Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2977

Appeal PA08-318

McMaster University

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NATURE OF THE APPEAL:

This appeal involves a request made by the Hamilton Spectator (the "Appellant") to McMaster University (the "University") under the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 (the "*Act*") for access to:

> ... all documents, correspondence and information related to McMaster University's handling of a Freedom of Information request filed by the Hamilton Spectator in 2006 seeking access to [the University President's] employment contract ... to include, but not be limited to, any and all costs incurred by McMaster to respond to The Spectator's FOI request ... [including] but not be limited to, all legal costs associated with actions taken and responses by McMaster with Ontario's Information and Privacy Commissioner and Ontario courts with respect to the Spectator's 2006 FOI request.

The University identified nineteen responsive records. It denied access to thirteen of these records. The basis for denial was the exemption under subsection 19(a) of the *Act*, namely that the records were subject to solicitor-client privilege and that the documents:

> ... were written communications of a confidential nature with legal advisors, which communications were directly related to the seeking, formulating and receiving of legal advice. This includes but is not limited to any statement of account delivered by a legal advisor to a client.

The Appellant appealed the University's decision and its claim to solicitor-client privilege, specifically the University's legal accounts. During the course of this proceeding, the University released four of the thirteen denied records, being Statements of Account dated February 18, June 9 (two) and June 27, 2008. Nine records remain subject to this adjudication.

The University raised an initial concern with the Information and Privacy Commissioner ("IPC") that the denied documents came under solicitor-client privilege not only in respect of the Appellant, but also in relation to the IPC. The University submitted that the documents related to legal advice given on the *Act* generally, the powers of the IPC and the judicial review application filed in respect of the IPC's Order PO-2641. The latter decision dealt with a request for access to the contract and the terms of employment of the University President.

This appeal was not streamed to mediation under Rule 5.05 of the IPC's *Code of Procedure* under the *Act* (the "*Code*"). Rather, the IPC, under subsection 56(1) of the *Act*, delegated to the undersigned, as an outside adjudicator, the powers, duties and functions to conduct this Appeal, including the power to make orders, excluding the limitations (not relevant to this proceeding) under subsection 56(2) of the *Act*.

Section 53 of the *Act* provides that the institution refusing access has the burden of proof that the records fall within one of the specified exemptions in the *Act*. Therefore, in accordance with Rule 7.03 of the IPC's *Code*, written submissions were first sought from the University.

The University did not object to sharing its submissions and same were provided to the Appellant. The Appellant did not provide any responding written submissions, notwithstanding being advised of Rule 7.09 of the *Code* that if a party did not submit representations by the date specified, the inquiry may proceed and an order issued in the absence of such representations. Neither party accepted an invitation to provide oral submissions.

Further submissions were requested, in part, on whether litigation privilege was in fact being claimed and, if so, whether this exemption no longer applied as the litigation had ended.

The University objected to sharing these submissions. Pursuant to subsection 5(a) and section 6 of Practice Direction 7 of the *Code*, I withheld these submissions on the basis that the "disclosure of the information [a detailed reproduction and analysis of the body of the record in question] would reveal the substance of a record claimed to be exempt" and that the information was communicated in a confidence that it would not be disclosed to the other party. The University subsequently provided redacted submissions it consented to share with the Appellant.

I also requested from the parties submissions regarding the exercise of discretion by the University, as section 19 is a discretionary exemption. Again, I have only received submissions from the University.

I have considered the representations received and have reviewed the records in reaching my decision to uphold the University's decision in respect of eight of the nine disputed records.

RECORDS:

The nine records remaining in issue in this appeal are:

Record 1: February 21, 2008, 1:49 p.m. e-mail from legal counsel sent to the University President and University Secretary, copied to further counsel, in respect of the application for judicial review and a second February 21, 2008 e-mail from the University Privacy Officer to the University President discussing counsel's e-mail.

Record 2: February 25, 2008, 1:04 p.m. e-mail from the University Secretary to legal counsel in respect of the application for judicial review and a February 25, 2008 e-mail from legal counsel sent to the University.

Record 3: June 4, 2008, 9:37 a.m. e-mail from the University President to the University Secretary, not copied to legal counsel, and a further June 4, 2008, 10:10 a.m. e-mail from the University Secretary to the University President, copied to legal counsel.

