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

ORDER PO-2867

Appeal PA08-342

University of Ottawa

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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*):

> Please provide a copy of all records pertaining to a presentation by the Canadian Friends of Burma and Ka Hsaw Wa of Earth Rights International titled "BURMA Blood Profits: Was Ottawa U's new Desmarais building paid for with cash tainted by the blood of innocent Burmese citizens?" held Dec 5th 2007 in the Desmarais building.
>
> This should include but not be limited to administration or protection services decisions, communications (including inter-/intra-administration emails) and recent history covering the time period of November 1, 2007 to the present.
>
> Please also provide a copy of any written rational or university policy pertaining to any decisions taken regarding this event being held.

The University located thirteen records responsive to the request and issued a decision letter granting partial access to them. The University advised that access was denied to records and portions of records pursuant to sections 19 (solicitor-client privilege), 21(1) (personal privacy) and 22(a) (publicly available) of the *Act*. With respect to the record for which section 22(a) of the *Act* was claimed, the University provided the appellant with a link to its website where the record could be obtained. The University also advised the requester that searches had been conducted in the following locations:

- Office of the Vice-President, Academic and Provost
- Office of the Vice-President, External Relations
- Protection Services, and
- Housing and Convention Services.

The requester (now the appellant) appealed the University's decision.

In his letter of appeal, the appellant advised that, in addition to appealing the University's decision to deny access to portions of the information, he is of the belief that the University's search was incomplete and that more responsive records must exist. At the intake stage of the appeal process, the University conducted a further search of electronic and paper records in the following areas:

1. Office of President and Vice Chancellor and Executive Assistant
2. Vice-President, Resources
3. Office of the Secretary of the University
4. Offices of Communication and Market Services - Vice-President External Relations including the records of three identified individuals
5. Director of Alumni Relations

The University issued a supplementary decision advising the appellant that, as a result of its further search, nine additional responsive records were located only in areas 1 and 2. Partial access was granted to these records. Access was denied to the severed portions of the records pursuant to sections 19, 21(1) and 22(a) of the *Act*.

The appeal was then transferred to the mediation stage of the appeal process, where the appellant confirmed that he had obtained the records to which the University denied access under section 22(a) of the *Act*. Accordingly, section 22(a) is no longer at issue in the appeal.

The University denied access to portions of Record 16 on the basis that the solicitor-client privilege at section 19 applies. The appellant has advised that he seeks access to this information. Accordingly, section 19 of the *Act* is at issue in this appeal only for the information severed from Record 16.

The University denied access to the identities of four individuals whose names appear in Records 17, 18, 19, 20, 21 and 22, under the mandatory exemption at section 21(1) of the *Act*. During mediation, the University reconsidered its decision to withhold the names of three of the four individuals on the basis that they would not qualify as personal information. Additionally, the three individuals consented to the disclosure of their identities. Accordingly, during mediation, the University granted access to the names of the three individuals listed in Records 17, 18 and 19.

The University was unable to contact one of the individuals whose information appeared in the records. The appellant advised the mediator that he wishes to obtain access to the identity of this individual, whose name was severed from Records 21 and 22. Accordingly, section 21(1) of the *Act* is at issue only for the information severed from Records 21 and 22.

The University decided to grant access to the information in Record 20 that it had originally withheld under section 21(1) of the *Act*. Record 20 is therefore, no longer at issue in this appeal.

The University denied access to a portion of Record 17 on the basis that it is not responsive to the appellant's request. This information is repeated in Records 18 and 19. The appellant advised the mediator that he wishes to pursue access to this information. Accordingly, the issue of non-responsiveness will be considered for these portions of Records 17, 18 and 19.

The University issued a second supplementary decision letter outlining the further disclosure as described above. The decision also stated that "the searches conducted by the University of Ottawa in this matter did not reveal any transcripts, notes, memos, audio tapes or video tapes or any other type of surveillance records."

