

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3329

Appeal PA13-116

University of Ottawa

April 7, 2014

Summary: The appellant was the subject of a large number of requests under the *Act* made to the university. He then requested records relating to those requests from the university, which denied access to them under the mandatory personal privacy exemption in section 21(1). The appellant appealed the denial of access and also objected to the fee charged, the university's refusal to grant a fee waiver, its decision to give him annual ongoing access to records and its denial of the right to examine the records. In this decision, the university's decision to deny access to the records under section 21(1) is upheld. Because access to the information sought in the records was denied, issues around fees, fee waiver and examination of the records were found to be moot. The adjudicator also held that the subject matter about which the appellant sought ongoing access to records has been resolved and no useful purpose would be served by ordering the university to provide decision letters about access to records on an ongoing basis.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 21(1), 24(4), definition of "personal information" in section 2(1)

Orders and Investigation Reports Considered: PO-3084, PO-3188 and PO-3241

OVERVIEW:

[1] 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:

...all records of communications - including but not limiting the generality of the foregoing all correspondence, notes of conversations, or "cc line" correspondence – between the University and the information requester, or their respective legal counsel, for each of the following FIPPA request files: A-11-3, A-11-4, A-11-66, A-11-67, A-11-68, A-11-69, A-11-70, A-11-72, A-11-76, A-11-77, A-12-27, A-12-28, A-12-33, A-12-34, A-12-35, A-12-36, A-12-38, A-12-39, A-12-40, A-12-68, A-12-83, A-12-84, A-12-85, A-12-86 and A12-87. If a file remains active or under mediation or appeal, then interpret this as a continuing access request under s. 24(3) of FIPPA for two years, or until file closure, whatever comes first.

[2] The university issued a decision dated February 21, 2013 granting partial access to the requested information. The university included an index of records with its decision setting out that access to some information was denied pursuant to the mandatory personal privacy exemption in section 21(1) of the *Act* and advised that some information contained in the records was denied on the basis that it is not responsive to the request.

[3] In addition, the university advised that it was prepared to provide continuing access to records relating to the five files that remained open at that time pursuant to section 24(4) and enclosed a continuing access schedule for them indicating that access would be provided to records on an annual basis for three years.

[4] The university also advised the appellant that, pursuant to section 57(1), it was charging a fee of \$125.60 to search for and photocopy the responsive records. In an email to the university dated February 26, 2013, the appellant requested that the university waive the fee on the basis of his belief that because he is an affected party with respect to each of the requests, it would be fair and equitable to do so. In addition, the appellant indicated that he had asked to see the original records, as opposed to photocopies. The appellant also objected to the disclosure schedule indicating that annual disclosure is unreasonable and too infrequent.

[5] The university replied to the appellant's email in an email dated March 1, 2013, advising him that the photocopy portion of the fee could be reduced if he would accept the information in electronic form on a CD. The university also indicated that the fee is fair and equitable and that access to original records is not reasonably practicable in these circumstances. In addition, the university explained the basis for the schedule for continuing access.

[6] The appellant appealed the decision of the university to this office. In his letter of appeal, the appellant indicates that, while other issues may arise, he is appealing:

1. The university's refusal to waive the fees, based on his belief that he is an "affected party" and is invoking the use of FIPPA to discover how he is affected;
2. The university's refusal to provide access to original documents pursuant to section 30(2) of FIPPA;
3. The university's refusal to provide continuing access at more frequent, though unspecified, intervals;
4. The university's refusal to consider the customary principles of academic freedom when administering its FIPPA obligations, to the extent that those principals offer interpretive guidance to FIPPA.

[7] During the course of mediation, the university issued a revised decision dated June 13, 2013 reducing the fee to \$70 by providing the records on a CD. In addition, the university advised the appellant that four of the five files listed on the continuing access schedule are now closed. As a result, the issue of continuing access only applies to one request (A-13-84).

[8] During mediation, the mediator also contacted the individuals who submitted the requests which are the subject of the present appeal (the requesters) to determine if they would consent to the release of the information denied pursuant to section 21(1) of the *Act*. The requesters declined to give their consent to the disclosure of their identities to the appellant.

[9] The parties were unable to resolve the remaining issues in dispute through mediation. The appellant indicates that he is appealing the issues of fee, fee waiver, continuing access, access to the original records, as well as the denial of access pursuant to the mandatory section 21(1) exemption.