Record 4: June 20, 2008, 2:52 p.m. e-mail from the University Secretary to legal counsel in respect of the application for judicial review.

Record 5: June 23, 2008, 9:35 a.m. e-mail from legal counsel sent to the University Secretary and a further June 23, 2008, 9:56 a.m. e-mail from the University Secretary to legal counsel, both in respect of the application for judicial review.

Record 6: June 23, 2008, 11:40 a.m. e-mail from the University Secretary to legal counsel in respect of the application for judicial review.

Record 7: June 23, 2008, 8:29 a.m. e-mail from legal counsel to the University President and a further June 23, 2008, 3:13 p.m. e-mail from the University, copied to legal counsel, both in respect of the application for judicial review.

Record 8: June 23, 2008, 4:25 p.m. e-mail from legal counsel to the University Secretary in respect of the application for judicial review.

Record 9: June 23, 2008, 4:33 p.m. e-mail from the University Secretary to legal counsel and a further June 24, 2008, 11:11 a.m. e-mail from legal counsel to the University, both in respect of the application for judicial review.

DISCUSSION:

Section 19 of the *Act* provides that:

> 19. 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 for use in giving legal advice or in contemplation of or for use in litigation.

The University's initial submissions confirmed its reliance solely on the subsection 19(a) solicitor-client privilege exemption of the *Act* to the right of access to the denied records. Eight of these records, it submits, are e-mails between the University and legal counsel that were inherently privileged, being communications made confidentially for the purpose of giving and receiving legal advice.

The University cites the Federal Court of Appeal in *Stevens v. Canada (Prime Minister)*, [1998] 161 D.L.R. (4th) 85, that the question whether a document is subject to solicitor-client privilege under the subsection 19(a) exemption is determined "not in the context of the Act, but in the context of the common law." It further cites IPC Order PO-1714/September 2, 1999

for the proposition that at common law, solicitor-client privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, for the purpose of obtaining professional legal advice.

The University submits that one of the denied records (identified as part of Record 3 noted above, the e-mail of June 4, 2008, 9:37 a.m.) was an internal communication between its employees conveying legal advice received from counsel. It further argues that the document relates directly to its strategic considerations respecting the judicial review with the "express and implicit instruction" it be forwarded to counsel to inform him of facts directly related to the judicial review for his consideration and legal advice.

The University submits that legal counsel was included in the subsequent reply to the e-mail for the purpose and in the course of providing legal advice and preparing for the judicial review. Relying on IPC Order P-402/January 15, 1993, the University argues that such communication is also privileged and exempt from disclosure under subsection 19(a) of the *Act*.

The University's additional submissions, however, argue that the disputed records are also subject to subsection 19(c) litigation privilege, the records being created solely in contemplation of and for the dominant purpose of a commenced adversarial judicial review proceeding between it and the IPC, and for discussing internal strategy and the related process.

The University argues that while subsection 19(a) incorporates common law solicitor-client privilege, subsection 19(c) is a clear and unambiguous statutory exemption that does not incorporate common law rules or principles.

The University cites the Ontario Court of Appeal in *Ontario (Attorney General) v. Ontario (Information & Privacy Commissioner*), 2002 CarswellOnt 4070, that the "error made by the inquiry officer was in assuming that the [legislative] intent was to grant litigation privilege to Crown counsel and then reading in the common law temporal limit." Accordingly, the University submits that while common law litigation privilege ends at the conclusion of the litigation, subsection 19(c) privilege "survives the end of the litigation in perpetuity."

The University argues that section 11.01 of the *Code* provides an adjudicator with discretion to decide whether to consider a new discretionary exemption outside the stated 35-day period after the institution is notified of the appeal. The University submits that such exercise of discretion is appropriate in this case as it would not compromise the integrity of the appeal process, nor does it prejudice the Appellant. More specifically, the University argues, citing considerations set out in IPC Order PO-2394/May 24, 2005, that:

- Mediation did not occur in this case, the matter being referred to an independent adjudicator. Hence, the possibility of a mediated resolution was not undermined by the raising of a new discretionary exemption.

- The records in question are not time sensitive. Hence, the Appellant is not prejudiced in any delay arising from the newly raised discretionary exemption.

