

Information and Privacy Commissioner,  
Ontario, Canada



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

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## FINAL ORDER PO-4077-F

Appeals PA12-266, PA13-337 and PA17-152

University of Ottawa

October 27, 2020

**Summary:** The appellant sought access to records relating to the university's funding of a specified lawsuit commenced by one of its current employees against a former employee. In Interim Order PO-4008-I, the adjudicator upheld the university's decision to withhold all the information at issue except for the total global amount of the invoices which he found did not qualify for exemption under sections 17(1) or 19(a) of the *Freedom of Information and Protection of Privacy Act* (the *Act*). He deferred a determination of whether the total global amount of the invoices qualified for exemption under section 21(1) until after he sought further representations on the issue. In this final order the adjudicator finds that the total global amount of the invoices is the personal information of the current employee but that it does not qualify for exemption under section 21(1) of the *Act* because it is an employee benefit under section 21(4)(a). He orders that the university disclose the total global amount of the invoices to the appellant.

**Statute 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"), 21(1), 21(4)(a); *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M.56, as amended, section 14(4)(a).

**Orders Considered:** Orders M-23, P-1212, MO-2293, MO-2521, PO-1952, PO-2568, PO-2641, PO-4008-I.

**Cases Considered:** *Hill v. Church of Scientology*, 1995 CanLII 59 (SCC), [1995] 2 SCR 1130; *Vaughan (City) v. Ontario (Information and Privacy Commissioner)*, 2011 ONSC 7082.

## OVERVIEW:

[1] This final order deals with the remaining issue to be addressed in three appeals arising out of three access requests under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*).

[2] The University of Ottawa (the university) initially received a request for access to records related to the university's funding of a specified defamation action brought by one of its employees (the current employee) against a former employee. In particular, the request was for access to:

All financial records (such as [a named law firm's] invoices) about the university's funding of the [current employee] vs. [former employee] defamation lawsuit. I expect these records to be in the appropriate finance department or service that would be implicated in a university's funding of litigation using an external law firm.

[3] The appellant's request stated that "[m]y main interest is ascertaining how much money has been spent or committed in this litigation."

[4] The university identified law firm invoices as responsive to the request and subsequently issued a decision relying on the discretionary exemption at section 19(a) (solicitor-client privilege) and the mandatory exemptions at sections 17(1) (third party information) and 21(1) (personal privacy) of the *Act* to deny access to the responsive records, in full.

[5] Mediation did not resolve the issues in appeal PA12-266, and the matter was moved to the adjudication stage of the appeal process. During the inquiry into appeal PA12-266 representations were sought and received from the university, the current employee and the named law firm (the affected parties), and the appellant, and were shared in accordance with section 7 of this office's *Code of Procedure and Practice Direction Number 7*.

[6] In the meantime, this office received another appeal from the appellant arising from a decision of the university denying access to similar information but for a later time period, which was assigned appeal file number PA13-337. As appeal PA13-337 did not move past the intake stage no representations were sought or exchanged.<sup>1</sup>

[7] Then, once all the proceedings in the defamation lawsuit had been completed, the appellant filed a third request, which covered the time period of the first two

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<sup>1</sup> As the records at issue in the present appeal are responsive to all three appeals (and requests) and the university, the named law firm and the current employee made extensive representations on the request for access to the legal invoices, and considering my determinations in this order, I decided that it was not necessary for me to seek specific representations on appeal PA13-337.

requests and was for access to:

All records about the [university's] funding of the [current employee] v. [former employee] defamation lawsuit. The respondent period is January 1, 2011 to present.

[8] The requester explained in his third request that:

My goal in this request is to determine the total dollar amount of the publicly-funded university's expenditures on legal fees (including lawyer's fees and disbursements) in the above-mentioned lawsuit. ...

Although it is expected that many of the records will be privileged, you nonetheless have a duty to create and disclose a summary record containing invoice dates and dollar amounts, ... .

... I will consider my request completed if such a summary document is provided.

