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

INTERIM
ORDER PO-2768-I

Appeal PA07-445

University of Ottawa

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NATURE OF THE APPEAL:

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

> …all records mentioning and/or discussing me and/or my activities and communicated by/to [named individual] personally and/or to [named individual] in all his official capacities at the University of Ottawa, including but not limited to President and Vice-Chancellor at the University of Ottawa, to/by another person or other persons other than myself and in which I am not a/the recipient of such communications from March 20, 2007 inclusive to present.

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

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

During the course of mediation, the appellant advised the mediator that he is of the view that additional records existed.

The University advised the mediator that it has produced all of the responsive records and that it does not have any other records. The University also provided the appellant with a letter outlining efforts made to locate responsive records.

The appellant maintains that additional responsive records exist. Accordingly, the reasonableness of the University's search is at issue in this 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, to which I sought and received further representations from the University. Subsequently, the University located 26 additional responsive records. The University disclosed 20 of these records to the appellant. Six records were not disclosed to the appellant as the University claimed that they were exempt due to the applicability of section 19 (solicitor-client privilege). Five of these six records were responsive to the request at issue. Three of these five records were also responsive to another request made by the appellant and were dealt with me in file PA07-427, which resulted in Order PO-2766-I. As the University had raised the application of section 19, I sought and received representations from both parties as to the applicability of this exemption to these two records.

RECORDS:

The records at issue are listed in the following chart:

Record #	To	From	Date
1	President and Vice-Chancellor	Legal Counsel	September 7, 2007
2	President and Vice-Chancellor	Legal Counsel	September 7, 2007

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 preferably in affidavit form:

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 that an e-mail message was sent from its Freedom of Information Coordinator (FOIC) to the President and Vice Chancellor (the President) asking him to conduct a search for all records that responded to the request. The University provided affidavits from the President and his executive secretary setting out the nature and the extent of the searches these individuals conducted for responsive records.

In their affidavits, the President and his executive secretary both state that they conducted searches in Microsoft Outlook for all responsive e-mail documents as well as searches using the Google Desktop tool for all responsive electronic documents on their systems.

The President states in his affidavit that:

> Except for documents that may have been delivered to me or to my office by [the appellant] personally, and to the best of my knowledge, I do not have paper records pertaining to [the appellant] and therefore did not search through the paper files in my office. To do so, would have simply increased the search time significantly and hence the fees payable by the person making the request.

The President's executive secretary states in her affidavit that:

> Except for documents delivered to [the President's] office by [the appellant] personally, and to the best of my knowledge, [the President] does not have paper records pertaining to [the appellant] and therefore I did not search through the paper files in his office.

The University further submits that:

> The decision by certain individuals to search for the [appellant's last name] rather than [appellant's first name] was appropriate as there are no doubt several students and/or employees of the University [with the appellant's first name]. Searching for this term would only have increased the research and preparation time and therefore increase the fees required of the appellant.
>
> The individuals were not expected to search for all possible spelling variations of the term [appellant's last name], therefore, a document with a spelling error would not have been found. Considering the time required and the cost, it would have been unreasonable to search for all other possible spelling variations.

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

> [The University] without justification incorrectly and unilaterally restricted the scope of their searches for records to records that contained my name, rather than records that substantively relate to me and my activities - it calls this "respond[ing] literally to the request"…
>
> The University did not respond to my requests for records related to "my activities". In fact, it is not possible for the University to respond to such requests with their literal restrictions…
>
> Due to the individuals involved, the severity of what has been actuated by certain members of the University's upper administration, and the political circumstances surrounding my requests to records …, it is not unreasonable to expect that there are additional records that would not have necessarily named me explicitly. It is common for members of an institution to refer in internal correspondence to an individual who has been critical of the institution other than by name…
>
> Even if the University intended to conduct only literal searches, the searches could not have been complete [since all] of the individuals who were asked to respond to the …requests limited their searches to …my last name…
>
> I remain concerned, given the broad context of my relation with the University, that it appears that the manner in which the University responded to my requests

> was a device to limit access. There was no reason or justification to answer my requests using their literal restrictions. If the University did in fact restrict its searches to only literal interpretations concerning requests for records concerning me as it claims it has done, then it is impossible for it to have produced as it did a responsive record [to another request] a record discussing matters relating to me substantively but not naming me explicitly, neither my first nor last names. This document is another example of members within the institution internally corresponding about a person without explicitly naming them.

