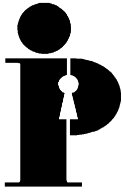

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

INTERIM
ORDER PO-2766-I

Appeal PA07-427

University of Ottawa

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The University of Ottawa (the University) received the following request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

> …all records mentioning and/or discussing me and appearing in the office of [name], Vice President Resources at the University of Ottawa from June 8, 2007 inclusive to present [September 28, 2007].

The requester subsequently advised the University to exclude all records in which he was the communicator and/or the recipient.

The University located responsive records and granted the requester access to them.

The requester, now the appellant, appealed the University's decision.

During the course of mediation, the appellant advised the mediator that he was of the view that additional records existed. The University clarified that additional responsive records existed but that they were being withheld pursuant to the discretionary exemption in section 19 (solicitor-client privilege) of the *Act*. The appellant advised the mediator that he wished to pursue access to these records.

The appellant continued to maintain that additional responsive records existed. Accordingly, the reasonableness of the University's search is at issue in the appeal.

As mediation did not resolve this appeal, the file was transferred to me to conduct an inquiry. I sent a Notice of Inquiry, setting out the facts and issues in this appeal to the University, initially, seeking its representations. I received representations from the University, a complete copy of which was sent to the appellant, along with a Notice of Inquiry. I received representations from the appellant. I sent a copy of the appellant's representations to the University seeking reply representations. I received reply representations. I then received further representations from the appellant concerning the possible existence of responsive records received by another requester. In response, I sought and received further representations from the University. Subsequently, the University located three additional responsive records. The University issued a decision letter to the appellant and claimed that these records were exempt due to the applicability of section 19. I then sent a copy of the University's reply representations to the appellant, seeking his representations. I received further representations from the appellant. I then sought and received representations in reply from the University.

RECORDS:

The records at issue are e-mails and are indexed in the Appendix to this order. The University claims that all of these records are exempt by reason of section 19.

DISCUSSION:

SEARCH FOR RESPONSIVE RECORDS

I will first determine whether the University conducted a reasonable search for records.

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

The University was asked to provide a written summary of all steps taken in response to the request. In particular, the University was asked to respond to the following questions:

1. Did the University contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.

2. If the University did not contact the requester to clarify the request, did it:

   (a) choose to respond literally to the request?

   (b) choose to define the scope of the request unilaterally? If so, did the University outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the University inform the requester of this decision? Did the University explain to the requester why it was narrowing the scope of the request?

3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.

4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

If the University provides an affidavit, it should be from the person or persons who conducted the actual search. It should be signed and sworn or affirmed before a person authorized to administer oaths or affirmations.

Representations

The University submits that in response to the appellant's request an e-mail message was sent from its Freedom of Information Coordinator (FOIC) to the Vice President Resources asking him to conduct a search for all records that responded to the request. The University provided affidavits from the Vice President Resources and his administrative assistant setting out the nature and the extent of the searches that these individuals conducted for responsive records.

In their affidavits, the Vice President Resources and his administrative assistant both state that they conducted searches in Microsoft Outlook for all e-mail documents, dated from June 8, 2007 to September 28, 2007 using the appellant's last name as the search term. Ninety-four pages of records were identified as responsive to the request.

The University admits in its representations that the Vice President Resources referred a file concerning the appellant to the University's Legal Counsel during the time period specified in the appellant's request. The University submits that this "Legal Counsel file" is outside the scope of the appellant's request. It submits that:

> …the documents …[are] part of a file in the possession of the Legal Counsel's office. The request at issue was for all documents "appearing in the office of [name] Vice President Resources". This file does not "appear" in the office of the Vice President. All responsive documents in the possession of the Vice President were disclosed.

