Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3297

Appeal PA13-261

York University

January 27, 2014

Summary: The appellant sought access to 13 records or types of records, some of which related to incidents involving him, and others which related to other identified individuals. In response, the university granted full or partial access to certain records, and denied access to the remaining records or portions of records on the basis of the exemptions in section 19 (solicitor-client privilege), 20 (danger to health and safety), 49(a) (discretion to refuse requester's own information), 21(1) and 49(b) (personal privacy), as well as the exclusionary provision in section 65(6)3 (labour relations or employment-related matters) of the *Act*. This order determines that the records responsive to request items 2 and 4 are excluded from the scope of the *Act* under section 65(6)3, and that the remaining records or portions of records qualify for exemption under sections 19, 20 and/or 49(a).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 2(1) (definition of personal information), 19(a), 20, 49(a), 65(6)3.

Orders Considered: PO-1940, PO-2642.

Cases Considered: *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.).

OVERVIEW:

[1] York University (the university) received an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for 13 records or categories of records which can be summarized as follows:

1. The names of each security guard involved with a specified incident involving the appellant.

2. Employment information about each security guard involved with the incident (e.g. when they were hired, how long they have been employed at the university, the schedule for that week, how many hours they worked, their psychological profile, training test results and successful training).

3. The security report relating to the incident.

4. Employment information about two named university employees (e.g. when they were hired, how long they have been employed at the university, the schedule for that week, how many hours they worked, their psychological profile, training test results and successful training).

5. All housing complaints filed with Student Housing Services and with the Office of Student Conflict Resolution by or about the appellant.

6. All security policy modifications since January 2010.

7. A detailed list of security training and trainers financed by the university.

8. All information available at Student Housing Services and the Office of Student Conflict Resolution regarding the incident.

9. The academic history and record of a named student – specifically, her major, how long she has been attending York University, her native country and language.

10. A detailed list of all calls made by the appellant from an identified telephone number to Security from July to October 2011, including the duration of the calls.

11. Any communications between the university and the Toronto Police Service, specifically in regards to the incident or to the appellant.

12. All communication, including emails, regarding the incident or the appellant, between certain named individuals in identified university departments.

13. All information about a named lawyer including whether he has taken any other cases for the university, and how much the university is paying him.

[2] In response, the university issued a decision which stated that records responsive to the request had been located, and attached an index of records. It stated that access was granted in full to 27 records, that partial access was granted to 13 records, and that access to one record was denied in full. It also indicated that access was denied to all of the records responsive to items 2, 4 and 9. The university stated that access was denied to the records or portions of records on the basis of the exemptions in section 19 (solicitor-client privilege), 20 (danger to health and safety) and 21(1) (personal privacy), as well as the exclusionary provision in section 65(6)3 (labour relations or employment-related matters) of the *Act*.

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

[4] During mediation, the possible application of the discretionary exemptions in sections 49(a) and (b) (discretion to deny requester's own information) was raised, because some of the records appeared to contain the personal information of the appellant.

[5] Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process. I sent a Notice of Inquiry to the university, initially, and received representations in response. I then sent the Notice of Inquiry, along with a copy of the non-confidential portions of the university's representations, to the appellant, who also provided representations in response.

[6] In this order, I find that the records responsive to request items 2 and 4 are excluded from the scope of the *Act* under section 65(6)3. I also find that the remaining records or portions of records qualify for exemption under sections 19, 20 and/or 49(a).

RECORDS:

[7] The records that remain at issue in this appeal are the withheld portions of numbered Records 1, 2, 27, 28, 29, 30, 35, 36, 37, 38, 39 and 41, Record 40 in its entirety, and all records responsive to items 2, 4 and 9 of the request.

ISSUES:

A. Does section 65(6) exclude the records responsive to items 2 and 4 from the scope of the *Act*?

B. Do the records contain "personal information" as defined in section 2(1)?

C. Does the discretionary exemption at section 49(a), in conjunction with the exemption at section 19, apply to certain withheld information in Records 35, 36, 38, 39, and 40?

D. Does the discretionary exemption at section 49(a) and/or the exemption in section 20, apply to the withheld information remaining at issue in records numbered 1, 2, 27, 28, 29, 30, 37, 38, 39 and 41, and the records responsive to item 9?