The appellant advised that, despite the additional searches conducted by the University, he believes that more records exist because there are many individuals carbon copied on the emails that comprise some of the records. He requested that another search be conducted for the email records of every person carbon copied on the responsive emails, in particular, the email records of the Dean of Academic.

The University advised the appellant that it had conducted further searches for emails of the named individuals who were carbon copied and/or in the "to" line of the responsive emails. The University advised that it could not conduct a search of the emails of three named individuals because they had left the University. The University also advised that it did not conduct a second search of the emails of the Dean of Academic on the basis that these records had previously been thoroughly searched by his Assistant.

The appellant continues to believe that more records responsive to his request must exist. The reasonableness of the University's search for responsive records is, therefore, an issue in this appeal.

As further mediation was not possible, the appeal was transferred to adjudication, where an adjudicator conducts an inquiry under the *Act*.

I began my inquiry into this appeal by sending this Notice of Inquiry setting out the facts and issues on appeal, to the University, initially. The University responded with representations.

I then sent a copy of the Notice of Inquiry, along with a copy of the non-confidential portions of the University's representations, to the appellant inviting him to submit representations. The appellant provided representations in response. As the appellant's representations raised issues to which I believed the University should be given an opportunity to reply, I also sought and received reply representations from the University.

RECORDS:

Portions of six records remain at issue in this appeal. They consist of email chains.

- Record 16 – section 19
- Records 17, 18, 19 – responsiveness
- Records 21 and 22 - section 21(1)

DISCUSSION:

SEARCH FOR RESPONSIVE 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.

Representations

The University submits that once it received the request, a search was undertaken to determine which entity of the University organized the Burma event and it was discovered that the event was being hosted by the Student Federation. The University submits that an initial search for responsive records, both electronic and paper, was conducted by the following offices:

- The Office of the Vice-President Academic and Provost
- The Office of the Vice-President of External Relations
- The Office of Protection Services
- The Office of Housing and Convention Services

The University explains that for the electronic search, the search terms "Burma" and "December 5, 2007" were utilized. The University submits that a total of thirteen responsive records were located and that the appellant was granted partial access to them.

The University submits that as a result of mediation, a second search for responsive records, both electronic and paper, was conducted of the following offices:

- The Office of the President and Vice Chancellor and Executive Assistant
- The Office of the Vice-President, Resources
- The Office of the Secretary of the University (now the Vice President, Governance)
- The Office of Communication and Marketing Services (including the records of three named individuals)
- The Office of the Director of Alumni Relations

The University explains that the search terms "Canadian Friends of Burma," "Burma Blood Profits," and "Desmarais" were utilized in addition to the terms "Burma" and "December 5, 2007." The University submits that additional responsive records were found in the Office of the President and Vice Chancellor and the Office of the Vice President, Resources and that the appellant was granted partial access to them.

The University submits that, at the request of the appellant, a further search for responsive records was conducted of the records of a named individual in the Office of the Dean of the Faculty of Social Sciences, a named individual in the Faculty of Social Sciences, and three named individuals in the Communications Office who were carbon copied and/or in the "to" line of the responsive emails. The University submits that no further records were found as a result of the search.

The University submits that all of the "searches were conducted by experienced employees familiar with the filing systems within their respective offices and that they had expended reasonable effort in conducting a search for records reasonably related to the request." The

University enclosed affidavits sworn by twenty individuals which described the searches they conducted for responsive records.

The University submits:

> The searches did not reveal any transcripts, notes, memos, audio tapes or video tapes or any other type of surveillance records. The fact that an individual was copied on an email did not imply that such individual would have information regarding the request. In many instances, individuals are copied on emails for informational purposes only.
>
> The request for information on the Burma event was received more than ten (10) months after the event occurred. Furthermore, the Burma event was not organized or hosted by the University of Ottawa. The request to reserve a room to hold the Burma event at the University of Ottawa was made by the Student Federation of the University of Ottawa. The Use of University Services and Facilities Procedure permits third parties to rent space at the University of Ottawa for various activities if space is available.
>
> The University of Ottawa cannot determine if records responsive to the request existed but no longer exist. Retention of paper records at the University of Ottawa are governed by the policy "Archives of the University 20-4" and email retention is governed by the practice set out in the document entitled "Email Practices at the University of Ottawa."