In response to the University's representations, the appellant submits that:

> Even if the University intended to conduct only literal searches for respondent records, the searches performed by the University were incomplete searches because searches were performed using only my surname and not my given name. Institutional records of correspondence by [the Vice President Resources], for example, exist where I am named by my given name… [T]he spelling of my surname by [the Vice President Resources in a specific record] is incorrect…

> The searches performed by the University using only my surname are incomplete searches because institutional records exist where matters substantively relating to me are discussed without referencing me using my given or surnames…
>
> In [an e-mail to the appellant from the Vice President Resources] he states "The file was passed on to the University's Legal Office"… In order for [the Vice President Resources] to have "passed" the file on, [he] must have been in possession of it and, therefore, these records are respondent to my request…
>
> [My] request [was] to include as respondent records those that were in the office of [the Vice President Resources] at any time in the period indicated, and that may not have been in his office at the time of the request. This was the meaning of my request…
>
> I believe that these actions by the University can be considered a shell game in an attempt to conceal records by passing them internally from one office in the University [Vice President Resources] to another office (Legal Counsel) and justifying this action through an unreasonable reading of my request, followed by an unreasonable invocation of section 19 of the *Act* …to not disclose the later-acknowledged records..
>
> Therefore, contrary to …the University's representations that "the 'Legal Counsel file' referred to by the appellant is outside the scope of this request", these records are respondent to my request and, therefore, subject to reasonable search in this appeal.

Analysis/Findings

Where a requester provides sufficient detail about the records that he is seeking and the institution indicates that records do not exist, it is my responsibility to ensure that the institution has conducted a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that the records do not exist. However, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request [Order P-624].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

A reasonable search would be one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request [Order M-909].

Although there is no burden of proof specified in the *Act* in this instance, the burden of proof in law generally is that a person who asserts a position must establish it.

The appellant submits that additional responsive records should have been located by means of searches conducted using his first name only as opposed to only his last name. I disagree with the appellant that the University was obligated to search for responsive records concerning the appellant in a manner other than using the appellant's surname as a search criterion. The appellant has requested records mentioning and/or discussing him or his activities. I find that it is not reasonable to expect that the University would be able to locate responsive records without searching for records that contain the appellant's surname.

As set out above, the issue before me is whether the search carried out by the University for responsive records was reasonable in the circumstances. Only electronic records were searched. I find that in response to the request, the University should have conducted searches for responsive paper records, as well as electronic records. In the request, the appellant seeks:

> …all records mentioning and/or discussing me and appearing in the office of [name], Vice President Resources at the University of Ottawa from June 8, 2007 inclusive to present [September 28, 2007].

If the University had wished to restrict its search to electronic records only, then it could have sought the agreement of the appellant to do so. If the appellant did not agree, then the University could have recovered any additional fees incurred by searching paper records by means of the fee provisions in the *Act*.

As the University did not conduct searches for paper records, I find that it has not provided sufficient evidence to establish that it has made a reasonable effort to identify and locate all responsive records. Accordingly, I find that the University has not conducted a reasonable search for records that are responsive to the appellant's request as required by section 24 of the *Act*. As a result, I will order it to conduct further searches for responsive paper records.

The appellant also submits that the University should search for responsive records in the University's Legal Office as the Vice President Resources had passed the appellant's file on to this office. The appellant's request was for all documents "appearing in the office of [name] Vice President Resources" during a specified time period. The appellant's file was in the office of the Vide-President Resources during the time period specified in the request, although it was not in his office at the time of the request. I find that "the "Legal Counsel file" referred to by the appellant is within the scope of this request" and these records are respondent to the appellant's request. Therefore, I will also order the University to search this file for responsive records.

PERSONAL INFORMATION

I will now determine whether the records listed in the Appendix to this order contain "personal information" as defined in section 2(1) 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;

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 [Order 11].

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 [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

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 [Orders P-1409, R-980015, PO-2225].

Effective April 1, 2007, the *Act* was amended by adding sections 2(3) and 2(4). These amendments apply only to appeals involving requests that were received by institutions after that date. Section 2(3) modifies the definition of the term "personal information" by excluding an individual's name, title, contact information or designation, which identifies that individual in a "business, professional or official capacity." Section 2(4) further clarifies that contact information about an individual who carries out business, professional or official responsibilities from their dwelling does not qualify as "personal information" for the purposes of the definition in section 2(1).

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

Neither the appellant nor the University made direct representations on this issue. However, as the records concern possible disciplinary action against the appellant, an employee of the University, I find that the records contain the personal information of the appellant.

