

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3045

Appeal PA09-212

University of Ottawa

January 31, 2012

Summary: The University of Ottawa received a request under the *Freedom of Information and Protection of Privacy Act* for access to records concerning a talk given by the appellant at a conference. Access to the records was denied under the exclusionary provision in section 65(6)3 (labour relations and employment records), and the discretionary exemption in section 49(a) read in conjunction with section 19 (solicitor-client privilege). The appellant also claimed that the university's search for records was not reasonable. This order upholds the university's decision.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 65(6)3, 19(a) and (c), 24.

Cases Considered: *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

OVERVIEW:

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

The University of Ottawa hired or secured a professional reporter to report on a talk I gave at the [name] annual conference in [place] on [date].

I request all records about my talk and trip to the [conference].

I expect that respondent records would exist in the offices of the Dean of the Faculty of Science, the Dean of the FGPS [Faculty of Graduate and Postdoctoral Studies], the VP-Academic, Legal Counsel, the Secretary of the University, the President, the VP-Resources, Protection Services, and possibly other offices and with consultants or managers.

[2] The university located the responsive records and granted partial access to them. Portions of the records were withheld pursuant to sections 65(6)3 (labour relations and employment records) and 49(a) in conjunction with 19 (solicitor-client privilege) of the *Act*.

[3] The requester, now the appellant, appealed the university's decision.

[4] During the course of mediation, the appellant advised the mediator that he was pursuing access to the withheld records. He was also of the view that additional records exist, including records related to the surveillance of or the reporting of his talk, as well as administrative and financial records related to expenses for his trip to the conference. Accordingly, the reasonableness of the university's search is at issue in this appeal.

[5] Mediation was not successful and the appeal was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. I sought and received representations from the university and the appellant, which were shared in accordance with *Practice Direction 7* of the *IPC Code of Procedure*. In this order, I find that the records are subject to the *Act* and are exempt by reason of the solicitor-client privilege discretionary section 19 exemption. I also uphold the university's search for records.

RECORDS:

[6] The records at issue in this appeal are listed in the following Index of Records:

Record #	To	From	Subject	Sections Claimed
2	Lawyers; Associate Vice-President, Human Resources; Secretary of the university; Director, Faculty Affairs and Labour Relations; Vice-President Academic and Provost; Dean of the Faculty of Graduate and Postdoctoral	Dean of the Faculty of Science	P&C [Personal & Confidential]: misuse of NSERC [Natural Sciences and Engineering Research Council of Canada] research funds	s. 65(6); s.19 with s. 49.(a)

	Studies; Director of Research, Grants and Ethics Services; Dean of the Faculty of Science; executive assistant to the Dean of the Faculty of Science			
3	Dean of the Faculty of Science; Lawyers; Associate Vice-President, Human Resources; Vice-President Academic and Provost	Secretary of the university	P&C: misuse of NSERC research funds	s. 65(6); s.19 with s. 49.(a)
4	Director of Research, Grants and Ethics Services	Associate Vice-President, Human Resources	P&C: misuse of NSERC research funds	s. 65(6); s.19 with s. 49.(a)
5	Dean of the Faculty of Science; Lawyers; Associate Vice-President, Human Resources; Secretary of the university; Director, Faculty Affairs and Labour Relations; Vice-President Academic and Provost; Dean of the Faculty of Graduate and Postdoctoral Studies; Director of Research, Grants and Ethics Services; executive assistant to the Dean of the Faculty of Science	Director of Research, Grants and Ethics Services	P&C: misuse of NSERC research funds	s. 65(6); s.19 with s. 49.(a)
6	Secretary of the university; Dean of the Faculty of Science;; Lawyer; Associate Vice-President, Human Resources; Director, Faculty Affairs and Labour Relations; Vice-President Academic and Provost;	Lawyer	P&C: misuse of NSERC research funds	s. 65(6); s.19 with s. 49.(a)

ISSUES:

- A. Did the institution conduct a reasonable search for records, including but not limited to surveillance or reporting of the talk at the conference, as well as the administrative and financial records related to expenses for the trip?

- B. Does section 65(6)3 exclude the records from the *Act*?
- C. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- D. Does the discretionary exemption at section 49(a) in conjunction with the section 19 exemption apply to the information at issue?
- E. Did the institution exercise its discretion under section 49(a)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Did the institution conduct a reasonable search for records, including but not limited to surveillance or reporting of the talk at the conference as well as administrative and financial records related to expenses for the trip?

