



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

ORDER P-921

Appeal P-9400654

Sheridan College of Applied Arts and Technology



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NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). Sheridan College of Applied Arts and Technology (the College) received a request for access to documents collectively known as the "DB package". DB is a solicitor who represented the College in a human rights complaint and a grievance filed against it by the requester.

The College responded by denying access to the documents in their entirety. The requester appealed.

During mediation, the scope of the appeal was narrowed to 12 records, to which the College continued to deny access on the basis of the following exemptions in the Act:

- solicitor-client privilege - section 19
- invasion of privacy - section 21

The records are described in Appendix A to this order.

A Notice of Inquiry was sent to the College and the appellant. As the records appeared to contain the personal information of the appellant, the parties were asked to comment on the application of section 49(a) of the Act. In addition, because some of the records appear to contain the personal information of the appellant and other individuals, I will consider the application of section 49(b). Representations were received from the College only.

DISCUSSION:

INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and 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.

As I have indicated, all of the records relate to the appellant's human rights complaint and grievance filed against the College. Thus, I find that they all contain his personal information. In addition, Records 4, 7, 11 and 12 contain the personal information of other identifiable individuals.

The personal information of the other individuals in Record 12 consists of the addresses, telephone numbers and start dates of the named personnel. Their names in conjunction with their professional titles and faculty group cannot be considered to be their personal information.

I will consider Record 11 in my discussion of the application of sections 19 and 49(a) of the Act.

Section 47(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 49 provides a number of exceptions to this general right of access.

Under section 49(b) of the Act, where a record contains the personal information of both the appellant and other individuals and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions found in section 21(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is where the personal information falls under section 21(4) or where a finding is made that section 23 of the Act applies to the personal information.

If none of the presumptions contained in section 21(3) apply, the institution must consider the application of the factors listed in section 21(2) of the Act, as well as all other considerations that are relevant in the circumstances of the case.

The College maintains that the presumption in section 21(3)(d) applies to the personal information contained in Record 4. I agree that the resume of this job candidate relates to her employment and educational history for the purposes of section 21(3)(d) of the Act. This personal information does not fall under section 21(4) of the Act. Nor has the appellant argued that there is a compelling public interest weighing in favour of disclosure of this information.

Record 7 consists of several lists of names of individuals who were the candidates in various job competitions at the College. The College submits that these individuals supplied their names in confidence to the institution (section 21(2)(h)). I agree that this is a relevant consideration which weighs in favour of non-disclosure of this personal information. The appellant has not provided any representations relating any considerations which weigh in favour of disclosing this information.

In my view, the character of the undisclosed information in Record 12 (the home addresses, telephone numbers and start date of other individuals), and the fact that it has no connection to the appellant, is a relevant circumstance favouring non-disclosure in the particular circumstances of this appeal.

The appellant has not submitted that there are any factors favouring disclosure of the personal information of other individuals contained in Records 7 and 12.

In summary, I find that the disclosure of the personal information of other individuals contained in Records 4, 7 and 12 would result in the unjustified invasion of the personal privacy of these individuals. Thus, the exemption in section 49(b) applies.

SOLICITOR/CLIENT PRIVILEGE/DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

The College claims that section 19 of the Act applies to exempt all the remaining records from disclosure.

Section 19 reads as follows:

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.

This exemption consists of two branches, which provide an institution with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1); and
2. a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

The College submits that Records 1, 2, 3, 5, 8, 9 and 10 qualify under Branch 1 of the exemption.

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the institution must provide evidence that the record satisfies either of the following tests:

1. (a) there is a written or oral communication; **and**
(b) the communication must be of a confidential nature; **and**
(c) the communication must be between a client (or his agent) and a legal advisor; **and**
(d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

2. the record was created or obtained especially for the lawyers brief for existing or contemplated litigation (Order 49).

Records 1 and 2 are legal accounts sent by the solicitor to the College for services related to the legal actions between the appellant and the College. The College submits that:

Although most orders [of the Commissioner's office] relating to this item favoured release of billings when the opinions did not form a part of the record, in this case the records does contain an indication of the processes used to determine the fees.

