Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4488

Appeal PA21-00323

Toronto Metropolitan University

February 22, 2024

Summary: The appellant made a request to the university for access to information about herself in relation to a specific event and meeting held on campus. The university denied access to 15 of 28 responsive records based on section 49(a) (right to refuse access to requester's own personal information), read with section 19 (solicitor-client privilege). In this order, the adjudicator finds all the withheld records are communications that are solicitor-client privileged and are therefore exempt under section 49(a) read with section 19(a). She upholds the university's decision and dismisses the appeal.

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 and 49(a).

Cases Considered: *Descôteaux v Mierzwinski*, [1982] 1 S.C.R. 860.

OVERVIEW:

[1] The appellant made a request to Toronto Metropolitan University[1] (TMU or the university) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to herself and about a meeting that took place addressing a campus event. After communicating with the university about her request, the appellant narrowed the request to be for access to "[all] communication, emails, notes, case notes or other information and records related to" the appellant from the university president

[1] At the time of the request and the decision under appeal, this institution was known as Ryerson University.

and the president's office, the vice-president and provost, an executive director and an executive assistant to the president between September 15, 2016 and September 1, 2017. The appellant provided the university with search terms associated with, and dates of, the meeting and event to help the university identify responsive records.

[2] The university located 28 responsive records and issued a decision initially denying access to all of them. The university denied access pursuant to section 19 of the *Act*, which protects records that are solicitor-client privileged from disclosure.

[3] The appellant appealed the university's decision to the Office of the Information and Privacy Commissioner of Ontario (IPC). A mediator was appointed to explore resolution with the parties.

[4] During mediation, the university issued a revised decision, granting full access to some responsive records, and partial access to other records (exempting portions under section 13 (advice or recommendations)). The university denied access to the remaining records in full under section 19 (solicitor-client privilege). According to the revised decision:

> …the University has decided to provide full access to Records 15, 18-24, and 28.
>
> In addition, the University has decided to provide partial access to Records 4-5, and 16-17 pursuant to Section 13 (advice or recommendation) of FIPPA as the disclosure of parts of these records would reveal advice or recommendations of the person employed in the service of the University.
>
> The University continues to deny access to Records 1-3, 6-14, and 25-27 pursuant to Section 19 (solicitor-client privilege) of FIPPA.

[5] After receiving the revised decision and the additional disclosure, the appellant informed the mediator that access to records 4, 5, 15 to 24 and 28 was no longer at issue in this appeal.

[6] Because it appeared that the remaining records may contain the appellant's personal information, the mediator raised the possible application of section 49(a) (discretion to refuse requester's own information). Section 49(a) allows an institution to deny a requester access to their own personal information when read with section 19.

[7] The mediation concluded with 15 records at issue, over which the university claimed the exemption in section 49(a) read with section 19. With no further mediation possible, the appeal was transferred to the adjudication stage of the appeal process. I conducted an inquiry during which I received representations from the university and the appellant. Because portions of the university's representations contained information that I was satisfied would reveal the contents of the records if shared with the appellant, those portions were severed from the copy of the university's representations provided to the

appellant in accordance with the IPC's *Practice Direction 7* on the sharing of representations.

[8] In this order, I find that the records at issue are solicitor-client privileged and therefore exempt under section 49(a) read with section 19(a). I find that the university exercised its discretion to deny access properly and I dismiss the appeal.

RECORDS:

[9] There are 15 records at issue. They are numbered by the university as records 1, 2, 3, 6 to 14, and 25 to 27. The university claims that all 15 records are exempt under section 49(a) read with section 19.

[10] The university did not provide copies of the records at issue to the IPC. Instead, the university submitted an affidavit sworn by its general counsel, in accordance with the IPC's Protocol for Appeals involving Solicitor-Client Privilege Claims where the institution does not provide copies of the records at issue to the IPC.[2]

ISSUES:

A. Do the records contain "personal information" as defined in section 2(1), and, if so, whose?

B. Does the discretionary exemption at section 49(a) of the *Act*, allowing an institution to refuse access to a requester's own personal information, read with the section 19 exemption for solicitor-client privilege, apply to the records?

DISCUSSION:

Issue A: Do the records contain "personal information" as defined in section 2(1) and if so, whose?