E. Did the university exercise its discretion under sections 19, 20 and/or 49(a)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A. Does section 65(6) exclude the records responsive to items 2 and 4 from the scope of the *Act*?

[8] As identified above, the university takes the position that the records responsive items 2 and 4 of the appellant's request are employment-related records and are excluded from the scope of the *Act* on the basis of the exclusion in section 65(6)(3). Items 2 and 4 of the request are for employment information about certain university employees including when they were hired, how long they have been employed at the university, their schedule for the week of the incident, how many hours they worked, psychological profile, training test results and successful training. The university states:

> The appellant specifically asked for "employment information" … and cited as examples records concerning hiring, length of employment, scheduling information, hours worked, psychological profiles, test results and training. By definition, then, the information he was seeking was excluded since employment related information generally falls within the scope of section 65(6)3. If we consider the examples of types of records sought, all of them would be excluded ….

[9] The appellant does not address this issue in his representations.

Analysis and findings

[10] Section 65(6)3 states:

> 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.

[11] 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*.

[12] 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.[1]

[13] 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.[2]

[14] 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.[3]

[15] 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

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[1] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).
[2] Order PO-2157.
[3] *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

Part 1: collected, prepared, maintained or used

[16] The university states that the requested records are "created and maintained by the university for the purpose of managing its workforce." I agree, and am satisfied that the requested records were prepared and maintained by the university, and that part 1 of the test has been established.

Part 2: meetings, consultations, discussions or communications

[17] The university states that the records "communicate information relating to attendance … staff training and development, and employee well-being, along with other matters." I accept the position taken by the university, and find that the university's collection and usage of the records relates to communications between the university and its employees. Accordingly, I find part 2 of the test has been established.

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

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

- a job competition[4]
- an employee's dismissal[5]
- a grievance under a collective agreement[6]
- disciplinary proceedings under the *Police Services Act*[7]
- a "voluntary exit program"[8]
- a review of "workload and working relationships"[9]
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act.*[10]

[19] The phrase "in which the institution has an interest" means more than a "mere

[4] Orders M-830 and PO-2123.
[5] Order MO-1654-I.
[6] Orders M-832 and PO-1769.
[7] Order MO-1433-F.
[8] Order M-1074.
[9] Order PO-2057.
[10] *Ontario (Minister of Health and Long-Term Care)* v. *Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.).

curiosity or concern", and refers to matters involving the institution's own workforce.[11]

[20] 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.[12]

[21] The university states that "[t]hese records are created and maintained by the university for the purpose of managing its workforce, and thus are records in which the institution has an interest. The records communicate information relating to attendance … staff training and development, and employee well-being, along with other matters." In its representations, the university also provides information about its employee files and the nature of the records maintained therein. It attaches to its representations excerpts from its Directory of Records, relating to the kinds of records requested, and states that these excerpts "demonstrate that [these] records are created and maintained within the context of [the university's] Human Resources function, i.e., the function that is responsible for managing the employer/employee relationship."

[22] The appellant does not provide representations on this issue.

[23] Based on the university's representations and on the nature of the records requested, I am satisfied that the records sought by the appellant that are responsive to items 2 and 4 fall within the exclusionary provision in section 65(6)3. In my view, the requested records (including hiring information, length of employment, scheduling information, hours worked, psychological profiles, test results and training records of identified employees) directly relate to employment-related matters, namely, the university's ongoing relationship with members of its own workforce. As a result, I find that the records are about employment-related matters for the purpose of section 65(6)3. In addition, I am satisfied that the university clearly has an interest in these records, as they relate to matters involving its own workforce. In these circumstances, I find that the exclusionary wording in section 65(6)3 applies to the requested records, and they fall outside the scope of the *Act*.

[24] As I have found that the records responsive to items 2 and 4 are excluded from the scope of the *Act*, there is no need to review the possible application of the exemptions claimed by the university for these records.

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[11] *Ontario (Solicitor General)* v. *Ontario (Assistant Information and Privacy Commissioner)*, cited above.
[12] *Ministry of Correctional Services*, cited above.

Issue B. Do the records contain "personal information" as defined in section 2(1)?

[25] 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 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,
>
> (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.

[26] 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.[13]

[27] 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.