Previous orders provide guidance in determining whether information that relates to an individual in a professional, official or business capacity, reveals something of a personal nature about the individual and, therefore, qualifies as personal information.

An examination of an individual's job performance has been found to be "personal information." In Order P-1180, former Inquiry Officer Anita Fineberg stated:

> Information about an employee does not constitute personal information where the information relates to the individual's employment responsibilities or position. Where, however, the information involves an examination of the employee's performance or an investigation into his or her conduct, these references are considered to be the individual's personal information. [emphasis added]

Statements provided to investigators by potential witnesses has also been found be "personal information." In Order PO-2271, former Senior Adjudicator David Goodis stated:

> When an individual in a professional capacity provides a statement about his or her actions and observations to an investigator, in a context where there is a reasonable prospect that the individual may be found at fault, the information "crosses the line" from the purely professional to the personal realm. The fact that the incident took place in the course of these individuals doing their job in no way undermines this conclusion.

Although the personal information in the records is about the appellant in his professional capacity, this information relates to an investigation into or assessment of the performance or alleged improper conduct of this individual. As such, the characterization of this information changes and becomes personal information.

In conclusion, I find that the records contain the personal information of the appellant. Specifically, I find that the records contain his name along with other personal information relating to him, as contemplated by paragraph (h) of the definition of personal information in section 2(1) of the *Act*. The other personal information that would be revealed by disclosure of the appellant's name concerns a potential disciplinary action against the appellant.

Therefore, I find that section 49(a) may apply to the information at issue in the records.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/SOLICITOR-CLIENT PRIVILEGE

I will now determine whether the discretionary exemption at section 49(a) in conjunction with the section 19 exemption applies to the information at issue.

Section 47(1) gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

Under section 49(a), an institution has the discretion to deny an individual access to their own personal information where the exemptions in sections 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, **19**, 20 or 22 would apply to the disclosure of that information.

Section 19 of the *Act* states as follows:

> 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.

Section 19 contains two branches as described below. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue. [Order PO-2538-R; *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)].

Solicitor-client communication privilege

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 [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

Litigation privilege

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank* (cited above)].

In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

> The "dominant purpose" test was enunciated [in *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169] as follows:
>
> > A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.
>
> It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both…
>
> [For this privilege to apply], there must be more than a vague or general apprehension of litigation.

Loss of privilege

Termination of litigation

Common law litigation privilege may be lost through termination of litigation or the absence of reasonably contemplated litigation. As stated in Order P-1551:

> Litigation privilege ends with termination of the litigation for which the documents were prepared or obtained [*Boulianne v. Flynn*, [1970] 3 O.R. 84 at 90 (Co. Ct.); *Meaney v. Busby* (1977), 15 O.R. (2d) 71 (H.C)]. The exception to this rule is where the policy reasons underlying the privilege remain, despite the end of the litigation. For example, privilege may be sustained in related litigation involving the same subject matter in which the party asserting the privilege has an interest [*Carleton Condominium Corp. v. Shenkman Corp.* (1977), 3 C.P.C. 211 (Ont. H.C.)]. In other words, the law will only give effect to the privilege while the purpose for its recognition continues to be served. Unlike solicitor-client

> communication privilege, the purpose of which is to protect against disclosures which could have a chilling effect on the solicitor-client relationship, the purpose of litigation privilege is to protect against disclosures which could have a chilling effect on the lawyer's preparation for the particular litigation, or any related litigation arising out of the same subject matter.

Note, however, that termination of litigation does not affect the application of statutory litigation privilege under branch 2 (see below). [*Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.)]

Waiver

Under branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege [Orders PO-2483, PO-2484].

Waiver of privilege is ordinarily established where it is shown that the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily evinces an intention to waive the privilege

[*S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.)].

Generally, disclosure to outsiders of privileged information constitutes waiver of privilege [J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; see also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.)].