The University concludes its representations by stating:

> The University of Ottawa is of the view that, given the nature and scope of the request, it has provided sufficient evidence to show that it has made reasonable effort to identify and locate records responsive to the request [Order P-624].

In his representations, the appellant does not specifically state that he believes that additional records might exist but he submits:

> Reasonable search is an issue of this appeal because the Institution has repeatedly demonstrated its inability to locate responsive records for the following reasons:
>
> - The Institution first provided some responsive records on October 23, 2008;
> - The Institution provided additional responsive records on February 26, 2009;
> - The Institution provided additional responsive records on April 17, 2009;
> - A separate request for access to information (the Institution's file no. AS-212) has produced an additional record that is responsive to the present request. [The appellant provided a copy of this record along with his representations].

The appellant continues:

> Reasonable search is an issue of this appeal because the Institution has not made representations that all the communicating parties in the responsive records have been asked to perform searches pursuant to the request for records; affidavits were provided by only some of the communicating parties. Other parties, for example, [three named individuals] and legal counsel were not asked to perform searches nor have they provided affidavits.
>
> Reasonable search is an issue of this appeal because the Institution has claimed in paragraph 23 of its representations that a reasonable search includes searches for the keyword "Burma." A separate request for access to information (the Institution's file no. AS-212) has produced a record that is responsive to the present request and contains "Burma" in the subject headline. An affidavit was provided for the present appeal by the Institution from [named individuals] Administrative Assistant, [named individual], demonstrating that the office of the Vice-President, Resources performed incomplete searches for responsive records.

In its reply representations, the University submits:

> The University of Ottawa affirms that it conducted a reasonable search for responsive records. Pursuant to section 24 of the [*Act*], the University of Ottawa is only required to prove that it has conducted a reasonable search for the records [Order P-95, P-221, PO-1954-I]. The *Act* does not require that the University of Ottawa prove with absolute certainty that further records do not exist.
>
> …
>
> Searches could not be conducted by, and affidavits cannot be obtained from individuals who left the University of Ottawa prior to the date of the request for information submitted by the Appellant. For example, at the time of the request, the position of Vice-President, External Relations was vacant, two communications officers had left to take positions with another institution unrelated to the University of Ottawa, and the position of legal counsel was vacant. The retention of records at the University of Ottawa in this regard is governed by the "Archives of the University 20-4" procedure and the document entitled "Email Practices at the University of Ottawa."
>
> …
>
> The University of Ottawa's decision letter of April 17, 2009 did not disclose additional new records as a result of a further search. In discussion with the mediator, the University of Ottawa agreed to exercise its discretion by disclosing further portions of records that had previously been partially disclosed or by partially disclosing records that had not been previously disclosed which records had all been previously identified in the Index of Records. The record that the

> Appellant obtained in a separate request for information, on a different subject matter, just happened to be attached to an email string relating to a record that had already been partially released to the Appellant under this Appeal. The record is number 17 in the "Disclosed" Index of Records. It was not a new additional responsive record.

Analysis and finding

As noted above, 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. In this appeal, the appellant has identified three named individuals who he believes should have been asked to conduct searches and provide affidavits because their names consistently appear as parties to the email exchanges that make up the responsive records. These three individuals were, at the time of the request, the Vice-President, Resources, the Vice-President pro tempore, University Relations and the President and Vice-Chancellor of the University. Additionally, the appellant has provided a copy of an additional record, an email from the Vice-President, Resources he feels is responsive to his request that was not identified in the current appeal.