- There is no significant procedural delay, the Appellant having failed to provide written submissions at any time in this appeal.
- Solicitor-client and litigation privilege are fundamentally important and should be stringently protected.
- The privilege claimed in this proceeding applies not merely to the University but also a third party, a former University employee who was represented by independent counsel and whose privacy must be protected.
- These records do not contain personal information of the Appellant. There is no sympathetic or compelling reason to disclose this sensitive information.
- The introduction of litigation privilege is more akin to an extension of the discretionary solicitor-client privilege already claimed, rather than the introduction of a new ground of exemption.

The University thus asks that its decision denying access to nine responsive records be upheld and this appeal dismissed.

(a) The subsection 19(a) exemption

The Supreme Court of Canada, in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), set out the following fundamental principles underlining the *Act*:

> Access to information in the hands of public institutions can increase transparency in government, contribute to an informed public, and enhance an open and democratic society. Some information in the hands of those institutions is, however, entitled to protection in order to prevent the impairment of those very principles and promote good governance.

Under subsection 19(a) of the *Act*, disclosure may be refused of a record that is subject to solicitor-client privilege. IPC Order PO-2538-R/December 29, 2006, held, on the basis of *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, this branch of the privilege exemption section encompasses both common law solicitor-client privilege and litigation privilege.

Fish J., writing for the majority in *Blank*, held that as a matter of statutory interpretation, the *Act* was adopted nearly a quarter-century ago, when it was not uncommon to treat "solicitor-client privilege" as "a compendious phrase that included both the legal advice privilege and litigation privilege."

Blank, however, further held that litigation privilege is a distinct form of privilege, that "the litigation privilege and the solicitor-client privilege are driven by different policy considerations and generate different legal consequences." *Ontario (Attorney General) v. Ontario (Information & Privacy Commissioner*) states that:

> What is clear now … is that the two privileges are distinct and separate in purpose, function and duration. Solicitor and client privilege protects confidential matters between client and solicitor forever. Litigation privilege protects a lawyer's work product until the end of the litigation.

Blank also stated that "[o]nce the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose — and therefore its justification." Thus, the Court held:

> … the principle "once privileged, always privileged", so vital to the solicitor-client privilege, is foreign to the litigation privilege. The litigation privilege, unlike the solicitor-client privilege, is neither absolute in scope nor permanent in duration.

Accordingly, *Blank* held that "common law litigation privilege comes to an end, absent closely related proceedings, upon the termination of the litigation that gave rise to the privilege." In this case, the judicial review application, to which the University submits the documents in question relate, has come to an end.

The University, thus, relied on common law solicitor-client privilege, or what Fish J. in *Blank* also referred to as legal advice privilege. In *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590, the Supreme Court of Canada, stated that:

> The following statement by Wigmore (8 Wigmore, *Evidence*, para. 2292 (McNaughton rev, 1961)) of the rule of evidence is a good summary, in my view, of the substantive conditions precedent to the existence of the right of the lawyer's client to confidentiality:
>
> > Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.
>
> Seeking advice from a legal adviser includes consulting those who assist him professionally (for example, his secretary or articling student) and who have as such had access to the communications made by the client for the purpose of obtaining legal advice.

Accordingly, IPC Order P-979/July 29, 1997 held that for a record to be subject to the common law solicitor-client privilege, the record must be a written or oral communication of a confidential nature between a client (or the client's agent) and legal advisor that relates directly to seeking, formulating or giving legal advice.

The Federal Court of Appeal in *Stevens* held that "what privilege protects is the integrity of the solicitor-client relationship." It protects "the right to communicate freely and openly with one's solicitor without fear of disclosure of that communication."

Criminal Lawyers' Association confirmed that the institution asserting the exemption has the burden of demonstrating that the exemption applies. It further held that the purpose of the section 19 "exemption is clearly to protect solicitor-client privilege, which has been held to be all but absolute in recognition of the high public interest in maintaining the confidentiality of the solicitor-client relationship."

Regarding Records 2 and 4 to 9 set out above, I am persuaded that the University has satisfied its onus regarding the subsection 19(a) exemption for disclosure. I find that:

- the records are written communications between a client, the University, and a legal advisor;

- the communications are of a confidential nature; and,

- the communications relate directly to seeking, formulating or giving legal advice.