Waiver has been found to apply where, for example

- the record is disclosed to another outside party [Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.)]
- the communication is made to an opposing party in litigation [Order P-1551]
- the document records a communication made in open court [Order P-1551]

Waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party. The common interest exception has been found to apply where, for example

- the sender and receiver anticipate litigation against a common adversary on the same issue or issues, whether or not both are parties [*General Accident Assurance Co. v. Chrusz* (above); Order MO-1678]

- a law firm gives legal opinions to a group of companies in connection with shared tax advice [*Archean Energy Ltd. v. Canada (Minister of National Revenue)* (1997), 202 A.R. 198 (Q.B.)]

- multiple parties share legal opinions in an effort to put them on an equal footing during negotiations, but maintain an expectation of confidentiality vis-à-vis others [*Pitney Bowes of Canada Ltd. v. Canada* (2003, 225 D.L.R. (4th) 747 (Fed. T.D.)]

Branch 2: statutory privileges

Branch 2 is a statutory exemption that is available in the context of Crown counsel giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

Statutory solicitor-client communication privilege

Branch 2 applies to a record that was "prepared by or for Crown counsel for use in giving legal advice."

Statutory litigation privilege

Branch 2 applies to a record that was prepared by or for Crown counsel "in contemplation of or for use in litigation."

Loss of Privilege

The application of branch 2 has been limited on the following common law grounds as stated or upheld by the Ontario courts:

- waiver of privilege by the *head of an institution* (see *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.)) and

- the lack of a "zone of privacy" in connection with records prepared for use in or in contemplation of litigation (see *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.)).

The University submits that:

> The office of the Legal Counsel provides legal advice with respect to numerous situations, therefore the section 19 exemption is an assurance for the University's

> employees and administrators that their legal issues will be dealt with discretion and respect. The solicitor-client privilege is crucial to individuals being able to request and obtain legal [advice] in total confidence. The University of Ottawa is of the opinion that in order to protect the integrity of the office of the Legal Counsel, files created and maintained in the course of providing legal advice are subject to the section 19 exemption and should not be disclosed.

The appellant submits that:

> Any privilege associated with the confidential nature of the communications of the records identified by the University as exempt from disclosure …potentially protected under Branch 1 has been waived by the actions of [the Vice President Resources] and possibly the actions of Legal Counsel to the University…

He submits that the Vice President Resources and the University's Legal Counsel waived communication privilege by disclosing to outsiders privileged information. He identifies these outsiders as a named non-University solicitor, a named professor, a named Dean and the French student campus newspaper.

He also submits that the privilege does not apply as the Vice President Resources is not a client to the Legal Counsel to the University in a solicitor-client relationship. He provided the University's official job description and summary of the Legal Counsel position, as follows:

> "working in close consultation with senior administrators" and "providing general legal advice and counsel of all kinds to the University and staff" Legal Counsel "will provide legal services and advice to the University in the conduct of its activities as a post-secondary educational institution"

Concerning the alleged waiver of privilege by disclosure of the records to the outside solicitor, he submits that:

> … any advice or counsel given by Legal Counsel as Legal Counsel to the University institution to the "University's employees and administrators" regarding "their" (i.e. personal) "legal issues" does not concern the University institution's activities and is, therefore, exempt from section 19 solicitor-client privilege under the *Act*, as well as being inconsistent with the employment duties and responsibilities of Legal Counsel to the University institution. Therefore, [the Vice President Resources] is not a client to the Legal Counsel to the University institution for matters of personal nature, interest, and concern to [the Vice President Resources]…
>
> The threat of a lawsuit against me from [the Vice President Resources']…attorney from a law firm [name] external to the University and retained by [the Vice

> President Resources] in his personal capacity ... Were this not a personal matter for [the Vice President Resources], then such a threat of a lawsuit would naturally come from the office of the Legal Counsel to the University…

Concerning the waiver of privilege by disclosure to the named professor, the appellant submits that:

> The records concern the broad issue discussed with [named professor] and would have involved many internal communications that cannot be protected under solicitor-client privilege. Therefore, the action of [the Vice President Resources] to merely pass on the records to Legal Counsel precludes any kind of written or oral confidential communication between a client and a legal advisor directly related to seeking, formulating or giving legal advice in a solicitor-client relationship.