Although the appellant is correct in noting that these three individuals do not appear to have personally conducted searches for responsive records as they were not asked to prepare affidavits attesting to any such search, I note that in its representations the University has included affidavits from individuals who performed a search on behalf of all three of these individuals. In particular, the University provided affidavits from the Assistant to the Vice-President, University Relations, the Executive Assistant to the President and Chancellor, and the Administrative Assistant of the Vice President, Resources. All three of these individuals attested to the fact that they conducted searches of their respective offices, on behalf of the three individuals identified by the appellant, for records responsive to the request. Accordingly, I do not accept that the fact that these individuals did not provide affidavits as evidence in this appeal suggests that the University did not conduct a reasonable search.

The appellant also submits in his representations that legal counsel should have been asked to conduct a search and provide an affidavit. However, I accept the University's submission in its reply representations that the individual who was legal counsel at the time of the event was no longer employed by the University at the time of the request. Therefore, the University submits that legal counsel could not be asked to perform a search or swear an affidavit.

I acknowledge that the University appears to have missed one additional email that was identified as responsive in a separate request. However, as noted by the University in its reply representations, the *Act* does not require that the University prove with absolute certainty that further records do not exist, but only that it has conducted a reasonable search for the records [Order P-95, P-221, PO-1954-I]. In my view, the University has done an extensive and thorough job at identifying and locating a large number of individuals who may have records responsive to the appellant's request. From my review of its representations and the affidavits of the individuals who conducted the searches, I accept that the University's search was reasonable.

Accordingly, I conclude that the University has conducted a reasonable search to locate the records responsive to the request.

RESPONSIVENESS OF RECORDS

The University claims that portions of Records 17, 18 and 19 contain information that is not responsive to the appellant's request.

Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> . . . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

To be considered responsive to the request, records must "reasonably relate" to the request [Order P-880].

Representations

In response to this issue, the University made the following submissions:

> In the appellant's … request for information, the appellant sought access to all records about the Burma event. The request was in writing and provided sufficient detail to enable an experienced employee of the University of Ottawa to identify the records sought.

Although during mediation the appellant indicated that he wished to have the issue of responsiveness addressed, in his representations he did not make any submissions on whether or not he agrees with the University's claim that portions of Records 17, 18, and 19 are not responsive to his request.

Analysis and finding

The appellant's request for information has been reproduced verbatim in the Nature of the Appeal section of this order. In my view, the request is clear and sufficiently detailed to enable an experienced University employee, upon a reasonable effort, to identify the responsive records.

Records 17, 18 and 19, portions of which include information that the University claims are non-responsive to the appellant's request, are email chains between individuals employed by the University.

I have reviewed the specific portions of Records 17, 18 and 19 that the University has severed as non-responsive. On each of these records, the portion that has been severed amounts to the same email, although on Record 18 the University has also severed a response to that email which does not appear in the chains that make up Records 17 and 19. From my review of the severances, the information discussed in these particular portions of the email chains do not relate to the Burma event but instead refer to an entirely different matter. Accordingly, I find that the portions of Record 17, 18 and 19 that the University claims are non-responsive, have been properly severed as they are not reasonably related to the appellant's request.

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1), in part, 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,
>
> (e) the personal opinions or views of the individual except where 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,

> (h) the individual's name if 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].

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.)].

The University submits that the severed portions of Records 21 and 22 contain the personal information of an identifiable individual as it meets the definition of that term in section 2(1). The appellant makes no specific representations on whether the severed information qualifies as personal information.

Having reviewed the severed portions of Records 21 and 22, I agree with the University that they contain the personal information of an identifiable individual within the meaning of the definition outlined in section 2(1) of the *Act*. Specifically, I find that the severed portions of the records contain an individual's name together with other personal information about them (paragraph (h)), information about the individual's race, national or ethnic origin (paragraph (a)) and information about their educational history (paragraph (b)). In my view, the personal information contained in the records also amounts to the personal opinion or views of the individual (paragraph (e)) and correspondence sent to the University that is implicitly of a private or confidential nature (paragraph (f)). Although most of this information in these records has been disclosed, I find that were the severed information disclosed, it is reasonable to expect that the individual to whom the information relates would be identified [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

Accordingly, I accept that the information that has been severed from Records 21 and 22 consists of personal information within the meaning of that term as defined by section 2(1) of the *Act*.

