



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER PO-2743

Appeal PA07-324

York University



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NATURE OF THE APPEAL:

York University (the University) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

... all records and correspondence, including electronic, in the possession of York University that were received from or produced by members of the staff and/or board of directors of the York University Foundation that identify me or relate or pertain to me in any way.”

The University subsequently clarified with the requester that the request is for records from July 2004 to the date of the request.

The University located the responsive records. One record was released in full, and another record was severed on the basis that portions of it are exempt under section 21(1) (personal privacy) of the *Act*. The remaining records were withheld pursuant to sections 19(a) and (c) (solicitor-client privilege) of the *Act*.

The requester (now the appellant) appealed the University’s decision to deny access.

During mediation, the appellant confirmed that he does not wish to pursue access to the portions of the record that were severed pursuant to section 21(1). Accordingly, section 21(1) is no longer an issue in this appeal. In addition, the appellant advised the mediator that he does not wish to pursue access to any duplicate records and to Records 3 and 19.

As no further mediation was possible, this file was transferred to the adjudication stage of the appeals process. I sent a Notice of Inquiry setting out the facts and issues in this appeal to the University, seeking its representations. I received representations from the University. At the same time, the University disclosed parts of Records 11, 17 and 18 to the appellant. I then sent a Notice of Inquiry to the appellant, seeking his representations. I received representations from the appellant.

RECORDS:

The records remaining at issue consist of emails and a fax, details of which are set out in the following index of records:

INDEX OF RECORDS

Record #	No. of Pages	Description	Disclose (Yes/No/Partial)	Sections Applied
1	5	email chain from President and CEO of York University Foundation (YUF) to University Secretary & General Counsel re: forward: Priority appellant’s claim against YUF, President and CEO, President Emerita	N	19(a)&(c)

Record #	No. of Pages	Description	Disclose (Yes/No/Partial)	Sections Applied
2	3	email chain from University Secretary & General Counsel to Claims Manager, named insurance company, cc. President and CEO of York University Foundation, Manager, Insurance, Risk Management and Taxation re: forward: Priority appellant's claim against YUF, President and CEO, President Emerita		19(a)&(c)
8	3	email chain from President and CEO of YUF to Director, Legal Services Re: appellant's claim against YUF, President and CEO, President Emerita	N	19(a)&(c)
9	1	email chain from President and CEO of YUF to University Secretary & General Counsel, Director, Legal Services re: forward: appellant's claim against YUF, President and CEO, President Emerita	N	19(a)&(c)
10	6	email chain from President and CEO of YUF to University Secretary & General Counsel, Director, Legal Services , Claims Manager, named insurance company re: Priority-appellant's claim against YUF, President and CEO, President Emerita	N	19(a)&(c)
11	6	fax from Vice-President, Operations of York University Foundation to Director, Legal Services	P	19(a)&(c)
12	3	email chain from President and CEO of YUF to Director, Legal Services re: appellant: Notice of Libel served on YUF and others this week	N	19(a)&(c)
14	5	email chain from University Secretary & General Counsel to Director, Legal Services re: forward: insurance coverage (forwarding email from President and CEO of YUF)	N	19(a)&(c)
16	2	email chain from University Secretary & General Counsel to Senior Partner & Lawyer of a named law firm, re: forward: privileged and confidential (forwarding email from President and CEO of YUF)	N	19(a)&(c)
17	2	email chain from Chief Marketing Officer to Director, Media Relations, re: forward: YUF ats appellant: privileged and confidential	P	19(a)&(c)

Record #	No. of Pages	Description	Disclose (Yes/No/Partial)	Sections Applied
18	2	email chain from Chief Marketing Officer to Director, Media Relations, re: Forward YUF ats appellant: privileged and confidential (forwarding email from President Emerita to University Secretary & General Counsel, cc. Senior Partner & Lawyer of a named law firm, President and CEO of YUF, Chief Marketing Officer)	P	19(a)&(c)

DISCUSSION:

PERSONAL INFORMATION

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;

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 [Order 11].

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

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 [Orders P-1409, R-980015, PO-2225].

Effective April 1, 2007, the *Act* was amended by adding sections 2(3) and 2(4). These amendments apply only to appeals involving requests that were received by institutions after that date. Section 2(3) modifies the definition of the term "personal information" by excluding an individual's name, title, contact information or designation which identifies that individual in a "business, professional or official capacity". Section 2(4) further clarifies that contact information about an individual who carries out business, professional or official responsibilities from their dwelling does not qualify as "personal information" for the purposes of the definition in section 2(1).

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

The University submits that:

The records contain a limited amount of personal information of the appellant, primarily his name in conjunction with the fact that he brought a legal action by issuing a Statement of Claim against the York University Foundation, its Board of Directors, and certain named individuals. Nevertheless, the records do not concern the appellant as they only deal with the University's communications and strategies with some of the defendants, including the former President of the University.

Although the incident that brought about the lawsuit occurred in the workplace (and thus the appellant filed a grievance against the University), the Statement of

Claim against the [YUF], a federally incorporated charitable body, was made in the appellant's personal capacity.

The lawsuit has been well publicized and disclosure of the records would reveal nothing that is not already known about the appellant except perhaps very limited information about how he and his lawyer pursued the case (which are facts already known to the appellant).

The appellant did not provide representations on this issue.