In reply, the University submits that:

> None of the actions of [the Vice President Resources] demonstrate an intention to voluntarily waive [solicitor-client] privilege.
>
> [The Vice President Resources] did not waive the solicitor-client privilege by engaging [named solicitor of named law firm. This solicitor] does not fit in the definition of an "outsider" since his services had been retained to provide legal advice to [the Vice President Resources] personally and as the Vice President of Resources of the University of Ottawa. All information divulged to [this solicitor] was protected by the solicitor-client privilege.
>
> Accordingly at no time in seeking and obtaining legal assistance from [named solicitor] in order to protect his personal and professional reputation did [he] demonstrate a voluntary intention to waive the privilege.
>
> [The Vice President Resources] did not reveal any privileged information in the communications [with the named professor]. [This professor] expressed his opinion on the use of the Computing Resources by the appellant, which raised some concerns that he shared with the Vice President of Resources. [The Vice President Resources] simply agreed that such action was a violation of the Code of Conduct for Computer Resources and that the matter was to be referred to the University's Legal Counsel. At no time was …privileged information exchanged.
>
> [The Vice President Resources] did not reveal any personal or privileged information in the communication [to the newspaper]… [T]he only document… that was sent to [the newspaper] is the User Code of Conduct for Computer Resources. The content of the letter [to the appellant from Vice President

> Resources] had not been disclosed, and the User Code of Conduct for Computer Resources is not privileged.

In surreply, the appellant submits that the principle of waiver does apply, as the University did not retain the services of the named outside solicitor. He maintains this position because he alleges that the University issued an apology letter to him for providing this solicitor with his home address in order to write him a letter. He states that:

> [The named solicitor's] actions evince that his legal file was with [the Vice President Resources] in [his] personal capacity and not with the University...

The appellant also submits that the Vice President Resources had no right to discuss certain matters with the named professor. He submits that this action constituted a waiver of privilege at common law.

He also submits that since he is an employee of the University,

> …the engagement by the Office of the Legal Counsel to the University with other University employees, including but not limited to the Vice President Resources concerning the Vice President Resources' personal legal issues involving me was actuated by the Office of the Legal Counsel in "conflict of interest"…
>
> The Office of the Legal Counsel does not contemplate providing ex officio services of a fiduciary nature to employees of the University in matters of personal interest to them (the employees), since such matters are not addressable by the opposing party within a Collective Agreement nor are they within the jurisdictions of any of the University's internal governing bodies…
>
> The fact that the threat of a lawsuit against me from [the Vice President Resources] came from [the outside law firm] and not the University admits of this fact; this is not a matter of interest to the University and, therefore, the Office of the Legal Counsel to the University cannot engage in a solicitor-client relationship with [the Vice President Resources] for a matter of personal interest to [him].

In reply, the University submits that it was in a solicitor-client relationship with the outside solicitor; that it had not waived its privilege with respect to the records at issue; and that the Office of the Legal Counsel was in a solicitor-client relationship with the records at issue. In particular, it submits that:

(a) whether the outside solicitor is in a solicitor-client relationship with the University

> [It] retained [the outside legal counsel] for the purpose of obtaining or giving professional legal advice to the University, including, [the Vice President

Resources], in his capacity as Vice President Resources, with respect to a defamation matter involving the appellant. Accordingly, [the outside solicitor] was in a solicitor-client relationship with the University and all communications between [him] and the University in respect of his retainer are considered to be of a confidential nature.

(b) concerning waiver of privilege by communicating with third parties

[T]he University has never "evinced an intention to waive the privilege"; in fact, no privileged information has been disclosed to date to an "outside" party. Disclosing the fact that the University intends to engage the Office of the Legal Counsel to address a matter of concern to the University to an employee of the institution (that is, a professor who is a party with a common interest), in our view, does not constitute a waiver of privilege.