[7] 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 and 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.

[8] 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 [Orders P-624 and PO-2559]. To be responsive, a record must be "reasonably related" to the request [Order PO-2554].

[9] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request [Orders M-909, PO-2469, PO-2592].

[10] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control [Order MO-2185].

[11] 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 [Order MO-2246].

[12] A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable [Order MO-2213].

[13] The university was asked to provide a written summary of all steps taken in response to the request. In particular, the university was asked:

1. Did the institution 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 institution 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 institution 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 institution inform the requester of this decision? Did the institution 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.

[14] The university submits that the scope of the request was clear. It states that the FIPPA Coordinator advised the Dean of the Faculty of Sciences, Dean of the Faculty of Graduate and Postdoctoral Studies, Vice-President Academic and Provost, Vice-President Governance, the Office of the President, Vice-President Resources, the Director of Protection Services, the Executive Director, Communications Directorate, the Director, Faculty Affairs and Labour Relations and the Coordinator, Academic Affairs and Academic Labour Relations that a request for access to information had been made to the university for the records. The Coordinator requested that the following keywords

be used for the search: "appellant's name", "name of conference", and "name of city conference took place in".

[15] The university submits that the searches were conducted by experienced employees of the university who are familiar with the operation of and filing systems within their respective offices.

[16] The appellant submits that the minimal keywords used for the searches were not proper under the *Act*, therefore, the search was incomplete and a new search should be ordered. He also submits that the university unilaterally narrowed the scope of his request and as such did not search for certain responsive records.

Analysis/Findings

[17] The appellant's request was for all records about the appellant's talk and trip to the conference. The FIPPA Co-ordinator asked that searches be conducted using the keywords "appellant's name", "name of conference", and "name of city". I find that these search terms were reasonable in order for the university to locate responsive records. These keywords are the keywords in the appellant's request.

[18] Furthermore, I find that the appellant is attempting to expand the scope of the request at the adjudication stage of the appeal. The mediator's report lists the search issue at the end of mediation to be:

Records including but not limited to surveillance or reporting of the [date] [name of conference] talk as well as administrative and financial records related to expenses for [my] trip to [place of conference].

[19] The appellant believes that his request included records related to all of his spending on all of his trips. I find that records concerning other trip expenses incurred by the appellant do not reasonably relate to the request and are, therefore, not responsive.¹

[20] I find that the appellant's request relates to records concerning a specific trip he undertook to speak at a specific conference. I find that the university conducted a reasonable search for responsive records and that the appellant has not provided a reasonable basis for concluding that additional responsive records exist. Accordingly, I am upholding the university's search for records.

B. Does section 65(6)3 exclude the records from the *Act*?

[21] Section 65(6)3 states:

¹ Order PO-2554.

Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[22] If section 65(6) applies to the records, and none of the exceptions found in section 65(7) applies, the records are excluded from the scope of the *Act*.

[23] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 1, 2 or 3 of this section, it must be reasonable to conclude that there is "some connection" between them. [Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).]

[24] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.). See also Order PO-2157.].

[25] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship [Order PO-2157].

[26] If section 65(6) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507].

[27] Section 65(6) may apply where the institution that received the request is not the same institution that originally "collected, prepared, maintained or used" the records, even where the original institution is an institution under the *Municipal Freedom of Information and Protection of Privacy Act* [Orders P-1560 and PO-2106].

[28] The exclusion in section 65(6) does not exclude all records concerning the actions or inactions of an employee simply because this conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its

employees [*Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.)].

[29] The type of records excluded from the *Act* by section 65(6) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions [*Ministry of Correctional Services*, cited above].

[30] For section 65(6)3 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and
3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

[31] The university submits that the records were prepared by employees of the university and maintained by the university. It states that the university was at all times acting as an employer and terms and conditions of employment of the appellant were at issue.

[32] Concerning Records 2 to 4 only, the university states that these records were collected and prepared by employees and/or agents on behalf of the university in relation to anticipated proceedings before a tribunal relating to labour relations. The university also states that these records concern the employment of the appellant.

[33] The university submits that all of the records consist of communications between the various university staff including its legal counsel concerning the appellant. It also states that the appellant was governed by a collective agreement which contemplates several types of arbitration at different stages in the disciplinary or hearing process.

[34] The appellant submits that the collective agreement requires the subject of any investigation to be informed of the existence of the investigation. He states that there is no evidence that link the records in question to any specific investigation or "anticipated proceeding". In particular, he states that the entire matter of the talk he gave at the conference has never been grieved and was never the subject of a disciplinary investigation.