[28] 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.[14]

[29] 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.[15]

[30] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[16]

[31] The university reviews in detail the numbered records remaining at issue, and states that "all of the numbered records at issue in the appeal contain the personal information of the appellant." On my review of these records, which are numbered 1, 2, 27, 28, 29, 30, 35, 36, 37, 38, 39, 40 and 41, I agree that they all contain the personal information of the appellant, as they include his name and/or relate to incidents in which he is involved.

[32] The university also takes the position that some small portions of records numbered 1, 2 and 40 contain the personal information of identifiable individuals other than the appellant (a named student, and an employee). Because of my findings below, it is not necessary to review each of these portions of these three records to

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[13] Order 11.
[14] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[15] Orders P-1409, R-980015, PO-2225 and MO-2344.
[16] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

determine if they also contain the personal information of individuals other than the appellant.

[33] With respect to the records responsive to item 9 of the request, the university states that all of the records responsive to this item consist of "the personal information of the student and possibly her next of kin." The university also states that these records do not contain the personal information of the appellant.

[34] The appellant does not address this issue.

[35] Item 9 is a request for the following:

> The academic history and record of [a named student] – specifically, her major, how long she has been attending York University, her native country and language.

[36] I agree with the position taken by the university and find that, based on the nature of the information requested, the records responsive to this item contain the personal information of the student, and not the personal information of the appellant.

[37] In summary, I find that all of the numbered records contain the personal information of the appellant. I also find that the records responsive to item 9 do not contain the personal information of the appellant, but do contain the personal information of the named student.

Issue C. Does the discretionary exemption at section 49(a), in conjunction with the exemption at section 19, apply to certain withheld information in Records 35, 36, 38, 39, and 40?

[38] Section 47(1) of the *Act* 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. Section 49(a) states:

> 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.

[39] 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.[17]

[17] Order M-352.

[40] In this case, the university relies on section 49(a) in conjunction with section 19 to withhold portions of Records 35, 36, 38, 39 and 40. Section 19 states:

> 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 or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

[41] 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

[42] 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.[18]

Solicitor-client communication privilege

[43] 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.[19]

[44] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[20]

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[18] 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).
[19] *Descôteaux* v. *Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[20] Orders PO-2441, MO-2166 and MO-1925.

[45] 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.[21]

[46] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[22]

[47] 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.[23]

Litigation privilege

[48] Litigation privilege protects records created for the dominant purpose of litigation, actual or reasonably contemplated.[24]

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

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

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[21] *Balabel* v. *Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[22] *Susan Hosiery Ltd.* v. *Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[23] *General Accident Assurance Co.* v. *Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).
[24] Order MO-1337-I; *General Accident Assurance Co.* v. *Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank* v. *Canada (Minister of Justice)* (cited above).

> [For this privilege to apply], there must be more than a vague or general apprehension of litigation.

Branch 2: statutory privileges

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

Statutory solicitor-client communication privilege

[51] 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."

Statutory litigation privilege

[52] Branch 2 applies to a record that was prepared by or for Crown counsel, or counsel for an educational institution, "in contemplation of or for use in litigation."

[53] Termination of litigation does not affect the application of statutory litigation privilege under branch 2.[25]

[54] Branch 2 includes records prepared for use in the mediation or settlement of actual or contemplated litigation.[26]

Representations and findings

[55] The university takes the position that the withheld portions of Records 35, 36, 38, 39 and 40 qualify for exemption under both section 19(a) and (c). It states:

> The discretionary exemption at section 19 … was claimed for Records 35, 36, 38, 39, and 40 because all of these records contain communications between York University employees and an external lawyer retained to represent York University before the Ontario Landlord and Tenant Board in a claim brought against the University by the Appellant, and/or with an internal counsel from the Office of the University Secretariat and General Counsel. The communications are thus protected from disclosure pursuant to section 19(a) as part of the continuum of privileged, and section 19(c) as records prepared by or for counsel employed or retained

[25] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer),* (cited above).
[26] *Liquor Control Board of Ontario* v. *Magnotta Winery Corporation*, 2010 ONCA 681.

> by an educational institution for use in giving legal advice or in contemplation of or for use in litigation.

[56] The appellant does not address this issue.

