

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3328

Appeal PA13-66-2

University of Windsor

March 28, 2014

Summary: The appellant sought access to the contents of her student file in the Faculty of Graduate Studies at the university. After mediation, access to only one record remained at issue. The university relied on section 49(a) (refuse to disclose requester's own information), in conjunction with section 19 (solicitor-client privilege) to deny access to the record. The university's decision is upheld.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1), 19(a) and 49(a).

Orders Considered: PO-1946 and PO-2800.

OVERVIEW:

[1] The University of Windsor (the university) received a multi-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for access to information pertaining to the requester. Ultimately, the requester clarified that she was only seeking access to the contents of her student file in the Faculty of Graduate Studies at the university.

[2] After this office opened a deemed refusal file, the requester received an access decision. As set out in its decision letter, the university granted partial access to the responsive records, relying on sections 49(a) (discretion to refuse requester's own

information), in conjunction with section 19 (solicitor-client privilege), as well as section 49(b) (personal privacy) to deny access to the portion it withheld.

[3] The requester (now the appellant) appealed the university's decision. As the university issued an access decision, the deemed refusal file was closed and this appeal file (PA13-66-2) was opened.

[4] At mediation, the appellant advised that she was no longer seeking access to the withheld portion of one of the records at issue. Accordingly access to that information and the application of section 49(b) are no longer at issue in the appeal. The appellant continued to seek access to the remaining withheld record.

[5] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*.

[6] I commenced my inquiry by sending the university a Notice of Inquiry setting out the facts and issues in the appeal. The university provided responding representations. I then sent a Notice of Inquiry to the appellant, along with the university's non-confidential representations. The appellant decided not to provide responding representations.

RECORDS:

[7] The sole record at issue is a one page email.

DISCUSSION:

A. Does the record contain personal information and if so, to whom does it relate?

[8] 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;

[9] 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.¹

[10] 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.

¹ Order 11.

[11] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.²

[12] 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.³

[13] The university states that it:

... takes no position on the issue as to whether the record at issue actually contains the "personal information" of the requester. Although the record does refer to her by name, it contains no substantive information about her other than to acknowledge that she is a student of the university. Notwithstanding the lack of substantive information, given that she is named in the record, the university has treated the record as though it contained the personal information of the requester.

[14] I have reviewed the email and find that it contains the appellant's personal information that falls within the scope of section 2(1) of the *Act*, including her name, which appears with other personal information about her (paragraph (h) of the definition).

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

[15] 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.

[16] 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.

² Orders P-257, P-427, P-1412, P-1621, R-980015 and PO-2225

³ Orders P-1409, R-980015, PO-2225 and MO-2344.

[17] 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.⁴

[18] In this case, the university relies on section 49(a) in conjunction with section 19. Sections 19(a) and (c) of the *Act* read as follows:

A head may refuse to disclose a record,

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

[19] Section 19 contains two branches. 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.

Branch 1: common law privilege

[20] 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 record at issue.⁵

Solicitor-client communication privilege

[21] 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.⁶

[22] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.⁷

⁴ Order M-352.

⁵ 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).

⁶ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

⁷ Orders MO-1925, MO-2166 and PO-2441.

[23] 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.⁸

[24] 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.⁹

Branch 2: statutory privileges

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

Statutory solicitor-client communication privilege

[26] Branch 2 applies to a record that was prepared by or for Crown counsel, or counsel for an educational institution or a hospital, “for use in giving legal advice.”

The university’s representations

[27] The university submits that the email at issue was written by an individual who had a senior oversight role at the university. It states that this individual was a lawyer employed by the university at the time she wrote the email to her client, the Faculty of Graduate Studies. The university submits that the email in question was part of the continuum of communications with her client “to permit her to provide the legal advice that she was hired to give.”

[28] The university states:

The email was marked as confidential or “Confid.” in the subject line and it was part of the continuum of communication between the solicitor and client.

[29] The university explains that:

There were legal issues raised with respect to [a certain matter]. Legal counsel was involved in a continuum of communication among herself and

⁸ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

⁹ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

a senior administrator at the university so that she could be kept informed of the facts of the matter and provide advice as required.

[30] The university submits that:

The information falls within the continuum of communications described by the Supreme Court of Canada in *Descôteaux v. Mierzwinski*, [1982] 1 SCR 860. In that decision the court noted that the purposes of the legal advice have to be construed broadly, and that all information exchanged in order to obtain or provide legal advice, and which is given in confidence for that purpose, enjoys the privileges attached to confidentiality.

[31] The university submits that this approach is supported by “the current case law” and has been confirmed in “dozens” of decisions of this office. The university specifically refers to Orders PO-1946 and PO-2800 in support of its position.

[32] The university further submits that it has not waived its common law or statutory solicitor-client privilege either implicitly or explicitly.

Analysis and finding

[33] I have carefully reviewed the email and considered the university’s confidential and non-confidential representations.

[34] The individual who sent the email was a lawyer and was acting in a senior oversight capacity within the university. The university submits that there were legal issues raised with respect to a matter that fell within her oversight role and that, as legal counsel, she was involved in a continuum of communication among herself and a senior administrator at the university in order to be kept informed of the facts of the matter and provide advice as required.

[35] Based on the evidence provided, and my review of the email at issue, I am satisfied that it represents part of a continuum of confidential communications between a solicitor and their client made for the purpose of giving or seeking legal advice. I further find that the university has not waived privilege in the communication either implicitly or explicitly. As a result, I find that the email falls within branch 1 of section 19(a) of the *Act*. In light of this finding it is not necessary for me to consider whether section 19(c) might also apply to the email.

[36] Accordingly, I find that the email is exempt under section 49(a) of the *Act*, in conjunction with section 19(a).

[37] Finally, I have reviewed the circumstances surrounding this appeal and the university's representations on the manner in which it exercised its discretion. Based on the evidence before me, I am satisfied that the university properly exercised its discretion not to disclose the record to the appellant.

ORDER:

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

Original Signed By: _____
Steven Faughnan
Adjudicator

_____ March 28, 2014