In reply, the University submits that there was no other reasonable way to conduct the searches. It submits that searching by name is most effective and least expensive way to conduct searches. The University disputes the appellant's contention that it should have been able to search for records concerning the appellant without using the appellant's name as a search criteria. It states that:

> The appellant has nothing to support [this] contention, except an example that was used in another context to refer to another individual not related to the appellant's requests. With all due respect, it is not the University's responsibility to conduct searches under all the possible spelling variations of the appellant's name or all possible appellations.
>
> Such procedures would only increase the search time significantly and increase the fees payable by individuals making requests. The University has the obligation to conduct a reasonable search, and, in this instance, performing a search for the appellant's name was reasonable.

Concerning the appellant's query about the disclosure of a record which does not name him, the University states that this communication was found by a named Dean while he was conducting his search. The Dean knew that this communication was about the appellant and therefore, included it in the responsive records which the Dean identified.

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 has claimed that additional responsive records that are in the custody or under the control of the University's President should have been located. I note however, that the University did review the index of records provided by the appellant and advised him that 25 records indicated therein were responsive to his requests in this appeal. Of the 25 records, 19 were records that the appellant was the recipient or communicator, however, each of these records were forwarded onto someone within the University. The University has provided a copy of these 19 records to the appellant. Of the remaining six records, five were responsive to this appeal. The University is claiming that these records are exempt by reason of section 19 of the *Act*. Three of these five records were also responsive to another appeal of the appellant in file PA07-427, and have been considered by me in that appeal.

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 name 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 other responsive records without searching for records that contain the appellant's name.

As set out above, the issue before me is whether the searches carried out by the University for responsive records was reasonable in the circumstances. I find that 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/or my activities and communicated by/to [named individual] personally and/or to [named individual] in all his official capacities at the University of Ottawa, including but not limited to President and Vice-Chancellor at the University of Ottawa, to/by another person or other persons other than myself and in which I am not a/the recipient of such communications from March 20, 2007 inclusive to present.

Only electronic records were searched. In its representations, the University states that:

> Individuals identified in request… did not think they had any hard copy paper records concerning the appellant, other than any documents that may have been sent to their attention from the appellant himself or that would have already been provided to the appellant. Therefore, paper records were not searched. To do so, would have simply increased the search time significantly and hence the fees payable by the appellant.

In my view, the University cannot unilaterally decide not to search for records on the basis that to do so would increase the search time and, as a result, the fee payable by an appellant. 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 means of the fee provisions in the *Act*.

As the University did not conduct searches for responsive 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 a further search for paper records responsive to the request.

PERSONAL INFORMATION

I will now determine whether the two records at issue in this appeal for which the University has claimed the application of section 19 contain "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,

> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

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. The records concern possible disciplinary action against the appellant, an employee of the University.

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 to be "personal information". In Order PO-2271, 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 a 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.)).

Representations

The University submits that:

> The undisclosed records were communications between employees of the University of Ottawa and the legal counsel and this, for the purpose of providing legal advice…
>
> 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 a crucial to individuals being able to request and obtain legal 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 did not provide representations directly in response to the representations concerning the two records at issue in this appeal.

Analysis/Findings

Based on my review of the University's representations and the records, I find that certain portions of these two 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 email chains comprising the records. In these e-mails, the University's solicitors are providing legal

advice to the President. I am satisfied this information forms part of the continuum of communications [Order MO-2206].

However, I find that certain portions of the records do not reveal solicitor-client privileged information. These email portions of the email chains are not e-mails between a solicitor and a client, nor do these e-mails in the email chain reveal privileged information. These e-mails comprise e-mails between University staff other than the University's Legal Counsel. Therefore, I will order these e-mails to be disclosed.

The e-mails in the two records at issue 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 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 the portions of the two records at issue 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(a) 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 portions of 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 President 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 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 by **April 28, 2009**. 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 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 23, 2009
Diane Smith
Adjudicator