Accordingly, I uphold the University's decision to withhold these records.

Regarding Record 1, I am persuaded that the February 21, 2008, 1:49 p.m. e-mail is similarly exempt under subsection 19(a) of the *Act*. A second e-mail of the same date is between University employees. In that document, a University employee who is not a legal advisor, reports to another employee on the content of a discussion with legal counsel.

IPC Order P-402, noted above, addressed a written communication from a Ministry employee, who was not a legal advisor, to a Ministry Director, reporting on the content of her meeting with a legal advisor and the advice she received at that meeting. Commissioner Mitchinson found that the test for exemption was established. Consistent with that decision, I find that the test for exemption has been established under subsection 19(a) of the *Act* regarding this record discussing counsel's e-mail, and I uphold the University's decision in this regard.

Turning to Record 3 noted above, I am persuaded that the June 4, 2008, 10:10 a.m. e-mail copied to legal counsel is also exempt, being a communication copied to legal counsel.

The 9:37 a.m. e-mail of June 4, 2008, however, is not a communication between a client and counsel. Nor is this an internal communication from one employee to another employee conveying legal advice received from counsel. Further, this is not communication between agents of a client and his solicitor, or communications between a client and agents of the solicitor, situations to which the Supreme Court of Canada in *Descôteaux* found that the principle of solicitor-client privilege extended.

Rather, this document pertains to the gathering of external information from non-counsel by a University employee, communicated to another University employee. This is different from IPC Order P-402, where a Ministry employee who was not a legal advisor reported on the content of her meeting with a legal advisor and the advice she received at that meeting. I am not persuaded that the University has established its exemption of the June 4, 2008 9:37 a.m.

e-mail under subsection 19(a) of the *Act* as solicitor-client privilege in the sense of legal advice privilege, as it initially submitted.

(b) The subsection 19(c) exemption

The University's subsequent submissions argue, in the alternative, that the 9:37 a.m. e-mail of June 4, 2008 was an internal e-mail generated in contemplation of the Judicial Review proceeding, "subsequently delivered to and considered by counsel for the purposes of offering legal advice to the institution in respect of the Judicial Review," and would come under the litigation privilege exemption of subsection 19(c) of the *Act*.

Subsection 19(c) of the *Act* is not based on the common law. The Ontario Court of Appeal, in *Ontario (Attorney General) v. Ontario (Information & Privacy Commissioner*), interpreted a prior version of section 19 of the *Act* that read:

> **19**. A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

The Court held that neither the words of the Attorney General to the Standing Committee nor the provision itself supported importing the common law temporal limit to the second part of section 19 immediately above, namely a record prepared for use in giving legal advice or in contemplation of or for use in litigation.

The second part of this former section 19, relevant to this case, is now found in subsection 19(c). I am persuaded that the reasoning in *Ontario (Attorney General) v. Ontario (Information & Privacy Commissioner*) applies equally to the present subsection 19(c). On the plain wording of the provision, I see no basis to import a temporal limit into subsection 19(c).

The University, however, did not initially rely on subsection 19(c) of the *Act* in denying access to any records. Section 11.01 of the *Code* provides that:

> In an appeal from an access decision, excluding an appeal arising from a deemed refusal, ***an institution may make a new discretionary exemption claim only within 35 days after the institution is notified of the appeal***. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period. [emphasis added]

In this case, the new discretionary exemption claim was raised more than a year after the University was notified of this appeal. It was raised in response to my request for clarification as to whether the exemption claimed by the University was one of litigation privilege, (which would come under the subsection 19(a) exemption that encompassed common-law litigation privilege) and that as the litigation was over, the privilege no longer applied. Thus, the question arises whether this new discretionary exemption should be considered.

(c) Discretion to consider a new discretionary exemption

Senior Adjudicator John Higgins held in Order MO-2226 that:

> The purpose of this office's 35-day policy is to provide institutions with a window of opportunity to raise new discretionary exemptions, but only at a stage in the appeal where the integrity of the process would not be compromised and the interests of the requester would not be prejudiced. The 35-day policy is not inflexible, and the specific circumstances of each appeal must be considered in deciding whether to allow discretionary exemption claims made after the 35-day period (Orders P-658, PO-2113). The 35-day policy was upheld by the Divisional Court in *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg* (21 December 1995), Toronto Doc. 110/95, leave to appeal refused [1996] O.J. No. 1838 (C.A.)