[10] I sought and received the representations of the university with respect only to several of the issues identified in the Mediator's Report. A complete copy of the representations of the university was then shared with the appellant, who was asked to address the fee and fee waiver issues, as well as whether the records are properly exempt under the mandatory personal privacy exemption in section 21(1).

[11] The appellant was also invited to make submissions on the other issues identified in the Mediator's Report, though I reserved the right to address only those issues which are relevant and substantive in nature in this order. The appellant provided me with representations which were then shared with the university. I received reply representations from the university in response.

[12] In this order, I uphold the university's decision to deny access to the information claimed to be exempt under the mandatory exemption in section 21(1) and find that it is not necessary for me to determine whether the fee was calculated in accordance with the *Act* or whether the university's decision not to waive the fee were appropriate. In addition, I find that I do not have to decide whether the university's decision respecting the proposed schedule for providing continuing access to the appellant was in keeping with the *Act*. Finally, I also do not need to address whether the university is required to provide the appellant with the opportunity to examine the original records.

RECORDS:

[13] There are 113 records at issue as noted on the Index of Records, consisting of the undisclosed portions of various correspondence, emails, cheques and notes.

ISSUES:

- A: Do the records contain personal information as defined in section 2(1) of the *Act* and if so, to whom does it relate?**
- B: Does the mandatory exemption at section 21(1) apply to the personal information at issue which is contained in the records?**
- C: Should the fee estimate of \$70 be upheld? Should the fee be waived?**
- D: Is the university's schedule for providing continuing access under section 24(4) of the *Act* reasonable?**
- E: Is it reasonably practicable to give the appellant the opportunity to examine the records in accordance with section 30(2) of the *Act*?**

DISCUSSION:

Preliminary Issues

[14] Because of the manner in which I have disposed of Issues A and B below, it is not necessary for me to address the issues raised by the appellant respecting the fee the university proposed to charge him for the records or its decision to not waive the fee charged (Issue C). I also find that as a result of the outcome of Issues A and B, it is not necessary for me to consider whether the appellant ought to be given the opportunity to examine the records (Issue E).

[15] In his representations, the appellant has clarified that he is only seeking access to the names of the requesters which appear in the responsive records. In my discussion below, I find that the section 21(1) personal privacy exemption applies to the names of the requesters, which is the only information at issue in the records. As I have determined that this information will not be made available to the appellant, the fee the university sought to charge, its decision not to waive the fee and whether it ought to provide the opportunity to examine the records are now moot.

Issue A: Do the records contain personal information as defined in section 2(1) of the *Act* and if so, to whom does it relate?

[16] 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;

[17] 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].

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

(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.

[19] 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].

[20] 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].

[21] 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.)].

[22] The records consist of the requests submitted by the requesters, as well as various accompanying documents, such as cheques to cover the filing costs, email and regular mail correspondence passing between the university and the requesters and receipts provided to the requesters by the university in relation to the payment of filing fees. In his representations, the appellant clearly states that he is only seeking access

to the identities of the requesters, and not any other personal information that might be contained in the records.

[23] The university argues that the identity of an individual who submits a request under the *Act* qualifies as the individual's personal information unless it is made in a business or professional capacity, which is not the case here. It relies on Order P-27 and submits that it "must assess whether it can disclose the identity of the Requester 'in accordance with the provisions of the Act' by 'weighing . . . any competing rights of the requester and third or affected persons'."

[24] In Order PO-3241, I made the following finding with respect to whether a request made by an individual whose business is the collection of information from public records represents that individual's personal information for the purposes of the definition of that term in section 2(1). I found that:

In my view, it is clear that the requests that are the subject of this request and the appellant's appeal were made in a professional, rather than a private or personal capacity. The appellant is in the business of gathering information from public records and this exercise was simply part of that work. As a result, I conclude that, as was the case in Order PO-2764, the appellant's name as it appears in the request form is not "personal information" because it relates to the appellant in a business capacity and not a personal capacity.

[25] The appellant alleges that one of the requesters is, in fact, acting on behalf of a national news organization and not in some personal capacity. He has provided me with evidence to substantiate his claim. The appellant demonstrated that information taken from representations provided to this office by the university and shared with the requester in another appeal involving a request for information about the appellant has appeared in newspaper articles in publications owned by the news organization. For this reason, he submits that one of the requesters is acting as a "cat's paw" for the news organization and the identity of the requester ought not to be protected because it does not qualify as "personal information" about this individual.