[35] In reply, the university states that:

An explanation as to the non-existence of "anticipated proceedings" is inconsequential given that the records would also be exempt under section[s] 19 and 49(a) of the *Act*.

Analysis/Findings

Part 1: collected, prepared, maintained or used

[36] Based upon my review of the records and the parties' representations, I find that the records were prepared and maintained by the university. Therefore part 1 of the test has been met.

Part 2: meetings, consultations, discussions or communications

[37] The records are all emails and attachments exchanged between university staff. Based upon my review of the records and the parties' representations, I find that the records were prepared and maintained by the university in relation to consultations, discussions or communications. Therefore part 2 of the test has been met.

Part 3: labour relations or employment-related matters in which the institution has an interest

[38] The phrase "labour relations or employment-related matters" has been found to apply in the context of:

- a job competition [Orders M-830 and PO-2123]
- an employee's dismissal [Order MO-1654-I]
- a grievance under a collective agreement [Orders M-832 and PO-1769]
- disciplinary proceedings under the *Police Services Act* [Order MO-1433-F]
- a "voluntary exit program" [Order M-1074]
- a review of "workload and working relationships" [Order PO-2057]
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act* [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.)]

[39] The phrase "labour relations or employment-related matters" has been found *not* to apply in the context of:

- an organizational or operational review [Orders M-941 and P-1369]
- litigation in which the institution may be found vicariously liable for the actions of its employee [Orders PO-1722, PO-1905 and *Ontario (Ministry of Correctional Services) v. Goodis*, cited above]

[40] The phrase "in which the institution has an interest" means more than a "mere curiosity or concern", and refers to matters involving the institution's own workforce [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above].

[41] The records collected, prepared maintained or used by an institution are excluded only if the meetings, consultations, discussions or communications are about labour relations or "employment-related" matters in which the institution has an interest. Employment-related matters are separate and distinct from matters related to employees' actions [*Ministry of Correctional Services*, cited above].

[42] Based upon my review of the records and the parties' representations, including the confidential portions of the university's representations, I agree with the appellant that the records do not concern labour relations or employment-related matters in which the university has an interest. The subject matter of the records concerns the use of Natural Sciences and Engineering Research Council of Canada (NSERC) research funds by the appellant. The NSERC role is described on its website as follows:²

NSERC's role is to make investments in people, discovery and innovation to increase Canada's scientific and technological capabilities for the benefit of all Canadians. ...We promote discovery by funding research conducted by postsecondary professors and foster innovation by encouraging Canadian companies to participate and invest in postsecondary research and training...

NSERC reports to Parliament through the Minister of Industry. It is governed by a President and a Council of distinguished members selected from the private and public sectors. The Council is advised by various standing committees that are guided by a peer review process.

[43] The records concern the possible misuse by the appellant of NSERC funds. The NSERC is an outside agency independent of the university. The university has not provided any specific evidence that would link the records specifically to any labour

² http://www.nserc-crsng.gc.ca/NSERC-CRSNG/vision-vision_eng.asp

relations or employment-related matters concerning the appellant nor has the university demonstrated how it has an interest in any anticipated proceedings between the appellant and the NSERC. Nor is there any evidence of anticipated proceedings arising from the appellant's use of NSERC funds. Although the university may have an interest in the records as it concerns an employee's misuse of research funds obtained from an outside agency, as stated above, employment-related matters within section 65(6) are separate and distinct from matters related to employees' actions [*Ministry of Correctional Services*, cited above].

[44] Accordingly, I find that part 3 of the test under section 65(6)3 has not been met. Therefore, section 65(6)3 does not apply to exclude the records from the application of the *Act*. I will consider below whether the records are exempt under section 49(a) in conjunction with section 19.

C. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[45] 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) 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;

[46] 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].

[47] Sections 2(2), (3) and (4) also relate to the definition of personal information. These sections state:

(2) Personal information does not include information about an individual who has been dead for more than thirty years.

(3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[48] 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 and PO-2225].

[49] 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 and MO-2344].

[50] 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.)].

[51] The university states that the records do not contain personal information relating to identifiable individuals other than appellant.

[52] The appellant does not dispute this submission by the university.

Analysis/Findings

[53] Based upon my review of the records, I agree with the university that they contain the personal information of only the appellant. Although this information is about the appellant in a professional capacity, it reveals something of a personal nature about him related to an allegation of misuse of funds.³

D. Does the discretionary exemption at section 49(a) in conjunction with the section 19 exemption apply to the information at issue?