PERSONAL PRIVACY

Having determined that the information severed from Records 21 and 22 qualifies as the personal information of an identifiable individual, the mandatory exemption at section 21(1) requires that the University refuse to disclose the information unless one of the exceptions to the exemption at section 21(1)(a) through (f) applies. In my view, the only exception which could have application in the present appeal is set out in section 21(1)(f), which states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 21(2), (3), and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy within the meaning of section 21(1)(f). Section 21(2) provides criteria to consider in making this determination, section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy and section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has ruled that once a presumption against disclosure has been established under section 21(3), it cannot be rebutted by either one or a combination of the factors set out in section 21(2). A section 21(3) presumption can be overcome, however, if the personal information at issue is caught by section 21(4) or if the "compelling public interest" override at section 16 applies [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

If none of the presumptions in section 21(3) apply, the institution must consider the factors listed in section 21(2), as well as all other relevant circumstances.

In the circumstances of this appeal, the only presumption that might apply is section 21(3)(d).

Section 21(3)(d) – employment or educational history

The University claims that the presumption at section 21(3)(d) applies in the circumstances of this appeal. That section reads:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > relates to employment or educational history.

The University submits:

> The personal information identifies the name of the individual and relates to the employment or educational history of the individual (paragraph 21(3)(d)). Therefore, there is a presumed unjustified invasion of personal privacy that cannot be rebutted by one or more factors or circumstances under section 21 (2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. This is not a case where a compelling public interest in the records clearly outweighs the purpose of the exemption. Except for the personal information, all the information in the record has been disclosed to the Appellant.

The appellant does not make specific representations on the possible application of the mandatory exemption in section 21(3)(d) that respond to the University's position. However, he submits that the consent of the individual to whom the information relates was not sought by the University.

In its reply representations, the University explains that it has not been able to contact the individual to whom the personal information relates. It further explains that the legal counsel through whom the information was sent left the University in 2008. The University submits that there is no email address, telephone number or postal address at which to contact this individual and that attempts to locate the individual were unsuccessful. The University submits:

> Despite reasonable efforts to do so, given the information it has at its disposal concerning the individual, the University of Ottawa has not been able to determine the status of this individual or contact this individual.

Information contained in resumes [Orders M-7, M-319, M-1084] and work histories [Order M-1084, MO-1257] has generally been found to fall within the scope of section 21(3)(d). However, a person's name, professional title and employer do not, without more, attract the application of the presumption in section 21(3)(d) [Order P-219, P-235, MO-2103-I].

Having reviewed the personal information in Records 21 and 22, I find that although the information can be said to relate the individual's employment or education, in my view, it is too general in nature to attract the application of the presumption at section 21(3)(d). Previous orders have held that general information regarding the kind of employment and the work location is not sufficient for section 21(3)(d) to apply [Order PO-2298, confirmed on reconsideration in PO-2590-R]. In the circumstances of this appeal, in my view, the information at issue does not contain specific details about the individual's educational or employment history, such as their occupation, employer and years of service or the type of education sought or obtained and the years of study or graduation. Accordingly, having considered the specific information contained in Records 21 and 22, I am not satisfied that it contains sufficient detail to fall within the ambit of the presumption listed at section 21(3)(d) of the *Act*.

Section 21(2)

As I have found that none of the presumptions listed in section 21(3) of the *Act* apply, I must now go on to determine whether the disclosure of the personal information contained in Records 21 and 22 would amount to an unjustified invasion of personal privacy. As noted above, section 21(2) of the *Act* provides factors to be considered when making this determination. Section 21(2) states:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;

(b) access to the personal information may promote public health and safety;

(c) access to the personal information will promote informed choice in the purchase of goods and services;

(d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

(e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

(f) the personal information is highly sensitive;

(g) the personal information is unlikely to be accurate or reliable;

(h) the personal information has been supplied by the individual to whom the information relates in confidence; and

(i) the disclosure may unfairly damage the reputation of any person referred to in the record.

