be vicariously liable.[14]

[29] Some previous orders of this office have also drawn a distinction between records that are created for an employment-related purpose and those that are created for another purpose but may later be used for an employment-related purpose. For example, in Order MO-2556, Senior Adjudicator Frank DeVries had to determine whether police incident sheets and occurrence reports were excluded under section 52(3) of the municipal *Act* (the municipal counterpart to section 65(6) of the *Act*). The police claimed that the section 52(3) exclusion applied because a complaint was made by the appellant against a police officer, and that the records at issue were collected, prepared, maintained and used in relation to proceedings arising from the complaint.

[30] In finding that section 52(3) did not apply to the records, Senior Adjudicator DeVries relied on the analysis contained in an earlier Order, Order M-927, and stated:

> As the records at issue in this appeal relate to the initial, day-to-day police investigation into circumstances involving the appellant, which occurred within the jurisdiction of the Police, they do not fall within the exclusionary provision in section 52(3). Although it may well be that subsequent complaints about the actions of the investigating officer resulted in further investigations and/or the creation of additional files (of which I have very little evidence), the original records that relate to the original investigations into the appellant's actions are not removed from the scope of the *Act* simply because they were reviewed or considered as part of a review of the officer's conduct under other legislation. Any such review does not alter the character of the original records, which were prepared for the purposes of the investigations conducted by the officer… Accordingly, I find that the original incident sheet and general occurrence report that form the records at issue in this appeal are not excluded from the operation of the *Act* simply because of their possible inclusion or review in subsequent complaint investigations and/or other proceedings.

[31] As noted by Senior Adjudicator John Higgins in Order M-927:

> [It] would be a manifestly absurd result, and one not intended by the Legislature, if the records at issue were removed from the scope of the

---

14 *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

> *Act* because they happen to have been reviewed in connection with an investigation of an employee's conduct.15

[32] For the reasons below, I find that the investigation reports at issue in this appeal were prepared and used in relation to meetings, consultations, discussions or communications about an employment-related matter in which the university has an interest, and are therefore excluded from the operation of the *Act* under section 65(6). I will begin by addressing the sexual activity report and will then address the excessive alcohol report.

Sexual activity report

[33] From my independent review of the investigator's mandate, as communicated by the university's law firm to the investigator and reproduced in the sexual activity report, it is clear that part of the mandate of the investigation was in relation to the coach's employment. While I cannot be more specific without revealing the content of the report, I rely in particular on the following portions of it:

- Tab 1, numbered paragraph (3)
- Tab 2, page 1, first paragraph and numbered paragraph (3)
- Tab 2, page 2, first underlined section
- Tab 2, page 3
- Tab 17, particularly paragraph 2

[34] While the mandate directed the investigator to examine other issues in addition to the employment-related one, I accept the university's submission that a primary purpose of the report was to review the reasonableness of the hockey coach's actions in view of the circumstances surrounding the men's hockey team matter. Further, I find that reviewing the reasonableness of those actions vis-à-vis the allegation of sexual misconduct had an employment-related purpose. This is clear from, for example, Tab 1, numbered paragraph (3), and Tab 17.

[35] Given that the mandate included this employment-related purpose, it is not surprising that the resulting sexual activity report also relates to this purpose. I have reviewed the report and conclude that a major focus of it was the hockey coach's actions in relation to the allegations of sexual misconduct. The coach's actions are discussed throughout the report. I also rely on the "Findings" section of the report, which is illustrative of the emphasis placed on the coach's conduct throughout the investigation.

---

15 See also Orders MO-2131, MO-2504 and PO-2095.

[36] Moreover, I find that the preparation and use of the sexual activity report is distinguishable from the types of situations present in *Ontario (Ministry of Correctional Services) v. Goodis* and Order MO-2556, both cited above. Both of those decisions stress that for section 65(6) (or the municipal equivalent) to apply, the records must relate to matters in which the institution has an interest as an employer.

[37] Here, the university was clearly acting as an employer when, through its counsel, it retained the independent investigator to investigate and prepare a report. Not only did the mandate and the report itself reference the coach's actions, they did so within the context of the coach's employment. The many indicia of the employment-related focus of the investigation and report include Tabs 15, 16, and 17. It is a matter of public record that the coach was terminated as a result of the investigation reports. This employment-related purpose distinguishes the sexual activity report from the records at issue in both *Ontario (Ministry of Correctional Services) v. Goodis* and Order MO-2556.

[38] Finally, I find that the university has an interest in the employment-related matter discussed in the sexual activity report. The phrase "in which the institution has an interest" means more than a "mere curiosity or concern", and refers to matters involving the institution's own workforce.[16] The report was commissioned by the university, through its counsel, and relates to the university's own workforce. The university acted on the report by terminating the coach.

[39] I find, therefore, that the university has established that there is some connection between the sexual activity report and "meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest."17 As a result, the sexual activity report is excluded from the *Act* pursuant to section 65(6).

