Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3556

Appeal PA14-150

Ryerson University

November 30, 2015

Summary: The appellant submitted an access request to Ryerson University for records relating to him that were held by a named individual at the university. The university located responsive records in three separate searches. The university disclosed some records and withheld others pursuant to certain exemptions and exclusions in the *Act*. The appellant appealed the university's decision that the section 19 exemption (solicitor-client privilege), in conjunction with section 49(a) (discretion to refuse requester's own information) applied to one record. He also claimed that additional records should exist. In this order, the adjudicator upholds the university's decision to deny access to the record at issue, and finds that the university conducted a reasonable search for responsive records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1), 19, 24, 49(a).

Orders and Investigation Reports Considered: Orders PO-1744, M-909, PO-2087-I, M-1112.

OVERVIEW:

[1] Ryerson University (the university) received a multi-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

> I am requesting copies of ALL documents held by [a named individual] relating to my person, including but not limited to:
>
> > ALL communications with all personnel at Ryerson University and the Chang School during the period of May 2013 to the present, including but not limited to the following:

[2] The request then listed specific types of records in Items i to ix. These items included: emails; correspondence; notes of telephone conversations; information about meeting dates and notes made by individuals present at such meetings; records indicating the parties who have had access to the requester's personal information held by the named individual; the syllabus for an identified course; a copy of the grades the requester received in an identified course; and records related to conversations, meetings and other correspondence between the named individual and two other named individuals.

[3] The university's initial search located one responsive record. The university denied access to the responsive record pursuant to the exclusion for research and teaching materials at section 65(8.1) of the *Act*. However, the university noted that the responsive record is publicly available on the instructor's website. As a courtesy, the university provided the requester with the website address.

[4] The appellant appealed the university's decision on the basis that additional responsive records should exist.

[5] During mediation, the appellant confirmed that he was not seeking access to the record that was withheld. Also during mediation, the university conducted a subsequent search for records, and located twenty-five additional responsive records. In a supplementary decision, the university granted full access to 24 of the additional records and partial access to the remaining one, with severances pursuant to sections 21 and 49(b) (personal privacy) of the *Act*. The appellant advised that he was not pursuing access to the information that was withheld under sections 21 and 49(b), but indicated that he believed that additional responsive records should exist.

[6] Mediation did not resolve this appeal, and it was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. I initially sought and received representations from the university regarding the reasonableness of the search conducted in response to the access request.

[7] While preparing its representations on the search issue, the university conducted an additional search of a location that had not been searched previously. Ten additional responsive records were located as a result of the subsequent search. In a supplementary decision, the university granted full access to nine of the ten records, and denied access to one record pursuant to section 49(a) (discretion to refuse requester's own information) and section 19 (solicitor-client privilege) of the *Act*. The

appellant confirmed that he wished to appeal the university's decision to withhold this record under sections 49(a) and 19. As a result, the university's decision to withhold this record was added as an issue in this appeal, and I sought and received supplementary representations from the university on the application of the exemptions in sections 19 and 49(a) to the newly-located record.

[8] I then sent the Notice of Inquiry, along with the non-confidential portions of the university's representations and supplementary representations, to the appellant. The appellant did not submit representations in response.

[9] For the reasons that follow, I find that that the newly-located record is exempt from disclosure under section 49(a) in conjunction with the solicitor-client privilege exemption at section 19 of the *Act*. I also find that the university's search was reasonable, and dismiss this appeal.

RECORDS:

[10] There is one record at issue in this appeal, consisting of email correspondence between employees at the university.

ISSUES:

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

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

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

D. Did the institution conduct a reasonable search for records?

DISCUSSION:

Issue A: Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[11] 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,
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> (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,
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> (g) the views or opinions of another individual about the individual, and
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> (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;

[12] 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]

[13] 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]

[14] To qualify as personal information, it must be reasonable to expect that an

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[1] Order 11.
[2] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

individual may be identified if the information is disclosed.[3]

Representations and finding

[15] The university submits that the record at issue contains the appellant's personal information. It states that the information relates to the appellant's education at the university, including certain legal demands that he made relating to his education.

[16] On my review of the record, I agree that it contains the appellant's personal information, as it includes information relating to his education at the university [paragraph (b) of the definition]. I also find that the record contains the appellant's name with other personal information relating to him [paragraph (h)].

Issue B: Does the discretionary exemption at section 49(a) in conjunction with the section 19 exemption apply to the record?

Section 49(a)

[17] 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.

[18] Section 49(a) reads:

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

[19] 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]

[20] 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.

[21] In this case, the university relies on section 49(a) in conjunction with section 19 to deny access to the record that contains the personal information of the appellant. I will now review the application of section 19 to the record.

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[3] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).
[4] Order M-352.

Solicitor-client privilege

Section 19 of the *Act* states as follows:

> A head may refuse to disclose a record,
>
> (a) that is subject to solicitor-client privilege;
>
> (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or
>
> (c) that was prepared by or for counsel employed or retained by an educational institution or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

[22] Section 19 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 (prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital) is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

[23] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

Solicitor-client communication privilege

[24] 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.[5] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[6] The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.[7]

[25] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[8]

[26] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either

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[5] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[6] Orders PO-2441, MO-2166 and MO-1925.
[7] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)
[8] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

expressly or by implication.[9] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[10]

Branch 2: statutory privileges

[27] Branch 2 is a statutory privilege that applies where the records were prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital "for use in giving legal advice or in contemplation of or for use in litigation." The statutory exemption and common law privileges, although not identical, exist for similar reasons.

