

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-4342

Appeal PA21-00523

McMaster University

January 26, 2023

**Summary:** The appellant, while a student at McMaster University (the university), made a complaint against the university to the university's Office of Equity and Inclusion. The university's counsel retained an investigator to investigate the events in question and prepare a report. The appellant made a request under the *Freedom of Information and Protection of Privacy Act* to the university for a copy of the report, which the university denied. In this order, the adjudicator finds that the report is exempt from disclosure under section 49(a) (discretion to refuse requester's own personal information), read with section 19(c) (solicitor-client privilege), because the report was prepared for university counsel for use in giving legal advice to the university. The university's decision is upheld and the appeal is dismissed.

**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"), 19 (c) and 49(a).

**Orders Considered:** Orders MO-2195 and PO-2967.

### BACKGROUND:

[1] The appellant was a graduate student at McMaster University (the university). As a result of certain events relating to the appellant's research, he made a complaint against the university and various faculty to the university's Office of Equity and Inclusion. Counsel for the university retained a consultant to investigate the appellant's allegations and prepare a report. Upon completion of the report, it was provided to the

university and its counsel. The university and the appellant entered into voluntary mediation and settled the complaint.

[2] The appellant then made a request to the university under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the report. The university denied access on the basis that the report was prepared for use in giving legal advice, relying on the exemptions for solicitor-client privilege in sections 19(a) and (c) of the *Act*.

[3] The appellant appealed the university's decision to the Information and Privacy Commissioner of Ontario (IPC), and a mediator was assigned to explore resolution and clarify the issues on appeal. During mediation, the university confirmed that in denying access, it relies on section 49(a) (discretion to withhold requester's own personal information) read with sections 19(a) and (c).

[4] The appeal was not resolved at mediation and the appellant informed the mediator that he wished to pursue the appeal at adjudication. I conducted an inquiry under the *Act* in which the parties provided representations.<sup>1</sup>

[5] In this order, I find that that report is exempt under section 49(a), read with section 19(c) and I uphold the university's decision to withhold it on that basis. I dismiss the appeal.

## **RECORD:**

[6] The record at issue is an independent investigation report relating to events involving the appellant and the university.

## **ISSUES:**

- A. Does the report contain the appellant's "personal information" as defined in section 2(1)?
- B. Does the discretionary exemption at section 49(a), allowing an institution to refuse access to a requester's own personal information, read with the section 19 solicitor-client privilege exemption, apply to the report?
- C. Did the university exercise its discretion under section 49(a)? If so, should I uphold the exercise of discretion?

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<sup>1</sup> Portions of the university's representations were withheld from the appellant, in accordance with the confidentiality criteria in Practice Direction 7 and section 7 of the IPC's *Code of Procedure*.

## **DISCUSSION:**

### **Issue A: Does the report contain the appellant's "personal information" as defined in section 2(1)?**

[7] To decide which sections of the *Act* may apply to a record, the IPC must first decide whether the record contains "personal information," and if so, whose. As I explain below, the report contains the appellant's personal information. His request is, therefore, a request for his own personal information under Part III of the *Act*.<sup>2</sup>

[8] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual." Recorded information is information recorded in any format, such as paper records, electronic records, digital photographs, videos, or maps.<sup>3</sup>

[9] Information is "about" the individual when it refers to them in their personal capacity, which means that it reveals something of a personal nature about the individual.

[10] Section 2(1) of the *Act* gives a list of examples of personal information, one of them being information relating to an individual's education [paragraph (b)]. The list of examples of personal information under section 2(1) is not a complete list, meaning that other kinds of information can also be "personal information."<sup>4</sup>

[11] The parties do not dispute, and I find, that the report contains the appellant's personal information. Among other things, it contains information about his education, as well as his account and others' accounts about the events leading to his complaint to the university's Office of Equity and Inclusion. This is information about the appellant in his personal capacity and is, therefore, his personal information.

### **Issue B: Does the discretionary exemption at section 49(a), allowing an institution to refuse access to a requester's own personal information, read with the section 19 solicitor-client privilege exemption, apply to the report?**

[12] 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 some exemptions from this right. Section 49(a) of the *Act* reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

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<sup>2</sup> Under sections 47(1) and 49 of the *Act*, a requester has a right of access to their own personal information, and any exemptions from that right are discretionary, meaning that the institution can still choose to disclose the information even if the exemption applies.