Excessive Alcohol Report

[40] For similar reasons, I also find that the excessive alcohol report is excluded from the *Act* under section 65(6). As noted above, part of the mandate of the investigation was in relation to the coach's employment, as evidenced by the following portions of the excessive alcohol report:

- Tab 1, numbered paragraph (3)
- Tab 2, page 1, first paragraph and numbered paragraph (3)
- Tab 2, page 2, first underlined section

---

16 *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.
17 See Orders MO-2537 and MO-2589.

- Tab 15, particularly paragraph 2

[41] Again, while the mandate directed the investigator to examine other issues in addition to the employment-related one, I agree with the university's submission that a primary purpose of the report was to review the reasonableness of the hockey coach's actions in view of the circumstances surrounding the excessive alcohol matter. Furthermore, I find that reviewing the reasonableness of those actions vis-à-vis the allegation of excessive alcohol consumption had an employment-related purpose. This is clear from, for example, Tab 1, numbered paragraph (3) and Tab 15 of the excessive alcohol report.

[42] In keeping with the report's mandate, and as is the case with the sexual activity report, a major focus of the excessive alcohol report is the hockey coach's actions in relation to the allegations of excessive alcohol consumption. The coach's actions are discussed throughout the report. I also rely on the "Findings" section of the report, which is illustrative of the emphasis placed on the coach's conduct throughout and the fact that the university was acting as an employer when, through its counsel, it retained the independent investigator to investigate and prepare the report. Not only did the mandate and the report itself reference the coach's actions, they did so within the context of the coach's employment. The many indicia of the employment-related focus of the investigation and report include the information found at Tabs 13, 14 and 15 of the excessive alcohol report.

[43] Finally, I find that the university has an interest in the employment-related matter discussed in the record. The report was commissioned by the university, through its counsel, and relates to the university's own workforce.

[44] I find, therefore, that the university has established that there is some connection between the excessive alcohol report and "meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest."[18] As a result, the excessive alcohol report is excluded from the *Act* pursuant to section 65(6).

Covering memoranda: representations, analysis and findings

[45] The memoranda from the university's counsel to the university are described in the university's representations as follows:

a. A covering memorandum from the law firm to the university, containing legal advice and counsel's opinion about the use, distribution, or reproduction of the four secure copies of the reports and on the potential liability of the university arising from the disclosure of the reports;

---

18 See Orders MO-2537 and MO-2589.

b. Two legal memoranda from the law firm to the university, containing legal advice and opinion for use in the university's decision of whether or not a redacted version of the sexual activity report could be disclosed. They also contain legal advice and opinion on the use, distribution and reproduction of the reports as well as the liability to the university arising from the disclosure of the reports, in whole or in part.

[46] Assuming, without deciding that the first two parts of the three-part test under section 65(6) are satisfied (i.e. the covering memoranda were collected, prepared, maintained or used by the university or on its behalf, and this collection, preparation, maintenance or use was in relation to meetings, consultations, discussions or communications), I find that section 65(6) does not apply to these memoranda because the meetings, consultations, discussion or communications were not in relation to labour relations or employment-related matters. It is clear from my review of the memoranda and the university's representations that the sole purpose of the memoranda was to address the distribution of the reports or redacted versions thereof. The university has not suggested that there was an employment-related purpose for the preparation or use of the memoranda. I find, therefore, that the covering memoranda are not excluded from the *Act* under section 65(6).

Conclusion

[47] I conclude that the investigation reports are excluded from the *Act* pursuant to section 65(6). Moreover, none of the section 65(7) exceptions apply here.

[48] As noted previously in this order, the fact that the *Act* does not apply to the investigation reports does not preclude the university from exercising its discretion to disclose them in whole or in part, outside of the access regime set out in the *Act*.[19] However, since the *Act* does not apply to the investigation reports, I do not have the jurisdiction to make any order relating to their disclosure or non-disclosure.

[49] Section 65(6) does not apply to the covering memoranda from the law firm to the university. The covering memoranda are, therefore, subject to the *Act.* I will now consider whether they are exempt from disclosure pursuant to section 19 (solicitor-client privilege) of the *Act.*

Issue B: Does the discretionary exemption at section 19 of the *Act* (solicitor-client privilege) apply to the covering memoranda?

[50] The university submits that the covering memoranda are exempt from disclosure on the grounds of section 19 of the *Act*, which provides as follows:

---

19 The university states in its reply representations that it "will continue to evaluate whether, and when, it can make further information public".

> 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.

[51] Section 19 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 (prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital) is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

[52] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

Solicitor-client communication privilege

[53] 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 legal advice.[20] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[21] The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.[22]

[54] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[23]

[55] 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.[24] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[25]

---

20 *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
21 Orders PO-2441, MO-2166 and MO-1925.
22*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)
23 *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
24 *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
25 *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

Loss of privilege

Waiver

[56] Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege knows of the existence of the privilege, and voluntarily demonstrates an intention to waive the privilege.[26]

[57] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.[27]

[58] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[28] However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.[29]

Analysis and findings

[59] The representations of the university and the appellant do not directly address whether the covering memoranda are exempt from disclosure pursuant to section 19 of the *Act*.30 However, from my review of the memoranda, it is clear that they are privileged communications between solicitor and client. The memoranda are written by the university's external counsel at the law firm retained by the university, are addressed to the university's general counsel, and contain legal advice. Further, I find that these memoranda were intended to be confidential. While two are marked "privileged and confidential" and one is not, this alone is not determinative. From the fact that the memoranda are directed only to the university's general counsel, and contain legal advice about the distribution of the investigation reports (which, in turn, are marked "privileged and confidential"), I infer that the memoranda were intended to confidential.

