

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3318

Appeal PA13-95-2

University of Ottawa

March 11, 2014

Summary: The appellant sought records from the university under the *Freedom of Information and Protection of Privacy Act (FIPPA or the Act)* about himself in the record-holdings of an identified adjunct professor. The university denied access to portions of certain email chains pursuant to the discretionary exemption in section 49(b) (personal privacy). In this order, the adjudicator orders disclosure of the responsive information in the records.

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 and 49(b).

OVERVIEW:

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

...

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

1. [Named faculty], [named Adjunct Professor]

...

[2] The requester specified the scope of the request as being from September 2007 to the date of the request.

[3] In response, the university issued a two-month time extension decision which was subsequently appealed by the requester (now the appellant). As a result of mediation, Appeal PA13-95 was resolved when the university agreed to issue an access decision.

[4] The university issued an access decision advising that partial access had been granted to the requested records. The university provided the appellant with an index of the responsive records describing the nature of each record and the exemptions claimed to deny access to some portions of them. In its index, the university indicated that the personal privacy exemptions in sections 21(1) and 49(b) of the *Act* apply to some of the records.

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

[6] During mediation, the appellant clarified that he was taking issue with the application of the exemptions to Records 10, 11, 13 and 14.

[7] The mediator relayed the issues to the university which advised that no affected persons had been notified of the request. As the records appeared to contain the personal information of both the appellant and the affected persons, the mediator discussed the notification process with the appellant who agreed to be identified as the requester in this appeal.

[8] The mediator contacted one of the affected persons to seek his feedback on the disclosure of the records at issue. The affected person objected to the disclosure of the records at issue.

[9] Upon discussion of the exemptions with the mediator, the appellant indicated that he wished to pursue this appeal to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. I sought and received representations from the university, the appellant and two individuals whose personal information may be contained in the records (the affected persons). Only the appellant and the university provided representations. Representations were exchanged between the university and the appellant in accordance with section 7 of the *IPC's Code of Procedure and Practice Direction 7*.

[10] In this order, I order disclosure of the responsive information in the records.

RECORDS:

[11] The records at issue consist of portions of two emails in the email chain that comprises Record 10 and one email in each of the email chains in Records 11, 13 and 14. The attachment to Record 14 is also at issue. The university has applied the discretionary personal privacy exemption in section 49(b) or the mandatory personal privacy exemption in section 21(1) to these portions of the records.

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(b) apply to the information at issue in Record 10?

DISCUSSION:

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

[12] 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;

[13] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.¹

[14] 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.

[15] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.²

[16] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.³

¹ Order 11.

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

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

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

[18] The university provided both confidential and non-confidential representations on this issue. It submits that the records contain the personal information of individuals other than the appellant. It states that even if the individuals are exchanging e-mails in a professional capacity, the information would reveal something of a personal nature about them.

[19] The university states that the emails at issue in Records 10 and 11 include personal opinions or views about other individuals.

[20] The university states that Records 13 and 14 contain the personal information of a professor. It states that:

To protect the independence of the process and to facilitate the evaluation process at the early stage, it is in the historic practice of the Faculty of Graduate Studies of the University to keep the names and the communications of the evaluators confidential until the decision is given to the student. After the decision is issued, the name of the evaluators and their evaluations are given to the student and the student is invited to communicate with the examiners to get feedback in order to be able to revise his work at their satisfaction... Therefore, the communications of the examiners before a decision is issued are implicitly of a confidential nature and falls under paragraph (f) of the definition of personal information.

[21] The appellant did not provide direct representations on this issue, other than to state that he knew the names of the examiners.

Analysis/Findings

[22] The records are all emails exchanged between university professors about the appellant's work as a graduate student at the university, discussing the appellant's thesis.

[23] Included in the information at issue in both Records 10 and 11 are the travel plans of the affected persons. I find that this information is not responsive to the appellant's request, which sought information only about the appellant. As the travel plans in Records 10 and 11 are not responsive to the appellant's request, I will remove this information from the scope of this request and order the university not to disclose this information.