<sup>3</sup> See the definition of "record" in section 2(1).

<sup>4</sup> Order 11.

where section 12, 13, 14, 14.1, 14.2, 15, 15.1, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

[13] The discretionary nature of section 49(a) (“may” refuse to disclose) recognizes the special nature of requests for one’s own personal information and the desire of the Legislature to give institutions the power to grant requesters access to their own personal information.<sup>5</sup> I address the university’s exercise of discretion further under Issue C.

[14] In this case, the university relies on section 49(a) read with section 19. Section 19 exempts certain records from disclosure, either because they are subject to solicitor-client privilege or because they were prepared by or for legal counsel for an institution. It states:

A head may refuse to disclose a record,

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

[15] Section 19 contains three different exemptions, which the IPC has referred to in previous decisions as making up two “branches.” The first branch is found in paragraph (a), and the second is found in paragraph (b) or (c), depending on the type of institution. Here, the institution is a university, so the relevant paragraph for the second branch is paragraph (c).

[16] The first branch, found in section 19(a), (“subject to solicitor-client privilege”) is based on the common law. The second branch is a statutory privilege created by the *Act*.

[17] The institution must establish that at least one branch applies. Here, the university says that both branches apply. Specifically, it relies on the common law solicitor-client communication privilege and the statutory communication privilege. Because I find below that the statutory communication privilege applies, I do not need to consider the common law communication privilege.

## **Branch 2: statutory privilege**

[18] The branch 2 exemption is a statutory privilege that applies where the records

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<sup>5</sup> Order M-352.

were “prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.” The statutory and common law privileges, although not identical, exist for similar reasons.<sup>6</sup>

***Statutory solicitor-client communication privilege***

[19] Like the common law solicitor-client communication privilege, this privilege covers records prepared for use in giving legal advice.

***Analysis and findings***

[20] For the appellant’s benefit, I confirm that I have carefully read his written submissions. My task is not to decide whether or not the university discriminated against him, or whether he has been misdiagnosed as he maintains. The only issue before me is whether the report is exempt under section 49(a) read with section 19. I find, for the following reasons, that the report is exempt under section 49(a) read with section 19(c).

[21] The relevant language in section 19(c) allows the university to withhold a record “that was prepared by or for counsel employed or retained by an educational institution...for use in giving legal advice.” While this statutory privilege is similar to the common law communication privilege, it is not identical to it, and requires an interpretation of the wording in section 19(c).

[22] I accept the university’s evidence in this regard, which the appellant did not directly challenge. The university provided an affidavit from its former Director, Human Rights & Dispute Resolution at McMaster University within its Equity & Inclusion Office (the Director), who was the Director at the relevant time. In her affidavit, she explains that, as Director, she was also required to be a lawyer licensed and in good standing with the Law Society of Ontario, and her duties included offering legal advice to the university.

[23] The Director explains that the appellant submitted his complaint under the university’s Discrimination, Harassment & Sexual Harassment: Prevention and Response Policy (the policy). When the appellant submitted his complaint, the Director and the investigator executed an engagement letter that stipulated that all work product and communication from the investigator would be delivered and treated as strictly privileged and confidential. The Director received the report in her capacity as legal counsel, with a view to offering the university (through the Provost) legal advice with respect to the subject matter of the report. She consulted with and advised the Provost in relation to the report.

[24] However, before any further steps in the complaint process were undertaken, and before any determinations were made regarding alleged violations of the policy or

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<sup>6</sup> Order PO-2251.

sanctions and remedies, the parties agreed to proceed to voluntary mediation. The complaint was resolved at mediation and the parties entered into a final settlement and release agreement, which disposed of the complaint. At no time during this process was the appellant provided with a copy of the report or apprised of any information contained in it.

[25] Based on my review of the Director's affidavit and the report itself, I agree that the report was provided to the Director on a confidential basis, for her use in providing legal advice to the university. I agree with the university that the facts before me are analogous to those in Orders MO-2195 and PO-2967, where the adjudicators found that reports prepared by third parties for use in giving legal advice were exempt under the statutory solicitor-client communication privilege.