The principles regarding the application of solicitor-client privilege to legal accounts were discussed by Assistant
[IPC Order P-921/May 4, 1995]

Commissioner Irwin Glasberg in Order M-213:

... the implication of this decision [Order 126] is not that the solicitor-client exemption will apply automatically to records of this nature, but rather that the decision-maker must determine, based on the contents of each legal account, whether the information contained in the document relates in a tangible and direct way to the seeking, formulating or provision of legal advice.

I adopt this approach for the purposes of analyzing the information contained in Records 1 and 2 in this appeal. Having carefully reviewed these documents, I find that only parts of them contain information which relates in a tangible and direct way to the seeking, formulating or provision of legal advice and thus would qualify for exemption pursuant to section 19 of the Act. I have highlighted these portions on the copies of these records which are being provided to the Freedom of Information and Privacy Co-ordinator of the College with a copy of this order.

Records 3, 5, 8, 9 and 10 all consist of written communications of a confidential nature between the solicitor and his client, the College. With the exception of Record 3, I find that they are all directly related to the giving or seeking of legal advice. Thus they meet the requirements of Branch 1 and qualify for exemption pursuant to section 19 of the Act.

Record 3 is a congratulatory note from the College to the solicitor, on the outcome of a case. I do not find that it is directly related to seeking, formulating or giving legal advice. Thus, it does not satisfy the fourth element of the first part of the Branch 1 test. Nor can Record 3 be said to have been created or obtained especially for the lawyer's brief for existing or contemplated litigation. Accordingly, it does not qualify for exemption pursuant to section 19 and should be disclosed to the appellant.

The College next submits that Records 6 and 11 satisfy the requirements set out in Branch 2 of the exemption. The College states that Record 6 was created by counsel for use in preparing a submission requested by the Ontario Human Rights Commission with respect to the appellant's complaint. Record 11 was prepared by the College for the solicitor to use in the human rights case. I am satisfied that both of these documents qualify for exemption pursuant to Branch 2 of section 19 of the Act.

Under section 49(a) of the Act, the Ministry has the discretion to deny access to records which contain an individual's own personal information in instances where certain exemptions would otherwise apply to that information. The exemptions listed in section 49(a) include the solicitor-client privilege exemption provided by section 19.

I have previously found that Records 1, 2, 5, 6, 8, 9, 10 and 11 contain the personal information of the appellant. I have also found that portions of Records 1 and 2, and Records 5, 6, 8, 9, 10 and 11 in their entirety, qualify for exemption under section 19 of the Act.

Accordingly, they are exempt under section 49(a).

ORDER:

1. I uphold the decision of the College to not disclose Records 4, 5, 6, 7, 8, 9, 10, 11 and 12 in their entirety and the highlighted portions of Records 1 and 2 on the copy of these records which have been provided to the Freedom of Information and Privacy Co-ordinator of the College with a copy of this order.
2. I order the College to disclose Record 3 and the non-highlighted portions of Records 1 and 2 to the appellant within fifteen (15) days of the date of this order.
3. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: _____
Anita Fineberg
Inquiry Officer

_____ May 4, 1995

APPENDIX A

INDEX OF RECORDS AT ISSUE Appeal Number P-9400654

RECORD NUMBER(S)	DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART	EXEMPTIONS OR OTHER SECTION(S) CLAIMED	DECISION ON RECORD
1	Account dated August 31, 1985 from solicitor to College	19/49(a)	Disclose in part
2	Account dated June 30, 1986 from solicitor to College	19/49(a)	Disclose in part
3	Letter dated May 12, 1985 from College to solicitor	19/49(a)	Disclose in full
4	Resume of job candidate	21	Do not disclose
5	Letter dated July 22, 1987 from solicitor to College	19/49(a)	Do not disclose
6	Letter dated February 5, 1992 from solicitor to College	19/49(a)	Do not disclose
7	List of candidates for various job competitions	21	Do not disclose
8	Letter dated May 28, 1992 from College to solicitor	19/49(a)	Do not disclose
9	Letter dated June 8, 1992 from college to solicitor	19/49(a)	Do not disclose
10	Letter dated June 19, 1992 from solicitor to College	19/49(a)	Do not disclose
11	Letter dated September 18, 1992 from College to solicitor	19/49(a)	Do not disclose
12	College personnel address list	21	Do not disclose