[60] I conclude that the covering memoranda contain confidential legal advice from the university's law firm to the university and are therefore subject to solicitor-client communication privilege, thereby qualifying for an exemption under the first branch of section 19.

[61] There is also no evidence before me that the university has waived its privilege

---

26 *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).
27 *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.
28 J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).
29 *General Accident Assurance Co. v. Chrusz,* cited above; Orders MO-1678 and PO-3167.
30 While both parties addressed at some length the applicability of section 19 to the investigation reports, I will not refer to those arguments, because I have found above that the *Act* does not apply to the investigation reports.

over the memoranda.31 Therefore, I find that, subject to my findings on the university's exercise of discretion, the memoranda are exempt from disclosure under section 19 of the *Act*.

[62] I also acknowledge the appellant's public interest arguments. However, section 19 is not one of the exemptions to which the public interest override can apply under section 23, which reads:

> 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.

[63] The Supreme Court of Canada addressed the issue of the absence of a public interest override for solicitor-client privileged records in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*.32 In upholding the constitutional validity of this statutory scheme, the Supreme Court noted that consideration of the public interest is already incorporated in the discretionary language of the exemption.

[64] As I have found that the covering memoranda are exempt from disclosure under section 19 of the *Act*, I do not need to consider whether any of the other exemptions relied on by the university also apply to them.

Issue C: Did the institution exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?

General principles

[65] The section 19 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.

[66] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it exercises its discretion in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

---

31 Again, while the parties made representations on the issue of waiver as it relates to the investigation reports, I will not refer to those arguments, because I have found that the *Act* does not apply to the investigation reports.
32 2010 SCC 23.

[67] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[33] This office may not, however, substitute its own discretion for that of the institution.34

Relevant considerations

[68] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[35]

- 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.

---

33 Order MO-1573.
34 See section 54(2) of the *Act*.
35 Orders P-344 and MO-1573.

Representations, analysis and findings

[69] The university made representations on its exercise of discretion. It submits that it took into account the following considerations in exercising its discretion in favour of non-disclosure of the records:36

a. the lack of a sympathetic or compelling need for the appellant to receive the records

b. the risk that disclosing solicitor-client communications would pose a risk that privilege over other privileged communications would be deemed by a court to have been waived

c. the university's past practice, namely the university's non-disclosure of solicitor-client communications.

[70] Both the university and the appellant also made submissions on the public interest. While, as noted above, the public interest override at section 23 does not apply to records that are exempt under section 19, I have taken into account the parties' public interest arguments in my review of the university's exercise of discretion.

[71] The university submits that it turned its mind to whether a redacted version of the sexual activity report could be disclosed to the public, and even went so far as to have a redacted version of it prepared. It submits that this represents a good faith effort to take into account the public interest in access to information. However, the university concluded that it could not disclose even a redacted version of the reports.

[72] The university further submits that because of the public interest in ensuring the protection of solicitor-client privilege, the public interest would be defeated, not enhanced, by disclosure of the records. The university refers to *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*,37 cited above, where the Supreme Court stated that solicitor-client privilege "has been held to be all but absolute in recognition of the high public interest in maintaining the confidentiality of the solicitor-client relationship". The university submits that solicitor-client privilege is key to enabling institutions to be well-informed about relevant legal principles when faced with challenging circumstances.

[73] The appellant, on the other hand, argues that the university is keeping the

---

36 The university also lists other considerations that it took into account, such as the protection of the personal privacy of third parties. However, those considerations apply only to the investigation reports, which I have found are excluded from the *Act*. Since I cannot review the university's discretion in respect of records that fall outside of the *Act*, I have not listed considerations that only apply to the investigation reports.

37 2010 SCC 23.

records secret to protect its own interests, not to protect the public interest.38

[74] I see no basis upon which to interfere with the university's discretion. The university specifically turned its mind to the possibility of disclosing portions of the investigation reports. Although this does not relate specifically to the covering memoranda, it is evidence that the university was aware of the fact that the section 19 exemption is discretionary, and that it considered the possibility of disclosing portions of the records despite the application of section 19. Ultimately, it exercised its discretion in favour of non-disclosure of the records. The university took into account relevant considerations and there is no evidence that it acted in bad faith or for an improper purpose. I therefore uphold the university's exercise of discretion.

ORDER:

1. I uphold the decision of the university that the investigation reports are excluded from the *Act* pursuant to section 65(6).

2. The three covering memoranda are not excluded from the *Act* pursuant to section 65(6). I uphold the decision of the university that they are exempt from disclosure pursuant to section 19 of the *Act*.

Original Signed by: November 26, 2015

Gillian Shaw
Adjudicator

---

38 I have not referred in detail to the appellant's extensive submissions on the public interest as it relates to the disclosure of the investigation reports, given my conclusion that they excluded from the *Act.*