[26] In Order MO-2195, the City of Vaughan's lawyer retained a consultant to conduct a forensic audit, for the purpose of providing legal advice to the city. Upon receipt of the consultant's report, the city's lawyer prepared a legal opinion for the city. The adjudicator found in the circumstances that the statutory solicitor-client communication privilege applied to the consultant's report. In Order PO-2967, the adjudicator found that the statutory communication privilege applied to an investigator's report that the University of Western Ontario's counsel had commissioned in order to provide legal advice to Western.

[27] Similarly, in the present circumstances, I find that the university retained the investigator to prepare the report for use by the university's solicitor in providing legal advice to the university.

[28] The appellant claims that the investigator promised to provide a copy of the report to him. I would observe that, in the copies of various emails that the appellant appended to his representations, there is no evidence that the investigator told him that the report would be provided to him. In any event, the privilege belongs to the university, not the investigator, and a promise to waive privilege does not amount to waiver of privilege.

[29] For these reasons, I find that the report is exempt from disclosure under the statutory solicitor-client communication privilege at section 19(c). In light of my finding, I do not need to consider whether the common law communication privilege protected by section 19(a) also applies.

**Issue C: Did the university exercise its discretion under section 49(a)? If so, should I uphold the exercise of discretion?**

[30] The section 49(a) exemption is discretionary (the institution "may" refuse to disclose), meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[31] In addition, the IPC 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; or it fails to take into account relevant considerations.

[32] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>7</sup> The IPC cannot, however, substitute its own discretion for that of the institution.<sup>8</sup>

[33] Some examples of relevant considerations are listed below. However, not all of these will necessarily be relevant in a particular case, and additional considerations may be relevant:<sup>9</sup>

- 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, and
  - the privacy of individuals should be protected,
- the wording of the exemption and the interests it seeks to protect,
- whether the requester is seeking their own personal information,
- whether the requester has a sympathetic or compelling need to receive the information,
- the relationship between the requester and any affected persons,
- whether disclosure will increase public confidence in the operation of the institution, and
- 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.

[34] If the institution refuses to give an individual access to their own personal information under section 49(a), it must show that it considered whether the record should be released to the requester because it contains their personal information.

[35] The university refers to ongoing legal proceedings relating to matters described

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<sup>7</sup> Order MO-1573.

<sup>8</sup> Section 54(2).

<sup>9</sup> Orders P-344 and MO-1573.

in the report and says that the appellant is legally adverse to the university in relation to the contents of the report. Its view is that the appellant does not have a sympathetic or compelling need to receive it. It also considered the privacy interests of the faculty who were respondents to the complaint. It says its customary practice has been to maintain reports of this nature in confidence.

[36] The appellant does not directly address the university's exercise of discretion, but I have considered his representations as a whole in coming to my conclusions.

[37] In the circumstances, I uphold the university's exercise of discretion under section 49(a) read with section 19(c). It is evident to me that the university was live to the fact that the report is about the appellant; however, it was also of the view that, given the adversarial relationship and ongoing legal proceedings between the parties, the report should not be disclosed to him. With respect to the university's submission that there is no sympathetic or compelling need for the appellant to have the report, implicit in that argument is the fact that the settlement was designed to put an end to the discrimination complaint. I see no error in the university's consideration of this as a relevant factor in its exercise of discretion.

[38] The appellant says that he did not read the settlement that he signed, because he trusted the university employee he was dealing with. In my view, whether the appellant understood the settlement is not a relevant factor in the university's exercise of discretion in the circumstances. While it may be open to the appellant to challenge the settlement, the IPC is not the appropriate forum for him to do that. The appellant has also not explained, nor is it apparent to me, why he would need a copy of the report to challenge the settlement.

[39] I am satisfied that the university considered relevant factors, did not consider irrelevant factors and exercised its discretion in good faith in deciding to withhold the report under section 49(a) read with section 19(c). I uphold its exercise of discretion.

[40] I acknowledge that my findings will disappoint the appellant, who is clearly troubled by the events leading to and surrounding the investigation and feels strongly that the report should be released to him. While I have considerable sympathy for his distress, my findings above are based on my application of the relevant legal principles to the facts as I understand them.

**ORDER:**

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

Original Signed by: \_\_\_\_\_

Gillian Shaw  
Senior Adjudicator

January 26, 2023