[11] To determine which sections of the *Act* may apply to the records, I must first decide whether the records contain "personal information," and, if so, whose. Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual."

[12] Information is about an identifiable individual when it refers to the individual in a personal capacity, meaning that it reveals something of a personal nature about them, and it is reasonable to expect that the individual can be identified from the information

[2] Issued June 2020.

alone or combined with other information.[3] Section 2(1) of the *Act* contains a list of examples of personal information.

[13] The parties agree that the records contain information that qualifies as the appellant's personal information within the meaning of section 2(1) of the *Act*, and I find that they do. Accordingly, I will consider the question of the appellant's access to the withheld records under section 49(a) read with section 19.

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 exemption for solicitor-client privilege, apply to the records?

[14] Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49, however, provides some exemptions from this general right of access to one's own personal information.

[15] Section 49(a) states that:

> 49. A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > (a). where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19 20 or 22 would apply to the disclosure of that personal information.

[16] In this case, the university relies on section 49(a) read with section 19.

Section 19: solicitor-client privilege

[17] 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 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 or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

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

[18] In previous decisions, the IPC has referred to the three different exemptions in section 19 as making up two "branches."

[19] The first branch, referred to as branch 1, is found in section 19(a) (subject to "solicitor-client privilege") and is based on common law. The second branch, or branch 2, is found in sections 19(b) and (c) ("prepared by or for Crown counsel" or "prepared by or for counsel employed or retained by an educational institution or hospital") and contains statutory privileges created by the *Act*.

[20] The university claims that both sections 19(a) and (c) apply to the records.

[21] The university must establish that at least one branch applies. Accordingly, I will first consider whether the records or parts of records are exempt from disclosure under the solicitor-client communication privilege in branch 1, found in section 19(a).

[22] At common law, solicitor-client privilege itself contains two types of privilege: solicitor-client communication privilege, and litigation privilege.

[23] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[4] Confidentiality is an essential component of solicitor-client communication privilege. The institution must demonstrate that the communication was made in confidence, either expressly or by implication.[5] The privilege does not cover communications between a lawyer and a party on the other side of a transaction.[6]

[24] Litigation privilege, the second type of common law privilege, protects records created for the dominant purpose of litigation. It is based on the need to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial.[7]

[25] Under common law, a client may waive privilege. An express waiver of privilege happens where the client knows of the existence of the privilege and voluntarily demonstrates an intention to waive it.[8] There may also be an implied waiver of solicitor-client privilege where fairness requires it, and where some form of voluntary conduct by the client supports a finding of an implied or objective intention to waive it.[9] Generally,

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[4] *Descôteaux v Mierzwinski*, (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[5] *General Accident Assurance Co. v Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[6] *Kitchener* (*City*) *v Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)
[7] *Blank v Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).
[8] *S. & K. Processors Ltd. v Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (C.A.)
[9] *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

disclosure to outsiders of privileged information is a waiver of privilege.[10]

Summary of Representations

The university's representations

[26] The university submits that the records meet the requirements for solicitor-client communication privilege at common law (branch 1) in section 19(a) of the *Act*. The university says that the records were prepared for the purpose of seeking or conveying legal advice and are therefore part of a "continuum of communications" between the university and its legal counsel.

[27] The university also submits that the records are subject to litigation privilege at common law (branch 1) as they were "created for the dominant purpose of proactively preparing for litigation" that it says the appellant was planning to commence.

[28] The university maintains that it has not waived privilege over any of the records at issue.

The appellant's representations

[29] The appellant submits that the university's affidavit does not explicitly state that the records are privileged when it says that they "relate to correspondence involving [the university's general counsel], the University's senior administrators, and/or the Assistant General Counsel (at that time)." The appellant submits that the use of the phrase "and/or" leaves open the possibility that the records include only one of the individuals described, that some records might have been exchanged solely among the university's senior administrators and do not include either the university's general counsel or then-assistant general counsel, or that some were simply communications sent to the office of the general counsel. This, says the appellant, raises the question of whether the records truly involve direct communications of a confidential nature between lawyer and client.

[30] The appellant also submits that the university's representations do not say that any advice that might be contained in the records was provided in relation to litigation.