[26] In the present appeal, I am not satisfied that the requests were made by the requesters in some professional or business capacity, thereby falling outside the realm of their private or personal interests. I accept that certain information contained in representations provided to this office and shared with one of the requesters found its way into an article written by a newspaper columnist. I do not, however, accept that this represents persuasive or conclusive evidence that the requesters were in some way employed by or acting as an agent for the news organization, thereby taking the request out of the private and into the professional realm. I am satisfied that the information was conveyed by one of the requesters to the news organization, but I am

not prepared to draw the conclusion that the request was made in some professional or business capacity by the requester.

[27] As a result, I conclude that the identities of the requesters constitutes their personal information as this information meets the criteria described in paragraph (h) of the definition. I find that the information consists of "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", comprising the fact that these individuals submitted requests under the *Act* to the university.

[28] Because the records contain information that qualifies as "personal information" within the meaning of that term in the *Act*, I will now determine whether the disclosure of the information the appellant is seeking, which consists solely of the names of the requesters, qualifies for exemption under section 21(1) of the *Act*.

Issue B: Does the mandatory exemption at section 21(1) apply to the personal information at issue which is contained in the records?

[29] Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies. The section 21(1)(a) to (e) exceptions are relatively straightforward. The section 21(1)(f) exception, allowing disclosure if it would not be an unjustified invasion of personal privacy, is more complex, and requires a consideration of additional parts of section 21. I find that none of the exceptions in sections 21(1)(a) to (e) are applicable in this appeal.

[30] Under section 21(1)(f), if disclosure would not be an unjustified invasion of personal privacy, it is not exempt from disclosure. Sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Also, section 21(4) lists situations that would not be an unjustified invasion of personal privacy. I find that the exceptions outlined in section 21(4) and the presumptions in section 21(3) do not apply in the present appeal. If no section 21(3) presumption applies, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy [Order P-239].

[31] In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring disclosure in section 21(2) must be present. In the absence of such a finding, the exception in section 21(1)(f) is not established and the mandatory section 21(1) exemption applies [Orders PO-2267 and PO-2733].

[32] The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2) [Order P-99]. The appellant relies on several factors under section 21(2) which he argues favour a finding that disclosure of the identities of the requesters would not constitute an unjustified invasion of their personal privacy. Specifically, the appellant argues that section 21(2)(d) and (i) are applicable, as well as several unlisted factors which I will describe in greater detail below.

21(2)(d): fair determination of rights

[33] For section 21(2)(d) to apply, the appellant must establish that:

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing

[Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.)].

[34] The appellant argues that the principles of natural justice and procedural fairness "strongly militate to disclose the identity" of the requesters. He points out that he was the subject of a large number of requests made under the *Act* by the requesters, many of which sought access to information of a personal nature about him. In Order PO-3188, I resolved an appeal involving one of the requesters in which the university argued that one of a series of many requests about the appellant in the present appeal was frivolous and vexatious, within the meaning of section 10(1)(b). In Order PO-3188, I upheld the university's decision and found that the request was frivolous and vexatious. One of the order provisions in Order PO-3188 limited this particular requester's ability to file requests with the university and appeals with this office. For this reason, the appellant argues that fairness dictates that he be entitled to know the identity of the individuals who have been seeking his personal information.

[35] The appellant has not provided me with evidence that the right which he seeks to enforce is a legal right drawn from common or statute law. Rather, the right which he seeks to enforce, a remedy of some kind against the requesters, derives from moral or ethical grounds based on what he describes as the requester's "moral turpitude". In addition, I have not been provided with evidence of any existing or contemplated legal proceeding for which the information sought in this appeal would be relevant or required in order to prepare a case. Instead, the appellant's arguments focus on the fact that the requesters' actions have harmed him and represent an invasion of his personal privacy and an attack on his professional reputation. I conclude that the factor favouring disclosure in section 21(2)(d) has no application in the current appeal.

21(2)(i): unfair damage to reputation

[36] This factor weighs in favour of privacy protection, rather than favouring access. Accordingly, it does not assist the appellant's arguments in favour of granting access to the information sought.

Unlisted factors

[37] The appellant makes lengthy arguments in favour of an unlisted factor favouring disclosure that relates to the fact that, as found in Order PO-3188, the requesters have abused the right of access and their "anonymity turns the Act from a tool of enlightenment into a cudgel of attack." For this reason, the appellant suggests that equity and fairness dictate that the requesters' identity ought to be disclosed, based on their "moral turpitude" and the fact that one of them was found to have abused the right of access under the *Act* in my decision in Order PO-3188. The appellant argues that he has the right to know who has been making these requests and "who is behind it".