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

[24] Remaining at issue in Record 10 is a one sentence statement by an affected person. I find that this statement is personal information relating to this individual as it represents the personal opinions or views of the affected person about himself in accordance with paragraph (e) of the definition of personal information in section 2(1). I find that this statement qualifies as the personal information of the appellant also as it contains the affected person's views or opinion about him, in accordance with paragraph (g) of the definition of personal information in section 2(1). Therefore, I will consider whether the discretionary personal privacy exemption in section 49(b) applies to this sentence in Record 10.

[25] Remaining at issue in Record 11 are three sentences. I find that this information is not the personal information of individuals other than the appellant. This information relates to the affected persons and other individuals in their professional capacity only, and does not reveal something of a personal nature about these individuals. Accordingly, as the remaining information in Record 11 is not personal information of other individuals, the personal privacy exemptions in sections 21(1) or 49(b) cannot apply. As no other discretionary exemptions were claimed and no mandatory exemptions apply, I will order this information disclosed.

[26] At issue in Record 13 is an affected person's email to the university's thesis examining board and other professors about his review of the appellant's thesis. I disagree with the university that Record 13 contains the personal information of this affected person. I find that the affected person who wrote the email at issue in Record 13 acted in his professional capacity evaluating the appellant's thesis and that the information in this record does not reveal something of a personal nature about him.

[27] Furthermore, I disagree with the university that an internal university email reviewing a graduate's student's thesis comes within paragraph (f) of the definition of personal information in section 2(1). This email is an internal university email and is not correspondence sent to the university by an individual that is implicitly or explicitly of a private or confidential nature.

[28] As the information at issue in Record 13 does not contain the personal information of any individuals other than the appellant, the personal privacy exemption in sections 21(1) or 49(b) cannot apply to it and I will order it disclosed.

[29] At issue in Record 14 is one email and its attachment. The email was also written by the affected person who wrote the email at issue in Record 13. He sent this email to the university's thesis examining board. The email contains this affected person's main points about his review of the appellant's thesis. The attachment to Record 14 is a copy of this professor's detailed review of the appellant's thesis. For the same reasons as set out above for the information at issue in Record 13, I find that this information is not personal information of other individuals, but information about an affected person in his professional rather than his personal capacity. Therefore, for the same reasons as I

have indicated respecting the information in Record 13, I will order the information at issue in Record 14 disclosed as the personal privacy exemption in sections 21(1) or 49(b) cannot apply to it.

B. Does the discretionary exemption at section 49(b) apply to the information at issue in Record 10?

[30] Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

[31] Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an “unjustified invasion” of the other individual’s personal privacy, the institution may refuse to disclose that information to the requester. Since the section 49(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.⁵

[32] Sections 21(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy.

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

[34] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 49(b), this office will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties.⁶

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

[36] The university submits that the presumption in section 21(3)(g) applies. This section reads:

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

⁵ See below in the “Exercise of Discretion” section for a more detailed discussion of the institution’s discretion under section 49(b).

⁶ Order MO-2954.

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

[37] The university states that the information contained in Record 10 constitutes the affected person's personal evaluation of himself.

[38] The appellant did not provide representations on the application of the presumptions in section 21(3) to the records.

[39] The thrust of section 21(3)(g) is to raise a presumption concerning recommendations, evaluations or references about the identified individual in question rather than evaluations by that individual.⁷

[40] The terms "personal evaluations" or "personnel evaluations" refer to assessments made according to measurable standards.⁸

[41] The information remaining at issue in Record 10 is one sentence that contains the personal opinion or views of an affected person about himself. It is not an assessment made according to measurable standards. I find that the presumption in section 21(3)(g) does not apply to this information.