Furthermore, it is submitted that the allegation that the University breached the appellant's privacy has no bearing on the question of privilege. No confidential communications between the University and its retained counsel or the Office of the Legal Counsel have been disclosed to third parties as a result of the alleged inappropriate disclosure of personal information…

A solicitor may be retained to act on behalf of several parties with common interests (in this case, the University, the Vice President Resources and [name of Vice President Resources]) where it is anticipated that proceedings against another party will be on the same issue or issues. This principle applies in this matter. In such cases, waiver of privilege would not be deemed to have occurred. [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)]

(c) *whether the Office of Legal Counsel can be in a solicitor-client relationship with respect to the records at issue*

The Office of the Legal Counsel is in a solicitor-client relationship with the University with respect to the records at issue. The Office of Legal Counsel provides legal advice of a diverse nature to the University on an on-going basis. It also manages the University's relationship with external counsel retained on behalf of the University.

The Office of the Legal Counsel was engaged to provide legal advice to University administration regarding an alleged violation of a University policy by the appellant …which policy fell within the administrative responsibility of the Office of the Vice President Resources.

The records at issue contain confidential communications between the Office of the Legal Counsel and the University and its employees for the purpose of

> obtaining or providing legal advice, which communications include working papers directly related to the seeking, formulating or giving of legal advice, [*Susan Hosiery Ltd. v. Minister of National Revenue* [1969] 2 Ex. C.R. 27]. Even if information may have passed by the Office of the Legal Counsel or the University to the other as part of the "continuum aimed at keeping both informed so that advice may be sought and given as required", this information would be considered to fall within the ambit of the solicitor-client communication privilege. *[Balabel* v. *Air India,* [1988] 2 W.L.R. 1036 at 1046 Eng. C.A.)].

Analysis/Findings

The appellant claims that privilege does not exist as the Office of Legal Counsel was not in a solicitor-client relationship with the Vice President Resources with respect to the records at issue. He also claims that even if a solicitor-client relationship existed, that this privilege has been waived by communication of this privileged information to third parties, who he identifies as the outside solicitor, the professor, the dean and the newspaper.

Based upon my review of the records, I find that the Office of Legal Counsel was in a solicitor-client relationship with the Vice President Resources. The legal advice they were providing him and other University officials concerned items within the sphere of this Vice President's official employment duties with the University. If a conflict of interest would arise as between the Legal Counsel's Office duties towards the Vice President Resources and another employee, such as the appellant, then this conflict could be addressed at that time. Nevertheless, at the time of the records' creation, the Office of Legal Counsel was in a solicitor-client relationship with the Vice President Resources and the other University officials that it was providing legal services to. The records contain communications from the University's Legal Counsel, acting as the solicitor, and University staff, acting as the client.

Based on my review of the parties' representations and the records, I find that certain records or portions of records contain direct communications of a confidential nature between University staff and the University's Legal Counsel made for the purpose of obtaining or giving professional legal advice. These records constitute e-mails in the e-mail chains comprising the records. In these e-mails, the University's solicitors are providing legal advice to its staff and this legal advice forms part of the continuum of communications [Order MO-2206].

With respect to the legal advice provided by the University's Legal Counsel specifically to the Vice President Resources, this advice concerned this individual's professional duties. This advice encompassed both a contemplated disciplinary action, along with a possible defamation action, against the appellant by the Vice President Resources.

However, I find that certain portions of the records do not reveal solicitor-client privileged information. These e-mail portions of the e-mail chains are not e-mails between a solicitor and a client, nor do these e-mails in the e-mail chain reveal privileged information. These e-mails

include the e-mails involving the named professor and Dean, and the newspaper. Therefore, I will order these e-mails disclosed.

The appellant has also argued that privilege has been waived by the retention of an outside law firm. This firm wrote the appellant concerning a possible defamation action against him on behalf of the Vice President Resources in his professional and personal capacity. The records at issue concern communication between this law firm and the office of the University's Legal Counsel. I find in this instance, that the solicitor-client communication privilege has not been waived due to the principle of common interest.

Waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party. As stated above, the common interest exception has been found to apply where the sender and receiver anticipate litigation against a common adversary on the same issue or issues, whether or not both are parties [*General Accident Assurance Co. v. Chrusz* (above); Order MO-1678]

I find that the common interest principle enunciated in the *Chrusz* case, cited above applies to the communication concerning the Vice President Resources professionally and personally as the client and the outside law firm and the University's Office of Legal Counsel as solicitors. There is a common interest in the anticipated litigation that may be brought by the Vice President Resources both in his official capacity with the University and personally [Order MO-2231].