[9] The university then created a new summary record containing the total legal fees and disbursements that appear on each of the 51 separate invoices submitted to the university. After receiving the position of the affected parties on disclosure, the university denied access to it. The appellant appealed the decision and the appeal was assigned appeal file number PA17-152, which was moved directly from intake to the adjudication stage, bypassing mediation. During the inquiry of appeal PA17-152, representations were sought and received from the university, the affected parties, and the appellant, and were shared in accordance with section 7 of this office's *Code of Procedure and Practice Direction Number 7*.

[10] In the course of the exchange of representations in both appeals PA12-266 and PA17-152, the possible application of the public interest override at section 23 of the *Act* became an issue to be addressed in the appeals.

[11] The appeals were then all transferred to me to adjudicate them.

[12] As all three appeals shared common issues, and the same parties, I decided to address them all in one consolidated order.

[13] In Interim Order PO-4008-I, I upheld the university's decision to withhold the dates, body and particular amounts of each invoice, as well as the summary record containing the total legal fees and disbursements the university created in Appeal PA17-152, but found that the total global amount of the invoices alone did not qualify for exemption under sections 17(1) or 19(a) of the *Act*. I decided in all the circumstances, to defer a determination on whether the total global amount of the invoices qualified for exemption under section 21(1) (personal information), including whether any of the circumstances in section 21(4), such as 21(4)(a) (employee benefit) applied, until after I sought further representations on this issue.

[14] Accordingly, I sent a Notice of Inquiry, setting out the facts and issues, to the university, the law firm and the current employee. The Notice of Inquiry asked for representations on the issue of whether the remaining information at issue met the definition of personal information under section 2(1) of the *Act*, and if so, whether it qualified for exemption under section 21(1) (personal information), and in that regard whether as an employee benefit under 21(4)(a) it should nonetheless be disclosed as an exception to the exemption. The university, the law firm and the current employee provided responding representations.

[15] I determined that in all the circumstances it was not necessary to share the representations I received with the appellant or to seek representations from him.

[16] In this order, I find that the total global amount of the legal invoices is the personal information of the current employee but that it does not qualify for exemption under section 21(1) of the *Act* because it is an employee benefit under section 21(4)(a). I order that the university disclose the total global amount of the legal invoices to the appellant.

## **RECORDS:**

[17] Remaining at issue is the total global amount of all the legal invoices at issue in the appeals.

## **ISSUES:**

- A. Is the information "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the section 21(4)(a) employee benefit exception to the personal privacy exemption at section 21(1) apply to the information at issue?

## **DISCUSSION:**

### **Issue A: Is the information at issue "personal information" as defined in section 2(1) and, if so, to whom does it relate?**

[18] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the information is "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;

[19] 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.<sup>2</sup>

[20] 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.<sup>3</sup> 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.<sup>4</sup>

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<sup>2</sup> Order 11.

<sup>3</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

<sup>4</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

[21] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>5</sup>

***The representations of the university and law firm***

[22] The law firm objects to the release of the information at issue, but provides no specific representations on the definition of personal information or the application of the section 21(1) exemption.

[23] The university submits that the total global amount of the invoices consists of "personal information" as defined in paragraph (b) of the definition of that term in section 2(1) of the *Act*.

[24] The university submits that:

The total global amount of the invoices belongs to the current employee and relates to financial transactions in which the current employee has been involved in a personal capacity. More specifically, the total global amount of the invoices relates to the defamation litigation initiated personally by the current employee and consists of her personal information.

***The current employee's representations***

[25] The current employee submits that the total global amount of the invoices is the current employee's confidential personal information because it reflects confidential legal services that were provided to the current employee personally, and not to the university.

***Analysis and finding***

[26] The defamation action that is the subject of the appeals before me has received a fair amount of publicity. The university committed to reimbursing the current employee's legal fees, and did so. The litigation was particularly contentious and protracted with multiple interlocutory motions and appeals over the course of approximately five years. The litigation has now concluded, after having wound its way in some form all the way to the Supreme Court of Canada.