[57] Records 35, 36, 38 39 and 40 all consist of emails or email strings between employees of the university and/or external counsel. I note that Record 36 is an email string that incorporates the same information as is contained in Record 35. As well, Record 39 is an email string that incorporates the information contained in Record 38. Record 40, which was withheld in its entirety, is a brief email message.

[58] Record 36 (which incorporates Record 35) is an email string between university employees, and relates to a specified legal action between the appellant and the university. Most of this email string has been disclosed to the appellant. There are two brief emails which have been denied on the basis of the exemption in section 19. Both of these emails relate to a specific request for information and/or documentation relating to the identified legal action. As well, a named lawyer is mentioned in one of the emails, and legal counsel was copied on both of them. I find these email exchanges are confidential communications between the client (the university) and legal counsel, and I am satisfied that these records either contain legal advice or form part of the continuum of communications aimed at keeping both legal counsel and the client informed so that advice may be sought and given as required. Accordingly, I find that the withheld portions of Records 35 and 36 qualify for exemption under Branch 1 of section 19(a).

[59] Record 39 (which incorporates Record 38) is also an email string between university employees, and relates to a specified legal action between the appellant and the university. Again, most of this email string has been disclosed. There are two, brief emails which have been denied on the basis of the exemption in section 19. One of these emails includes information about legal representation, and the other relates directly to a named legal counsel's advice. Legal counsel was copied on both of these emails. I am satisfied that these emails are confidential communications that formed part of the continuum of communications between the client (the university) and legal counsel for the purpose of obtaining or providing legal advice, and that the withheld portions of these two records qualify for exemption under Branch 1 of section 19(a).

[60] Record 40 is an email from a university employee to legal counsel, relating to a specific legal proceeding. I find that this email is a confidential communication between the client (the university) and legal counsel for the purpose of obtaining or providing legal advice, and qualifies for exemption under Branch 1 of section 19(a).

[61] Accordingly, as I have found that section 19 applies to the withheld portions of Records 35, 36, 38, 39 and 40 for which it is claimed, I uphold the university's decision

to withhold these records pursuant to section 49(a), subject to my findings on its exercise of discretion, below.

Issue D. Does the discretionary exemption at section 49(a) and/or the exemption in section 20, apply to the withheld information remaining at issue in records numbered 1, 2, 27, 28, 29, 30, 37, 38, 39 and 41, and the records responsive to item 9?

[62] As noted above, 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, and 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.

[63] The university takes the position that the records remaining at issue qualify for exemption under section 20 (in conjunction with section 49(a) for the numbered records that contain the appellant's personal information). Section 20 reads:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

[64] For this exemption to apply, the university must demonstrate that disclosure of the withheld portions of the records "could reasonably be expected to" lead to the specified result. To meet this test, I must be provided with evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the evidence must establish that the reasons for resisting disclosure are not frivolous or exaggerated.[27]

[65] The records remaining at issue are the undisclosed portions of records numbered 1, 2, 27, 28, 29, 30, 37, 38, 39 and 41, and the records responsive to item 9 (the academic records and history of a named student). The numbered records are:

- Record 1: a report from Security Services relating to the incident;
- Record 2: the incident report pertaining to the incident; and
- Records 27, 28, 29, 30, 35, 36, 37, 38, 39 and 41: communications, including emails, regarding the incident and/or other incidents.

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[27] *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.).

[66] I note that all of the numbered records remaining at issue have been substantially disclosed to the appellant. Only portions of these records have been withheld, and these portions contain simply the names or other identifiers of the individuals involved in the incident or other incidents (including the names and contact information of identified university staff), the contact information of an identified student and, in one instance (a brief severance from page 10 of Record 2) a statement made by an identified student relating to her residence.

Representations

[67] The university provides representations in support of its position that the withheld information is exempt from disclosure under section 20. It begins by referring to the correspondence and other information sent by the appellant to the university as "inflammatory and abusive." It also states that, in considering whether to disclose the information remaining at issue, it consulted with its Security Services and with some of the named employees, and that this "revealed a pattern of threatening and harassing behaviour that people found worrisome." The university provides examples of the kinds of postings the appellant has made online and the concerns raised, and states that its "priority is to protect the health, safety and well-being of its employees."