Analysis and findings

[31] I have considered the university's description of the records both in its representations and in the index of records attached as an exhibit to the affidavit of its general counsel that describes the records. For the reasons that follow, I find that the records are exempt under section 49(a) read with section 19(a).

[32] I accept that the records are emails exchanged between university employees and

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[10] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).

the university's general counsel. The university has provided dates and times of the emails and has identified the senders and recipients by name and title. The records begin with an email from a university official to the university's general counsel requesting legal advice and continue as university employees provide information to counsel, who provide legal advice on a matter involving the appellant.

[33] The Supreme Court of Canada in *Descôteaux v Mierzwinski* [11] held that solicitor-client communication privilege rests on three requirements: that the communication is between solicitor and client, entails the seeking or giving of legal advice, and which is intended by the parties to be confidential.[12] I find that all three requirements are present in this case. I find that the details of the records as described are consistent with a client being made aware of an issue, contacting legal counsel about an issue, providing information to legal counsel about the matter, and receiving advice.

[34] I find that the records are aimed at keeping the client (the university in this case) and its counsel informed so that advice could be sought and given and that the records therefore fall within the common law solicitor-client communication privilege aspect of section 19(a). The records are direct communications of a confidential nature between the university and its counsel prepared for the purpose of soliciting, giving and receiving legal advice, and are communications that would, if disclosed, reveal legal advice sought by or given to the university by counsel.

[35] The rationale for the common law solicitor-client communication privilege is to ensure that a client may freely confide in their lawyer on a legal matter.[13] The privilege covers the request for legal advice, the document containing legal advice, and information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.[14]

[36] I also find that there is no evidence to suggest that the university has either explicitly or implicitly waived its privilege with respect to any of the records. I therefore find that section 49(a), read with section 19(a), applies to all 15 records.

[37] As noted above, the university need not prove that more than one type of privilege applies to the records. Accordingly, because I have found that the records are solicitor-client communication privileged under section 19(a), I need not consider the university's claim that they are also subject to the common law litigation privilege or to the branch 2 statutory privilege in section 19(c).

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[11] [1982] 1 S.C.R. 860 at 888, and *Pritchard v Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809 at paragraph 15, and *Solosky v The Queen*, [1980] 1 S.C.R. 821.
[12] Relying on *Descôteaux v Mierzwinski*, [1982] 1 S.C.R.
[13] Orders PO-2441, MO-2166 and MO-1925.
[14] *Balabel v Air India*, [1988] 2 W.L.R 1036 at 1046 (Eng. C.A.); *Canada (Ministry of Public Safety and Emergency Preparedness) v Canada (Information Commissioner)*, 2013 FCA 104.

The university exercised its discretion appropriately

[38] The section 49(a) and 19 exemptions are discretionary and permit an institution to disclose information even though it could withhold it. The institution must exercise its discretion when determining whether to disclose information in response to a request. On appeal, although it cannot substitute its discretion for the institution's, the IPC may determine whether the institution failed to exercise its discretion properly.

[39] The university submits that it weighed the appellant's right of access to her own personal information against its own interest and the public interest in confidentiality protected by the exemption in section 19, including the preservation of the need to allow for the giving and receipt of confidential legal advice. The university says that it considered that disclosure would result in a waiver of solicitor-client privilege over the records, and whether it was possible to disclose a portion of the records without waiving privilege.

[40] The appellant submits that the university failed to consider factors that favoured her interests, or a public interest in disclosure. She says that the university did not consider the extent to which the information in the records is significant to her or to other interested parties, such as certain equity seeking groups.

[41] I find that the university exercised its discretion appropriately. I find that the interest in protecting the need to allow for the giving and receipt of confidential legal advice, and whether disclosure would result in a waiver of solicitor-client privilege over privileged communications, were relevant considerations. In view of the records the university partially disclosed, I am satisfied that the university considered whether it was possible to disclose some information to the appellant without waiving privilege over solicitor-client communications. In this regard, I accept that the university considered that the records contain the appellant's personal information. I find that the university did not exercise its discretion in bad faith or for an improper purpose, or that it relied on irrelevant considerations.

[42] I uphold the university's exercise of discretion and its decision to deny access to the 15 records at issue under section 49(a) read with section 19(a).

ORDER:

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

Original signed by:	February 22, 2024
Jessica Kowalski Adjudicator	