[27] This office has previously considered whether legal invoice dollar amounts can be considered the personal information of an individual. In Order PO-1952, which was

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<sup>5</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

upheld by both the Divisional Court and the Court of Appeal<sup>6</sup>, the adjudicator considered an access request for the total dollar amount of legal fees paid by the Ministry of the Attorney General (MAG) to lawyers retained by an accused individual. MAG paid the accused's legal fees pursuant to the *Criminal Code*<sup>7</sup>. MAG claimed several exemptions to deny access to the records, including section 21 (personal privacy). In Order PO-1952, the adjudicator found that the total dollar amount of legal fees paid to the lawyers were not financial transactions involving the accused, as any financial transaction was between MAG and the lawyers. However, as the accused's identity was publicly known and the aggregate figures reflected in the record related to various billings or payments made by MAG to his lawyers, the adjudicator found that the information was "about an identifiable individual" and fell within the scope of the introductory wording of the definition of "personal information".

[28] In Order PO-2568, this office was again considering a request for access to the total dollar amount of legal fees and disbursements paid by MAG to lawyers representing an accused individual. MAG had denied access to the information on the basis of multiple exemptions, including, again, the personal privacy exemption at section 21 of the *Act*. Referencing Order PO-1952, the adjudicator in Order PO-2568 found that the amount paid by MAG to the accused's law firm did not qualify as financial transactions involving the accused, as it was clear that the accused was not involved in any financial transactions between MAG and the law firm. However, the adjudicator accepted that the information was about the accused in a more general sense, and found that it fit within the scope of the introductory wording of the definition of "personal information".

[29] While the above cases involve an institution's payment of an accused's legal fees, and not an employee's legal fees, I find that the same reasoning is applicable to the circumstances of this appeal. By its nature a defamation action is a response to a personal attack on the integrity and reputation of an individual, who in the appeal before me happens to be a lawyer. In *Hill v. Church of Scientology*<sup>8</sup>, the Supreme Court of Canada explained:

Although it is not specifically mentioned in the *Charter*, the good reputation of the individual represents and reflects the innate dignity of the individual, a concept which underlies all the *Charter* rights. It follows that the protection of the good reputation of an individual is of fundamental importance to our democratic society.

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<sup>6</sup> In *Ontario (Ministry of the Attorney General) v. Mitchinson*, 2004 CanLII 13070 (ON SCDC) and *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, 2005 CanLII 6045 (ON CA).

<sup>7</sup> RSC 1985, c C-46.

<sup>8</sup> 1995 CanLII 59 (SCC), [1995] 2 SCR 1130.

Further, reputation is intimately related to the right to privacy which has been accorded constitutional protection. As La Forest J. wrote in *R. v. Dymont*, 1988 CanLII 10 (SCC), [1988] 2 S.C.R. 417, at p. 427, privacy, including informational privacy, is "[g]rounded in man's physical and moral autonomy" and "is essential for the well-being of the individual". The publication of defamatory comments constitutes an invasion of the individual's personal privacy and is an affront to that person's dignity. ...<sup>9</sup>

[30] In this case the current employee's identity is publicly known, and the invoices relate to the total amount paid by the university to reimburse the current employee's legal fees. Therefore, in my view, this information falls within the introductory wording of the definition of "personal information".

[31] As a result, I find that the total global amount of the invoices alone qualifies as the current employee's personal information within the meaning of section 2(1) of the *Act*.

**Issue B: Does the section 21(4)(a) employee benefit exemption to the mandatory personal privacy exemption at section 21(1) apply to the information at issue?**

[32] The university and the current employee took the position that the total global amount of the invoices was subject to the mandatory exemption at section 21(1) and the public interest override at section 23 of the *Act* did not apply<sup>10</sup>. The law firm objected to the release of the information and also took the position that it was not in the public interest that the information be disclosed. However, although invited to do so, they did not provide any representations on whether the information at issue constituted a benefit under section 21(4)(a) of the *Act*, with its disclosure thereby not resulting in an unjustified invasion of personal privacy.