Analysis/Findings

Based upon my review of the records, I find that they contain the personal information of the appellant. Specifically, I find that the records contain his name along with other personal information relating to him, as contemplated by paragraph (h) of the definition of personal information in section 2(1) of the *Act*. The other personal information that would be revealed by disclosure of the appellant's name concerns the lawsuit that he has brought in his personal capacity.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/SOLICITOR-CLIENT PRIVILEGE

Because the records contain the personal information of the appellant, I will now determine whether the discretionary exemption at section 49(a), in conjunction with the section 19 exemption applies to the information at issue.

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.

Under section 49(a), an institution has the discretion to deny an individual access to their own personal information where the exemptions in sections 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, **19**, 20 or 22 would apply to the disclosure of that information.

In this case, the University relies on section 49(a) in conjunction with sections 19(a) and (c).

Section 19(a) and (c) state as follows:

A head may refuse to disclose a record,

- (a) that is subject to solicitor-client privilege;
- (c) that was prepared by or for counsel employed or retained by an educational institution for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 contains two branches as described below. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

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. [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)].

Solicitor-client communication privilege

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

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

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

The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

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

Litigation privilege

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank* (cited above)].

In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth’s: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

The “dominant purpose” test was enunciated [in *Waugh v. British Railways Board*, [1979] 2 All E.R. 1169] as follows:

A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.

It is crucial to note that the “dominant purpose” can exist in the mind of either the author or the person ordering the document’s production, but it does not have to be both.

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[For this privilege to apply], there must be more than a vague or general apprehension of litigation.

Branch 2: statutory privileges

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.

Statutory solicitor-client communication privilege

Branch 2 applies to a record that was “prepared by or for Crown counsel for use in giving legal advice.”

Statutory litigation privilege

Branch 2 applies to a record that was prepared by or for Crown counsel “in contemplation of or for use in litigation.”

Representations

The University submits that:

The exemptions apply to the records since the records concern the University's response to the lawsuit. The University itself was not named in the suit since the University was responding to the issue through the grievance process. However, the University was interested in discussing the suit against the Foundation for two reasons. First, the York University Foundation, although a separately incorporated body with its own legal counsel, exists to serve the fundraising needs of the University and therefore, the maintenance of its reputation is important to

the University. Second, one of the individuals named in the suit is the University's former President, [name] who was President up until [date]. As President, she occupied an ex officio position on the Foundation's Board of Governors, and accordingly the University's general counsel believed it prudent to maintain a watching brief over the file, notwithstanding that litigation counsel had been retained by the Foundation for it and the President as defendants...

The records document discussions between the University's legal counsel who provided legal advice to the University's President and its communications staff, and reflect discussions with the Foundation, the Foundation's legal counsel, and the University's insurers. All of the discussions were held in the context of the litigation brought against the Foundation and the University's President, and accordingly, the records are exempt from disclosure.

The appellant submits that section 19 does not apply as the YUF and its staff are not clients of the University counsel, nor are they their agents or employees and, furthermore, that the University is not a party to any existing or contemplated litigation.

Analysis/Findings

The records all contain communications from the University's Secretary and General Counsel or the University's Director of Legal Services, acting as the solicitor, and University staff, acting as the client. In Order PO-2738, I recently determined that the YUF is a separate entity from the University and is not part of the University. I agree with the appellant that the YUF and its staff are not clients of the University and therefore, the YUF is not in a solicitor-client relationship with the University's counsel. However, the appellant has initiated legal proceedings not only against the YUF, but also against one of its staff who at the time of the records' creation was both a director of the YUF and the University's President.

Based on my review of the parties' representations and the records, I find that the severed records or parts of records at issue refer directly to direct communications of a confidential nature between University's lawyers and its staff made for the purpose of obtaining or giving professional legal advice. The records constitute email chains and a fax in which the University's solicitors are providing legal advice to its staff and this legal advice forms part of the continuum of communications [Order MO-2206].

Accordingly, I find that the records or parts of records at issue qualify as confidential solicitor-client communications under branch 1 of section 19(a) as they represent direct communications of a confidential nature between a solicitor and client for the purpose of obtaining professional legal advice. I have not been provided with any evidence to support a finding that the privilege in these records has been waived. Subject to my review of the University's exercise of discretion, I conclude that these records or parts of records are exempt from disclosure under section 49(a), in conjunction with section 19(a) of the *Act*.

EXERCISE OF DISCRETION

I will now determine whether the University exercised its discretion under section 49(a), and, if so, whether I should uphold this exercise of discretion.

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.

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

The University submits that:

The primary factor considered by York University in exercising its discretion is that the information is privileged. The records concern communications primarily between the University's legal counsel and the Foundation and its legal counsel regarding the lawsuit brought by the appellant, and therefore disclosure to the appellant could prejudice the Foundation's and the former President's legal position.

As an additional factor, York University considered the ongoing adversarial stance taken by the appellant towards the University. At the time the request was made, there was an outstanding grievance underway addressing the very same issues...

The appellant did not address this issue in his representations.

Analysis/Findings

Based on the University's representations, I find that it exercised its discretion with respect to the undisclosed information in the records at issue in a proper manner, taking into account relevant factors and not taking into account irrelevant factors. The information contained in the records is, in my view, subject to solicitor-client privilege. Although the records concern communications primarily between the University's legal counsel and the Foundation and its legal counsel regarding the lawsuit brought by the appellant, all of the records include legal advice being provided by the University's solicitors to its clients, who are staff members of the University. Furthermore, I find that disclosure of the information at issue in the records will not increase public confidence in the operation of the University.

In conclusion, I find that the University properly exercised its discretion not to disclose the records to the appellant.

ORDER:

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

Original signed by: _____
Diane Smith
Adjudicator

_____ December 12, 2008