The records that I have found not subject to solicitor-client privilege under Branch 1 are also not subject to Branch 2, as Branch 2 is a statutory exemption that is available in the context of Crown counsel giving legal advice or conducting litigation. None of the specific e-mails that I have found to not be subject to Branch 1 contain communication by Crown counsel giving legal advice or conducting litigation.

I have not been provided with any evidence to support a finding that the privilege in the records or portions of the records that I have found subject to Branch 1 has been waived. Therefore, subject to my review of the University's exercise of discretion, I conclude that these records or portions of records that I have found to be subject to the Branch 1 solicitor-client communication privilege are exempt from disclosure under section 49(a), in conjunction with section 19 of the *Act*.

EXERCISE OF DISCRETION

I will now determine whether the University exercised its discretion under sections 49(a) in conjunction with section 19, and, if so, whether I should uphold the exercise of discretion.

The section 49(a) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner 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
- it fails to take into account relevant considerations

In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

Relevant considerations may include those listed below. However, 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

The University did not provide representations on its exercise of discretion. Therefore, I have no evidence before me that the University exercised its discretion with respect to the records that I have found subject to solicitor-client privilege. Therefore, I will order the University to exercise its discretion.

ORDER:

1. I order the University to conduct searches of the record-holdings of the Vice President Resources and the office of the University's Legal Counsel for responsive paper records. I order the University to provide me with an affidavit sworn by the individual(s) who conducted the searches, confirming the nature and extent of the searches conducted for the responsive records within 30 days of this interim order. At a minimum, the affidavit should include information relating to the following:

   (a) information about the employee(s) swearing the affidavit describing his or her qualifications and responsibilities;

   (b) the date(s) the person conducted the search and the names and positions of any individuals who were consulted;

   (c) information about the type of files searched, the search terms used, the nature and location of the search and the steps taken in conducting the search; and,

   (d) the results of the search.

2. The affidavit referred to above should be sent to my attention, c/o Information and Privacy Commissioner/Ontario, 2 Bloor Street East, Suite 1400, Toronto, Ontario, M4W 1A8. The affidavit provided to me may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in IPC Practice Direction 7.

3. If, as a result of the further searches, the University identifies any additional records responsive to the request, I order the University to provide a decision letter to the appellant regarding access to these records in accordance with the provisions of the *Act*, considering the date of this interim order as the date of the request.

4. I order the University to disclose those records or portions of the records that I have found not subject to solicitor-client privilege. For ease of reference I have highlighted the portions of these records that *should not* be disclosed to the appellant on the copy of the records sent to the University with this interim order.

5. I order the University to exercise its discretion with respect to the records that I have found to be subject to solicitor-client privilege by reason of the application of section 49(a) in conjunction with section 19. I order the University to advise the appellant and this office of the result of this exercise of discretion, in writing. If the University continues to withhold all or part of the records, I also order it to provide the appellant with an explanation of the basis for exercising its discretion to do so and to provide a copy of that explanation to me. The University is required to send the results of its exercise of discretion, and its explanation to the appellant, with the copy to this office, no later than 30 days from the date of this interim order. If the appellant wishes to respond to the University's exercise of discretion, and/or its explanation for exercising its discretion to withhold information, the appellant must do so within 21 days of the date of the University's correspondence by providing me with written representations.

6. I remain seized of this appeal in order to deal with any outstanding issues arising from this appeal.

Original signed by: March 18, 2009
Diane Smith
Adjudicator

APPENDIX

Index of Records

RECORD #	TO	FROM	DATE
1	Assistant to Vice President Resources, Legal Counsel	Vice President Resources	July 17/07
2	Vice President Resources	Legal Counsel	July 17/07
3	Vice President Resources	Legal Counsel	June 6/07
4	Legal Counsel	Assistant to Vice President Resources	July 17/07
5	Assistant to Vice President Resources	Legal Counsel	July 18/07
6	Vice President Resources	Legal Counsel	June 6/07
7	Vice President Resources	Vice President Resources, Legal Counsel	June 6/07
8	Vice President Resources	Legal Counsel	June 6/07
9	Legal Counsel	Vice President Resources	June 7/07
10	Vice President Resources	Legal Counsel	June 19/07
11	Vice President Resources	Assistant to Vice President Resources	June 20/07
12	Legal Counsel	Dean	June 20/07
13	Vice President Resources, Assistant to Vice President Resources	Legal Counsel	June 22/07
14	Legal Counsel, Assistant to Vice President Resources	Vice President Resources	June 22/07