[68] The university then provides representations on the application of section 20 to the specific information withheld from Records 1, 2, 27, 28, 29, 30, 37, 38, 39 and 41. It states:

> Normally, York University does not sever names of employees from records when processing [requests under the *Act*]; names in the context of employment responsibilities are considered to be business information. However, section 20 was claimed for [the withheld portions of] Records 1, 2, 27, 28, 29, 30, 37, 38, 39 and 41 because all contain the names of York University security officers or other employees who have been verbally threatened and thus we determined that there was a reasonable threat to the safety or health of our employees.
>
> As is evident from the records themselves, the appellant has exhibited a pattern of verbally abusive, threatening, and harassing behaviour towards employees of York University. … Safety concerns were expressed on the part of some employees and accordingly, we decided to err on the side of protecting our employees.

[69] With respect to the information responsive to item 9, namely, the academic history and record of a named student, the university states that it "… has claimed the discretionary exemption at section 20 broadly for any and all records under Item 9." The university acknowledges that normally, pursuant to its policy on access to student

records, it will disclose a certain amount of information about a student unless specifically instructed by the student not to do so. It reviews its policy, and then states:

> In this case, given the adversarial nature of the relationship between the student (whose name is known by the appellant) and the appellant himself, and the pattern of abusive and threatening behaviour on the part of the appellant towards the student (including allegedly uttering a death threat) and towards a number of other people, the university decided that there was a credible threat to the safety or health of the student. Any information pertaining to the student's major, for example, could be used to figure out what classes she might be taking and the location of those classes.

[70] The appellant provides lengthy representations and attachments to his representations in support of his position that the exemption in section 20 ought not to apply. Although he acknowledges that he was the subject of a Trespass Notice and other restrictions placed on him by the university, he reviews the circumstances leading to these restrictions, and provides his explanations and arguments as to why these restrictions were improperly imposed. These include his view that the university and their employees overreacted to otherwise harmless events, and that some of the interpretations placed on his actions were incorrect. The appellant also identifies some of the unfortunate consequences the university's actions have had on him, and states that he has not threated anyone and that the university "can't even cite a single piece of verifiable proof of such."

[71] In addition, the appellant provides attachments to his representations, which include recitations of the various allegations made against him, as well as a copy of an Information in Support of Request to a Justice of the Peace prepared by university counsel, in which the university reviews the appellant's actions and requests that specific restrictions to be placed on him. The appellant states that this Information simply describes the university's "perjurous and defamatory statements" made in front of a Justice of the Peace, and he indicates that he disputes the university's interpretation of his actions.

Analysis and findings

[72] In Order PO-1940, Adjudicator Laurel Cropley considered the wording of section 20, and found that it applied to deny records to an appellant who was deemed to be "angry and potentially dangerous" after having engaged in a pattern of abusive and intimidating correspondence with the institution. In that order she stated:

> [I]t is noteworthy to add (in response to the appellant's assertions that he would not physically attack anyone) that a threat to safety as contemplated by section 20 is not restricted to an "actual" physical attack.

> Where an individual's behaviour is such that the recipient reasonably perceives it as a "threat" to his or her safety, the requirements of this section have been satisfied. As the Court of Appeal found in *Ontario (Ministry of Labour)*:
>
> > It is difficult, if not impossible, to establish as a matter of probabilities that a person's life or safety will be endangered by the release of a potentially inflammatory record. Where there is a reasonable basis for believing that a person's safety will be endangered by disclosing a record, the holder of that record properly invokes [sections 14(1)(e) or 20] to refuse disclosure.[28]

[73] Adjudicator Corban applied this approach when she upheld the application of the same section in Order PO-2642, in the context of an appeal involving Queen's University. She stated:

> … based on the representations … as well as on a review of the records themselves, I accept that the appellant has engaged in persistent and harassing behaviour towards the affected parties. As noted above, although there is no evidence before me that the appellant has been physically violent towards the affected parties or any other individuals, from their confidential representations, it is clear that the affected parties perceive that disclosure of this information could reasonably be expected to seriously threaten their health or safety. …

[74] I adopt the approach taken by Adjudicators Cropley and Corban, and the Court of Appeal in *Ontario (Ministry of Labour)* cited above, and find it applicable to the current appeal.