[33] Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies. The only relevant exception here is the section 21(1)(f) exception, allowing disclosure if it would not be an unjustified invasion of personal privacy. Determining whether section 21(1)(f) applies requires a consideration of sections 21(2), (3) and (4).

[34] However, notwithstanding the application of the factors at sections 21(2) or the presumptions at section 21(3), if any of paragraphs (a) to (d) of section 21(4) of the *Act* apply, disclosure is not an unjustified invasion of personal privacy and the

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<sup>9</sup> *Ibid*, at paragraphs 120 and 121.

<sup>10</sup> Section 23 of the *Act* provides that an exemption from disclosure of a record under sections 13, 15, 15.1, 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.



information is not exempt under section 21. In this appeal section 21(4)(a) is relevant.

[35] Section 21(4)(a) reads:

(4) Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,

(a) discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution or a member of the staff of a minister;

***What constitutes a benefit?***

[36] This office has interpreted “benefits” to include entitlements, in addition to base salary, that an employee receives as a result of being employed by the institution. The following have been found to qualify as “benefits”:

- insurance-related benefits,
- sick leave, vacation,
- leaves of absence,
- termination allowance,
- death and pension benefits,
- right to reimbursement for moving expenses, and
- incentives and assistance given as inducements to enter into a contract of employment.<sup>11</sup>

***Analysis and finding***

[37] As set out above, although invited to do so, none of the university, law firm or current employee provided representations on this issue.

[38] This office has considered the meaning of “benefits” in section 21(4)(a) of *FIPPA* and the equivalent section 14(4)(a) of the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)*<sup>12</sup> in several orders. In Order M-23, the adjudicator found that since “benefits” available to officers or employees of an institution are paid from the public purse, “benefits” should be given a fairly expansive interpretation. The adjudicator wrote:

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<sup>11</sup> Orders M-23 and PO-1885.

<sup>12</sup> RSO 1990, c M.56.

In my opinion, the word "benefits" as it is used in section 14(4)(a), means entitlements that an officer or employee receives as a result of being employed by the institution. Generally speaking, these entitlements will be in addition to a base salary. They will include insurance-related benefits such as, life, health, hospital, dental and disability coverage. They will also include sick leave, vacation, leaves of absence, termination allowance, death and pension benefits. As well, a right to reimbursement from the institution for moving expenses will come within the meaning of "benefits". ...

[39] In Order P-1212, the adjudicator applied this expansive definition of "benefits" and found that "all of the entitlements provided to [a former College President] as part of his employment or upon conclusion of his employment as an officer and/or employee of the College are properly characterized as 'benefits' for the purpose of section 21(4)(a)."

[40] In the judicial review of Order MO-2521, the Divisional Court upheld this office's expansive approach to benefits in *Vaughan (City) v. Ontario (Information and Privacy Commissioner)*<sup>13</sup>. Order MO-2521 related to an access request for every invoice submitted for reimbursement by a city employee for his use of the 407 toll highway. In the access decision that was the subject of Order MO-2521, the city had provided partial access to the requested records, withholding the employee's entry and exit points and the related times of entry and exit on the basis that disclosure of this information would be an unjustified invasion of privacy. In Order MO-2521, the adjudicator ordered disclosure of the withheld information on the basis that the city's payment of the employee's 407 toll expenses is a "benefit" under section 14(4)(a), as it is an entitlement that the individual receives as a result of being employed by the institution, in addition to his base salary.

[41] On judicial review, the city argued that section 14(4)(a) only captures descriptions of an employment agreement. The Divisional Court disagreed:

... While s. 14(4)(a) may include this information, it is certainly not limited as such. Instead, the clear wording of this section captures information that "discloses" a benefit. **This calls for an expansive interpretation, as a wide variety of information is capable of "disclosing" a benefit. Indeed, anything from a reimbursed restaurant receipt to an insurance policy can "disclose" a benefit.**<sup>14</sup> [Emphasis added.]