[42] Section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.⁹

[43] The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2).¹⁰

[44] The university has raised the application of certain factors that favour privacy protection in section 21(2)(h) and (i), which read:

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

- (h) the personal information has been supplied by the individual to whom the information relates in confidence; and

⁷ Order P-171.

⁸ Orders PO-1756 and PO-2176.

⁹ Order P-239.

¹⁰ Order P-99.

- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

[45] Concerning section 21(2)(h), the university states that:

In order to provide independence to examiners and to facilitate the evaluation process at the early stage it is the historic practice of the Faculty to keep confidential the examiners identity and their communications before the decision and the evaluation is given to the student. Therefore, as the information was provided in the evaluation process before the decision had been issued, the expectation of confidentiality of all parties should be inferred and this expectation is reasonable in the circumstances.

[46] The identity of the examiners is not at issue in this appeal, as the university states in its reply representations that the appellant was aware of the names of these individuals.

[47] The university provided confidential representations on the application of section 21(2)(i).

[48] Section 21(2)(h) applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 21(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.¹¹

[49] Based on my review of the sentence at issue in Record 10, I find that I do not have sufficient information that it was written with a reasonable expectation of confidentiality. The affected person who wrote this email did not provide representations. The remainder of the email at issue in Record 10 (other than travel plans) has been disclosed to the appellant. Therefore, I find that the factor in section 21(2)(h) does not apply.

[50] Concerning section 21(2)(i), the applicability of this section is not dependent on whether the damage or harm envisioned by the clauses is present or foreseeable, but whether this damage or harm would be "unfair" to the individual involved.¹²

[51] I did not receive representations from the affected person who wrote the email at issue in Record 10. Based on my review of the sentence at issue in Record 10 and the confidential representations of the university, I find that disclosure of the sentence at issue may damage an affected person's reputation; however, I find that I do not have sufficient information to find that in the circumstances of this case, that this harm

¹¹ Order PO-1670.

¹² Order P-256.

would be unfair. Accordingly, I do not find the factor at section 21(2)(i) to apply in the circumstances of this appeal.

[52] The appellant provided detailed representations raising the unlisted factors favouring disclosure of the information at issue. He submits that disclosure is necessary to shed light on the fairness of the university's graduate thesis evaluation process. He submits that the evaluation process of his thesis was unfair and that the evaluator, one of the affected persons, was biased. He states that disclosure of the information at issue may assist him in gaining information about the fairness of this evaluation process. The university was provided with a copy of the appellant's representations, but did not address this submission in its reply representations.

[53] In previous orders, factors which have also been found to be relevant in determining whether the disclosure would be an unjustified invasion of personal privacy include:

- inherent fairness issues,¹³
- ensuring public confidence in an institution.¹⁴

[54] I find that these factors are relevant in this appeal. Based on my review of the appellant's representations and the information at issue in Record 10, I find that these factors raised by the appellant apply and weigh in favour of the disclosure of the information at issue.

[55] In conclusion, I have found that only factors under section 21(2) which favour disclosure of the information in Record 10 apply and that no presumptions under section 21(3) or factors under section 21(2) protecting privacy interests apply. Therefore, I find that disclosure of the information at issue in Record 10 does not constitute an unjustified invasion of personal privacy. Accordingly, I will order disclosure of the remaining information at issue in the records, which is the one sentence at issue in Record 10.

ORDER:

1. I order the university to disclose all of the remaining information at issue in the records to the appellant, except for the information about travel plans in Records 10 and 11, by **April 15, 2014** but not before **April 9, 2014**. For ease of reference, I have provided the university with a copy of the emails at issue in Records 10 and 11, highlighting the information that should not be disclosed.

¹³ Orders M-82, PO-1731, PO-1750, PO-1767 and P-1014.

¹⁴ Orders M-129, P-237, P-1014 and PO-2657.

2. In order to verify compliance with order provision 1, I reserve the right to require that the university provide me with a copy of the records sent to the appellant.

Original Signed By: _____
Diane Smith
Adjudicator

_____ March 11, 2014