The factors in paragraphs (a), (b), (c) and (d) of section 21(2) generally weigh in favour of disclosure, while those in paragraphs (e), (f), (g), (h) and (i) weigh in favour of privacy protection [Order PO-2265].

Having reviewed the information at issue and the factors listed in section 21(2), in my view, none of the factors weighing either for or against disclosure of the information, are relevant. In the absence of evidence to establish that disclosure of the information would *not* constitute an unjustified invasion of the personal privacy of the individual to whom the personal information relates, the exception at section 21(1)(f) does not apply and disclosure of the information would amount to an unjustified invasion of personal privacy.

As section 21(4) does not apply and there is no evidence that there is a compelling public interest in the disclosure of the specific personal information found in Records 21 and 22, I find that section 21(1) applies to exempt the personal information in those records as identified by the University, and that it should not be disclosed to the appellant.

SOLICITOR-CLIENT PRIVILEGE

The University claims that section 19 applies to exempt portions of Record 16 from disclosure.

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. Branch 1 arises from the common law and section 19(a). Branch 2 is a statutory privilege and arises from section 19(b), or in the case of an educational institution, from section 19(c). The institution must establish that at least one branch applies.

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)].

In the circumstances of this appeal solicitor-client communication privilege is relevant.

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.)].

Branch 2: statutory privileges

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

The University submits that the statutory solicitor-client communication privilege applies in the circumstances of this appeal.

Statutory solicitor-client communication privilege

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

Representations

The University submits that the discretionary exemption at section 19 applies to exempt portions of Record 16 from disclosure, arguing that:

> The severed portion of Record 16 is a confidential communication between Legal Counsel of the University of Ottawa and an officer of the University of Ottawa, which communication was prepared for the purpose of giving 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 of Ottawa'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, documents providing legal advice are subject to the Section 19 exemption and should not be disclosed.
>
> The University of Ottawa submits that it has not taken any action that constitutes a waiver of common law solicitor-client privilege either implicitly or explicitly. The severed portion of Record 16 has not been disclosed to outsiders by either the Legal Counsel or the officer receiving the advice nor has the University of Ottawa, knowing of the existence of the privilege, voluntarily evinced an intention to waive the privilege.
>
> The University of Ottawa respectfully submits the severed portion of Record 16 is subject to common law solicitor-client communication privilege and, therefore must not be disclosed.

The appellant takes the position that the University has not met its burden of proof to establish that the solicitor-client privilege at section 19 applies. The appellant submits:

> The Institution has not made representations that the records it claims are exempt from disclosure pursuant to section 19 of the *Act* in conjunction with subsection 49(a) of the *Act* and pursuant to Branch 1 common law privileges [Orders 49, P-1551] requiring of the records that:
>
> 1. (a) there must be a written or oral communication; **and**
>
>   (b) the communication must be of a confidential nature; **and**
>
>   (c) the communication must be between a client (or his agent) and a legal advisor; **and**
>
>   (d) the communication must be directly related to seeking, formulating or giving legal advice;
>
> OR
>
> 2. The record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.
>
> Since I, the Appellant, cannot examine the records intact and without censor, the Commissioner should examine all records where section 19, solicitor-client privilege has been cited and apply the above tests to ascertain the Institution's improper exercises of discretion. However, the Commissioner should be informed that litigation has not been commenced nor are there reasonable grounds for contemplated litigation.

> The Commissioner should consider the possible inappropriate citations of section 19 by the Institution because of its relationship of [named individual] of Power Corp and former Director of French energy giant Total, who has recently donated $15millions to the Institution and who has a Institutional building named after him …International human rights groups like Earth Rights have thoroughly documented Total's abuses and violations of human rights in Burma. Therefore, the Institution could be improperly and in bad faith relying on section 19 to prevent from disclosure information concerning vested political interests.