RECORD #	TO	FROM	DATE
15	Vice President Resources	Legal Counsel	June 22/07
16	Legal Counsel	Vice President Resources	June 22/07
17	Vice President Resources	Legal Counsel	June 22/07
18	Legal Counsel	Vice President Resources	June 22/07
19	Vice President Resources, Assistant to Vice President Resources	Legal Counsel	June 22/07
20	Legal Counsel, Assistant to Vice President Resources	Vice President Resources	June 22/07
21	Vice President Resources	Legal Counsel	June 22/07
22	Legal Counsel	Vice President Resources	June 22/07
23	Assistant to Vice President Resources	Vice President Resources	June 26/07
24	Vice President Resources	Legal Counsel	June 19/07
25	Legal Counsel	Vice President Resources	July 9/07
26	Vice President Resources	Legal Counsel	July 10/07
27	Assistant to Vice President Resources, Legal Counsel	Vice President Resources	July 10/07
28	Vice President Resources	Legal Counsel	July 17/07
29	Legal Counsel	Vice President Resources	July 17/07
30	Vice President Resources	Legal Counsel	July 17/07

RECORD #	TO	FROM	DATE
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32	Legal Counsel	President	July 27/07
33	President	Legal Counsel	July 27/07
34	President	Legal Counsel	July 27/07
35	President, Vice President Resources	Legal Counsel	Aug 1/07
36	Legal Counsel	Vice President Resources	Aug 9/07
37	Vice President Resources	Legal Counsel	Aug 9/07
38	Vice President Resources	Legal Counsel	Aug 10/07
39	Legal Counsel	Vice President Resources	Aug 12/07
40	Vice President Resources	Legal Counsel	Aug 10/07
41	Legal Counsel	Vice Dean, Graduate & Postdoctoral Studies	Aug 17/07
42	President, Vice President Resources	Legal Counsel	Aug 17/07
43	Vice President Resources	Lawyer	Aug 13/07
44	Vice Dean Graduate & Postdoctoral Studies	Legal Counsel	Aug 17/07
45	President, Vice President Resources	Legal Counsel	Aug 17/07
46	President, Vice President Resources	Legal Counsel	Aug 17/07
47	President, Legal Counsel	Vice President Resources	Aug 18/07
48	Vice President Resources	Lawyer	Aug 20/07

RECORD #	TO	FROM	DATE
49	Lawyer	Vice President Resources	Aug 21/07
50	Vice President Resources	Lawyer	Aug 21/07
51	President	Legal Counsel	Sep 5/07
52	Vice President Resources	Legal Counsel	Sep 7/07
53	President, Vice President Academic & Provost	Legal Counsel	Sep 10/07
54	Legal Counsel	Secretary	Sep 28/07
55	Vice President Academic & Provost,	Legal Counsel	Sep 28/07
56	Vice President Resources, President	Vice President Academic & Provost	Sep 28/07
57	Vice President Academic & Provost	Vice President Resources	Sep 28/07
58	Legal Counsel	Secretary	Oct 1/07
59	Vice President Academic & Provost	Legal Counsel	Oct 1/07
60	Vice President Resources	Vice President Academic & Provost	Oct 1/07
61	President, Legal Counsel, Vice President Academic & Provost	Vice President Resources	Sep 7/07
62	Vice President Resources, Legal Counsel, Vice President Academic & Provost	President	Sept 7/07
63	Vice President Resources	Legal Counsel	June 6/07

RECORD #	TO	FROM	DATE
64	Vice President Resources	Legal Counsel	June 19/07
65	Legal Counsel	Vice President Resources	Aug 12/07