[38] The appellant also argues that his academic freedom has been infringed upon because of the amount of time he was required to spend providing the records and other information that was responsive to the multiple requests filed with the university by the requesters about his activities. The appellant relies on the findings of Commissioner Ann Cavoukian in Order PO-3084 which upheld the university's decision not to disclose certain financial information relating to the appellant on the basis, in part, that to do so would impinge upon his academic freedom.

[39] I am sympathetic to the concerns raised by the appellant respecting the lengths he was required to go in order to provide the university with information and records to assist it in responding to the requesters' many requests and appeals. I upheld the university's decision finding the request in Order PO-3188 to be frivolous and vexatious and limited the right of that particular requester in that case to file further requests and appeals. It would appear that this limitation has effectively ended the requester's activities. In my view, the sanction imposed in Order PO-3188 addressed the

requester's actions in a meaningful way and has provided the appellant with an effective remedy as the requests and appeals have now stopped. I do not agree with the argument that the requesters' conduct ought to be a consideration favouring disclosure of their identity. I find that the conduct of one requester has been addressed and sanctioned in Order PO-3188 and need not provide the basis for any further remedy in this appeal.

[40] In addition, I do not agree that because the appellant's academic freedom has been in some way impaired because he was required to answer access requests and appeals, this ought to be a factor weighing in favour of the disclosure of the requesters' identity. The statutory obligation to respond to requests made under the *Act* lies with the university and is not nullified considerations about inconvenience or difficulty in responding. The fee requirements and the frivolous and vexatious provisions in the *Act* provide institutions with the ability to limit the impact on their operations of unmeritorious requests within the confines of the *Act*. Those provisions allow an institution to address these types of requests, and the university successfully argued in favour of a frivolous and vexatious finding in Order PO-3188.

[41] Based on my consideration of the personal privacy exemption in section 21(1) and the fact that no factors favouring disclosure are present in this appeal, I find that the records are exempt under section 21(1) as their disclosure would result in an unjustified invasion of the personal privacy of the requesters.

Issue D: Is the university's schedule for providing continuing access under section 24(4) of the *Act* reasonable?

[42] The appellant takes issue with the schedule that the university formulated in response to his request for continuing access to any records that might be responsive to his request. Section 24(4) states:

When a request that is to continue to have effect is granted, the institution shall provide the applicant with,

- (a) a schedule showing dates in the specified period on which the request shall be deemed to have been received again, and explaining why those dates were chosen; and
- (b) a statement that the applicant may ask the Commissioner to review the schedule.

[43] In this case, the university provided the appellant a continuing access schedule which would provide him with access decisions respecting any records responsive to the requests that are the subject of the appeal on March 11, 2013, January 22, 2014 and January 22, 2015. During the adjudication stage of the appeal, the university advised

the appellant that four of the five files listed on the continuing access schedule are now closed. As a result, continuing access only remains in issue for one file (A-13-84).

[44] The appellant initially indicated to the university that he wished to have access decisions respecting the records generated by these appeals on a monthly basis. In his representations, he states that setting the interval at one year is not reasonable and asks that it be amended to provide for an access decision on a quarterly basis. He does not, however, provide any representations on why providing access decisions on a quarterly basis is more fair or reasonable, given the subject matter of the request reflected in file A-13-84, or the type of records which might be responsive to it.

[45] I have consulted with the IPC's file management systems in order to determine whether the request designated as file A-13-84 continues to be active or whether it resulted in an appeal being filed with this office. Based on the information I have obtained within the IPC's data system, I have determined that no appeal of the university's decision in request A-13-84 was filed in relation to that request and no appeal file was, accordingly, opened. Therefore, I conclude that the need for ongoing access to records relating to the processing of request A-13-84 no longer exists as it appears to have been concluded, at least as far as this office is concerned. I will not, therefore, address this issue further in this order and the university is not required to continue to issue decision letters respecting access to records pertaining to this matter in accordance with its access schedule.

[46] In conclusion, I uphold the university's decision to deny access to the identities of the requesters under section 21(1) and dismiss the other aspects of this appeal for the reasons outlined above.

ORDER:

I uphold the decisions of the university and dismiss the appeal.

Original signed by: _____
Donald Hale
Adjudicator

_____ April 7, 2014