[75] Based on the representations of the university and the appellant (including the attachments he provided), as well as on my review of the records themselves and the circumstances of this appeal, I am satisfied that there exists a reasonable basis for believing that the disclosure of the information in the records remaining at issue could reasonably be expected to seriously threaten the health or safety of the individuals named in the records. In addition to other evidence about other restrictions and concerns about the appellant's actions, the evidence is clear that a Trespass Notice has been placed against the appellant. Further, the appellant has been restricted from attending certain areas of the university and certain university staff have expressed safety concerns based on the appellant's actions.

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[28] *Ontario (Minister of Labour) v. Big Canoe, supra.*

[76] I accept that I have not been provided with evidence that the appellant has been physically violent towards any individuals; however, it is clear from the evidence before me that there exists a perception that disclosure of the information could reasonably be expected to seriously threaten the health or safety of the individuals whose information is contained in the withheld records. Although the appellant disputes the university's perception of the circumstances involving him which resulted in the restrictions placed on him, for the purpose of this appeal, I find that there exists sufficient evidence to satisfy me that disclosure could reasonably be expected to seriously threaten the health or safety of the individuals. Further, I find that this evidence is detailed and convincing and not "frivolous or exaggerated" in accordance with the guidance provided by the Ontario Court of Appeal in the *Ontario (Ministry of Labour)*.[29] As a result, I find that the requirements of section 20 have been met for the records remaining at issue.

[77] Accordingly, I am satisfied that the records remaining at issue that do not contain the personal information of the appellant qualify for exemption under section 20 of the *Act*. With respect to those records that contain the personal information of the appellant, I find that they qualify for exemption under section 49(a), read in conjunction with section 20. These findings are subject to my review of the university's exercise of discretion, below.

Issue E. Did the university exercise its discretion under sections 19, 20 and/or 49(a)? If so, should this office uphold the exercise of discretion?

[78] The section 19, 20 and 49(a) exemptions are discretionary, and permit 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.

[79] 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.

[80] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[30] This office may not, however, substitute its own discretion for that of the institution.[31]

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[29] *Supra.*
[30] Order MO-1573.
[31] Section 54(2).

[81] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[32]

- 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
- the relationship between the requester and any affected persons
- 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 historic practice of the institution with respect to similar information.

[82] The university states that it exercised its discretion to apply the exemptions to the withheld information in a proper manner, taking into account relevant factors and not taking into account irrelevant factors. It states:

> The primary factor considered by [the university] in exercising its discretion not to disclose these records to the appellant is the safety and health of its employees and students. The appellant has exhibited ongoing verbally abusive, threatening and harassing behaviour towards [the university's] employees and some of its students.
>
> Some individuals have expressed personal safety concerns. The university aims to provide a violence-free and harassment-free place of work and place of study. …

[32] Orders P-344 and MO-1573.

> The university was careful to consider whether withholding the information requested was relevant to a fair determination of rights affecting the appellant and decided that it was unlikely to do so.
>
> The appellant's subsequent behavior … has confirmed our view of the correctness of the disclosure decisions. He continues to exhibit a vexatious and verbally abusive pattern of behaviour in all his interactions with [the university] and with other institutions with which he comes into contact.

[83] The university then refers to an excerpt from a decision of another tribunal as an example of the appellant's pattern of behavior.

[84] The appellant does not directly address the issue of the university's exercise of discretion, however, he does identify that he is interested in accessing all of the records, as they are relevant to a fair determination of his legal and other rights.

[85] Having reviewed the material in this file, I am satisfied that the university exercised its discretion under sections 19, 20 and 49(a) appropriately and took into account only relevant factors. I note that, with the exception of request items 2, 4 and 9 (which were for employment or educational information about others), the university carefully reviewed the records at issue, disclosed substantially all of them, and only withheld some parts of the records, including certain names and other identifiers. I note particularly that the university disclosed to the appellant all information relating directly to him.

[86] Based on these circumstances, and the representations of the university, I find that the university considered only relevant considerations, and in doing so, exercised its discretion properly in the circumstances. Accordingly, I uphold the university's exercise of discretion.

ORDER:

I uphold the decision of the university, and dismiss this appeal.

Original signed by: January 27, 2014
Frank DeVries
Adjudicator