[54] 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.

[55] Section 49(a) reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

[56] Section 49(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information [Order M-352].

[57] Where access is denied under section 49(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[58] In this case, the institution relies on section 49(a) in conjunction with section 19.

³ Orders PO-2524 and PO-2633.

[59] Section 19 of the *Act* states in part as follows:

A head may refuse to disclose a record,

(a) that is subject to solicitor-client privilege; 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.

[60] 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 in the case of an educational institution from section 19(c). The institution must establish that at least one branch applies.

[61] The university relies on the solicitor-client communication privilege in both branches 1 and 2.

Branch 1: common law privilege

[62] 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)].

Branch 2: statutory privileges

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

Representations

[64] The university submits that the records consist of privileged and confidential communications between external legal counsel retained by the university and senior administration. The university states that solicitor-client privilege is crucial to individuals within the university, as it allows them to freely make requests to obtain legal advice, knowing it will remain confidential.

[65] The university also submits that it did not take any action that constitutes a waiver of its common law and statutory solicitor-client privilege either implicitly or

explicitly. It states that the records have not been disclosed to outsiders either by the university's legal counsel or the officers receiving the advice.

[66] The appellant did not provide representations on whether the records are subject to the discretionary solicitor-client privilege exemption in section 19.

Analysis/Findings

[67] 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.)].

[68] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Orders PO-2441, MO-2166 and MO-1925].

[69] 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.)].

[70] 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].

[71] 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.)].

[72] The records are email chains concerning the same issue circulated amongst university staff (including internal counsel), and external counsel retained by the university. All of the records arise out of the same originating email. The author of the originating email is seeking legal advice concerning the matter set out in his email. In response to the originating email, legal counsel acting on behalf of the university provided legal advice. The email chains in the records represent a "continuum of communication" as set out above.

[73] Based upon my review of the records, I find that they contain solicitor-client communications. The records were all prepared by or for counsel for the university, for use in giving legal advice or are part of a "continuum of communications" between legal

counsel and university staff. The records come within both branch 1 and 2. I find that section 49(a) in conjunction with sections 19(a) and (c) apply to all of the records. Accordingly, subject to my review of the university's exercise of discretion, the records are exempt under section 49(a).

E. Did the institution exercise its discretion under section 49(a)? If so, should this office uphold the exercise of discretion?

[74] 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.

[75] 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.

[76] 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)].

[77] 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.

[78] The university submits that when exercising its discretion it took into consideration:

- the purpose of the *Act*,
- that the appellant was seeking his own personal information,
- whether the appellant had a sympathetic or compelling need to receive the information, and
- whether disclosure would increase public confidence in the operation of the university.

[79] The university states that the records represent either a communication of a confidential nature between a solicitor and client for the purpose of providing advice, or the receipt of confidential information by a solicitor in order for the solicitor to formulate advice on an on-going legal matter. The university submits that:

There is no sympathetic or compelling need for the [appellant] to receive the information. On the other hand, the protection of the confidentiality of the advice is important to the university as it provides the university with confidence that it is able to seek legal advice or exchange information communications with university legal counsel in the furtherance of such advice at present and in the future.

Historically, the university has never disclosed solicitor-client communications as such communications are regarded as privileged, thereby increasing public confidence in the operation of the University of Ottawa.

[80] The appellant submits that the university exercised its discretion in bad faith and for improper purpose and in a manner that is inconsistent with the *Act*. The appellant states that he has a compelling need to receive his personal information and that he will make the records public, thereby increasing public confidence in the operation of the university and making the university accountable.

Analysis/Findings

[81] The records are privileged communications between legal counsel and university staff or communications that form part of a "continuum of communications" aimed at keeping legal counsel informed so that advice may be sought and given. I am satisfied that the university considered that the subject-matter of the records are significant to the appellant and that one of the purposes of the *Act* includes the principle that a requester should have a right of access to his own information.

[82] The purpose of the solicitor-client privilege exemption seeks to protect confidential communications between solicitors and their clients. Based upon my review of the records and the parties' representations, I find that the university exercised its discretion in a proper manner taking into account relevant factors and not taking into account irrelevant factors.

[83] Accordingly, I find that the records are properly exempt from disclosure under section 49(a), read in conjunction with section 19, of the *Act*.

ORDER:

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

Original signed by: _____
Diane Smith
Adjudicator

_____ January 31, 2012