Under subclauses 29(1)(b)(i) and (ii) of the *Act*, notice of refusal to give access to a record or part of a record shall, where there is such a record, set out the specific provision of the *Act* under which access is refused and the reason the provision applies to the record.

As noted, the University's initial letter to the Appellant denying access to records stated that:

> The responsive records to which access is denied were written communications of a confidential nature with legal advisors, which communications directly related to the seeking, formulating and receiving of legal advice.

The University, in its initial submissions in this proceeding, submitted that one "of the responsive records was an internal communication from one McMaster employee to another conveying legal advice received from counsel."

On my review of the record in question, I find that neither of these statements accurately describes the 9:37 a.m. e-mail of June 4, 2008, which was not a communication with a legal advisor, or an agent of a legal advisor, or passing on legal advice received from counsel.

In IPC Order MO-2308/May 23, 2008, Adjudicator Loukidelis stated that:

> Earlier identification of an exemption claim permits an appellant the time to consider and reflect on its application, consult on the issue if desired, and to address the exemption claim in mediation. In my view, there is something inherently unfair to an appellant in discovering the basis for an institution's denial of access through a Notice of Inquiry issued long after the appeal process has been initiated.

As noted by the University, mediation did not occur in this case. Nonetheless, I find, in the specifics of this case, the integrity of the process would be compromised and the interests of the Appellant would be prejudiced if this new (and as noted in *Blank*, distinct) discretionary exemption is allowed to be claimed under a separate (non-common law) subsection on the basis of a changing description of the document in question. Accordingly, pursuant to Rule 11.01 of the

Code, I decline to exercise my discretion to consider the new discretionary exemption claim of subsection 19(c) of the *Act* made after the 35-day period allowed.

(d) The University's Exercise of Discretion

I have found that eight of the nine dispute records are exempt from disclosure under subsection 19(a) of the *Act*. IPC Order PO-2364/January 25, 2005 provides that the section 19 exemption is discretionary and permits an institution to disclose information despite the fact that it could withhold it. On appeal, an adjudicator may determine whether the institution failed to exercise its discretion or whether 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

If any of these circumstances are present, the matter may be sent back to the institution for an exercise of discretion based on proper considerations. The adjudicator may not, however, substitute his or her own discretion for that of the institution.

Relevant considerations include the following, although not all those listed will necessarily be relevant and additional unlisted considerations may be relevant (Orders P-344, MO-1573):

- 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.

Criminal Lawyers' Association held that the duty of the Reviewing Commissioner involves two steps:

> First, the Commissioner determines whether the exemption was properly claimed. If so, the Commissioner determines whether the head's exercise of discretion was reasonable.

Further, the Court confirmed that:

> The Commissioner may quash the decision not to disclose and return the matter for reconsideration where: the decision was made in bad faith or for an improper purpose; the decision took into account irrelevant considerations; or, the decision failed to take into account relevant considerations (see IPC Order PO-2369-F/February 22, 2005, at p. 17).

The Court, however, regarding records falling under the section 19 solicitor-client exemption, cited Major J., in *R. v. McClure*, 2001 SCC 14, who, stressing the categorical nature of the privilege, held that:

> ... solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis.

I am persuaded that, regarding the documents for which I found the subsection 19(a) properly claimed, the University's exercise of discretion was reasonable. Given specifically the importance of the solicitor-client relationship protected by subsection 19(a) noted in *Stevens* above, I am not persuaded that the University's decision regarding these exempted documents was made in bad faith or for an improper purpose, that the decision took into account irrelevant considerations or failed to take into account relevant considerations. Thus, I am not persuaded that this matter should be sent back to the University for reconsideration.

ORDER:

1. I order the University to disclose the e-mail of Record 3 identified as the June 4, 2008, 9:37 a.m. e-mail, within thirty (30) days after the date of this order.

2. I uphold the University's decision not to disclose the remaining records in their entirety.

	June 30, 2011
Lawrence Blackman Adjudicator	Date