Analysis and finding

The University submits that the severed portions of Record 16 qualify for exemption under the statutory solicitor-client communication privilege outlined in section 19(c). Record 16 is an email chain between a number of individuals employed by the University, including its in-house legal counsel. The majority of the email chain has been disclosed to the appellant. The portion of the email chain that has been severed is an exchange between legal counsel and an officer of the University whose disclosure would reveal a question regarding a legal matter posed by the officer and the advice given by counsel in response to the question.

In my view, having reviewed the severed portions of Record 16 closely, I accept that they amount to written communications of a confidential nature between a client (the officer of the University) and his legal counsel, directly related to the seeking, formulating or giving of legal advice. Accordingly, subject to my review of the University's exercise of discretion, I find that the severed portions of Record 16 are properly exempt under the discretionary solicitor-client privilege exemption at section 19(c) of the *Act*.

EXERCISE OF DISCRETION

I have upheld the University's claim that the exemption at section 19 applies to the severed portions of Record 16. The exemption at section 19 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)].

The University submits that it exercised its discretion based on the principles set out in the *Act* that state "that information should be available to the public" and "that individuals should have access to their own personal information and that exemptions to access should be limited and specific." The University submits:

> The Office of the Legal Counsel at the University of Ottawa provides legal advice of a diverse nature to the University of Ottawa on an on-going basis. It also manages the University of Ottawa's relationship with external counsel retained on behalf of the University.
>
> In examining Record 16, it was determined that partial access could be given to most of the record and this was granted to the Appellant. With respect to the undisclosed portion of the record, this portion represents a communication of a confidential nature that was prepared for the purpose of obtaining and/or giving legal advice. It has been determined that the information that was severed and not disclosed related to an actual request by an officer of the University of Ottawa for specific legal advice as to whether the University of Ottawa could be at risk and the response of legal counsel to such request.
>
> The Appellant is an individual. The severed portion of Record 16 for which the section 19 exemption has been applied does not discuss or contain the Appellant's personal information.
>
> There is no organizational or structural need for the Appellant to receive the undisclosed portion of the record in order to function and there are no ramifications to the requester if he does not receive this information. Thus, there is no sympathetic or compelling need for the requester to receive the information. On the other hand, the nature of the advice is important to the University of Ottawa as it provides recommendations as to how the University of Ottawa should proceed with respect to similar situations in the future.
>
> Historically, the University of Ottawa does not disclose solicitor-client communications as such communications are regarded as privileged. This increases public confidence in the operation of the University of Ottawa.
>
> The solicitor-client communication privilege exemption represents an assurance for University administrators and employees that their legal issues will be dealt with discretion and respect. The solicitor-client communication privilege is crucial to individuals being able to request and obtain legal advice in total confidence. Public confidence in the operation of the University of Ottawa will be undermined if the non-disclosed portion of Record 16 is disclosed.
>
> Accordingly, in order to protect the integrity of the Office of the Legal Counsel, it is important that the section 10 exemption continue to be maintained in respect of the undisclosed portion of Record 16. The University of Ottawa, in its analysis, has taken into account all relevant factors in the exercise of its discretion.

The appellant submits that the University's exercise of discretion in claiming the application of the discretionary solicitor-client exemption at section 19 "could be improper and in bad faith." The appellant, however, does not make any further submissions to explain his position.

Analysis and finding

Having considered the representations of the parties and the information at issue in Record 16, in my view, there is no evidence before me to suggest that the University failed to take into account relevant considerations, took into account irrelevant considerations, or exercised its discretion in bad faith or for an improper purpose. Consequently, I find that the University properly exercised its discretion in withholding portions of Record 16 from the appellant, pursuant to the solicitor-client privilege exemption at section 19 of the *Act*.

ORDER:

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

Original Signed By: January 22, 2010
Catherine Corban
Adjudicator