[42] The court found that the IPC's decision was reasonable, and supported by the overarching goals of transparency and accountability under *MFIPPA*. The court

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<sup>13</sup> 2011 ONSC 7082.

<sup>14</sup> *Ibid*, at paragraph 42.

elaborated as follows:

... As the benefits available to municipal employees are paid from the public purse, it is inconsistent with the democratizing features of the Act to withhold the redacted information.

When municipal employees use publicly funded benefits for personal use, they must also be aware of their accountability to taxpayers. As stated in a decision of the Commissioner in Order P-256, Liquor Control Board of Ontario, [1991] O.I.P.C. No. 49, at p. 9:

In submitting expense claims for reimbursement, government employees should do so on the basis that they may be called upon to substantiate each and every expenditure, both internally to the management staff of the institution, and externally to the general public.

Where the tax payers of the municipality bear the burden of funding an employee's benefit, and this benefit is used in a personal capacity, they retain the right to know the details of its usage under s. 14(4)(a) of the MFIPPA. If the employee did not care for such scrutiny, there remained the options of purchasing a personal transponder for the highway or reimbursing the City for the personal trips taken. By accepting money from the public coffers to compensate his use of the highway, the employee tacitly accepted the responsibility to substantiate his expenses to taxpayers.<sup>15</sup>

[43] In Order MO-2293, the adjudicator found that information in a severance agreement related to "payments in lieu of accumulated but unpaid leaves of absence, time earned, and allowances, as well as pension contributions and a legal indemnification clause effective to the date of resignation" reflected benefits to which the affected party was entitled under his employment contract, and therefore met the definition of "benefit" in section 14(4)(a) of *MFIPPA*.

[44] In Order PO-2641, the adjudicator found that the following information in a university President's agreement with the university constituted "benefits" under section 21(4)(a):

... information relating to the President's termination allowance, bonus payments, benefits due upon retirement, benefits relating to estate planning, legal advice, leased vehicles, membership dues at social and sporting clubs, entitlement to reimbursement for health care costs,

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<sup>15</sup> *Ibid*, at paragraphs 44 to 46.

research allowances, right to reimbursement for reasonable and identifiable expenses, payments made in lieu of accumulated leaves of absences, and the right to renegotiate identified terms of the contract relating to benefits. ...

[45] In my view, the above decisions support a conclusion that the university's reimbursement of the current employee's legal expenses amounts to an employee "benefit" under section 21(4)(a). This approach aligns with the Divisional Court's support of an expansive definition of "benefit", including anything from a reimbursed restaurant receipt to an insurance policy. It is also supported by the notion that the public should have transparency regarding public expenditures. Given the precedent for finding that the legal indemnification of or provision of legal advice to an officer or employee constitutes a "benefit" in Orders MO-2293 and PO-2641, in my view, the university's reimbursement of the current employee's legal invoices for her defamation lawsuit also qualifies as a "benefit" under section 21(4)(a) of the *Act*.

[46] Accordingly, I find that the exception in section 21(4)(a) applies and disclosing the total global amount of the legal invoices would not constitute an unjustified invasion of personal privacy.<sup>16</sup>

[47] As the total global amount of the legal invoices is not exempt under section 21(1) I will order this information be disclosed to the appellant.

## ORDER:

1. I order the university to disclose the the total global amount of the legal invoices to the appellant by **November 2, 2020** but not before **November 28, 2020**.
2. In order to verify compliance with this order, I reserve the right to require the university to provide me with a copy of what it discloses to the appellant.
3. The timelines noted in order provision 1 may be extended if the university is unable to comply in light of the current COVID-19 situation, and I remain seized to consider any resulting extension request.

Original signed by \_\_\_\_\_  
Steven Faughnan  
Adjudicator

October 27, 2020 \_\_\_\_\_

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<sup>16</sup> In light of this conclusion, it is not necessary for me to address any of the other issues raised in the Supplementary Notice of Inquiry or the parties' representations on those issues.