Representations

[28] The university submits that the record is subject to solicitor-client privilege under both branches of section 19.

[29] In support of its position, the university begins by reviewing the law on solicitor-client privilege. It reviews a number of court decisions which confirm that the privilege is a fundamental right of a lawyer's client, and that "legal advice" is broadly construed and is not limited to telling the client the law. The university also refers to the legal authorities which confirm that the privilege also applies to "a continuum of communications" falling within the ordinary scope of a solicitor-client relationship.

[30] The university then refers to the specific record at issue. It submits that the record is an email between a sessional instructor and a university administrator, in which the administrator conveys legal advice received from the university's in-house counsel. The university submits that while the solicitor is not copied on the email, it still falls within the "continuum of communications" that sustains the solicitor-client relationship, and disclosure would reveal the legal advice, which was communicated between university staff in "strict confidence."

[31] The university also submits that legal advice was at all times communicated in confidence and there has been no waiver of the privilege attaching to the record. As a result, the university submits that the record meets the requirements for solicitor-client privileged communication under branch 1 of section 19.

[32] The appellant did not provide representations on this issue.

Analysis and findings

[33] As stated in the university's representations, the record at issue consists of an email between a university administrator and a university instructor. The university's

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[9] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[10] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

legal counsel is not included as a sender or recipient.

[34] Previous orders of this office have confirmed that internal communications not involving a lawyer can qualify for exemption under section 19 where disclosure of the record would reveal the content of communications between a solicitor and client. In Order PO-2087-I, Adjudicator Cropley considered whether briefing papers prepared by non-legal staff at the Ministry of Finance would qualify for solicitor-client privilege under section 19 of the *Act*. In doing so, she stated the following:

> These records were prepared by non-legal staff in the Ministry. However, large portions of them refer to or reflect the legal advice that is contained in the other records at issue in these discussions. In my view, disclosure of this information would reveal the legal advice that was provided and should, therefore, be protected under section 19.

[35] Furthermore, in Order M-1112 Adjudicator Hale found that documents passing between employees of a client can be subject to solicitor-client privilege if they transmit or comment on communications with lawyers that are connected with legal advice.

[36] Applying this approach to the record at issue, I find that record contains information exchanged between university staff in the context of communicating privileged legal advice obtained from the university's counsel. As a result, I find that disclosure of the record would reveal legal advice prepared by counsel for the university and provided to its client (the university). Based on the representations of the university, I am also satisfied that this information was provided in confidence. Accordingly, I find that the solicitor-client communication privilege in branch 1 of section 19 applies to the record at issue. Moreover, as section 19 applies, I find that the record is exempt from disclosure under section 49(a), subject to my review of the university's exercise of discretion.

Issue C: Did the institution exercise its discretion under sections 19 and/or 49(a)? If so, should this office uphold the exercise of discretion?

[37] The section 19 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.

[38] 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.

[39] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[11] This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

Relevant considerations

[40] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[12]

- 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.

Representations

[41] The university submits that it properly exercised its discretion when deciding to

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[11] Order MO-1573.
[12] Orders P-344 and MO-1573.

deny access to the record at issue. It states that it reviewed the record and weighed the appellant's right of access to his personal information against the interests protected by the solicitor-client privilege exemption. The university also states that it took into consideration all of the relevant circumstances including:

- The purposes of the *Act*; whether the appellant was seeking his own personal information;
- whether the appellant had a sympathetic or compelling need to access information contained in the record; the wording of the section 19 exemption and the interests it seeks to protect;
- the fact that disclosure would involve waiving solicitor-client privilege; and
- whether it was possible to disclose a portion of the record without waiving privilege.

[42] After weighing these considerations, the university states that it exercised its discretion to deny access to the record.

Analysis and findings

[43] I am satisfied that the university has properly exercised its discretion in deciding not to disclose the record at issue. I am satisfied that the university has not made this decision in bad faith or for an improper purpose, nor has it taken into account irrelevant considerations or failed to take into account relevant ones. I note that the university granted access to many pages of records, and chose to only deny access to one record on the basis of sections 49(a) and 19. In the circumstances, I find that the university property exercised its discretion to deny access to the record under sections 49(a) and 19.

SEARCH FOR RESPONSIVE RECORDS

Issue D: Did the institution conduct a reasonable search for records?

[44] In appeals involving a claim that additional responsive records exist, as is the case in this appeal, the issue to be decided is whether the university has conducted a reasonable search for the records as required by section 24 of the *Act*. If I am satisfied that the search was reasonable in the circumstances, the university's decision will be upheld. If I am not satisfied, further searches may be ordered.

[45] A number of previous orders have identified the requirements in reasonable

search appeals.[13] In Order PO-1744, the adjudicator made the following statement with respect to the requirements of reasonable search appeals:

> … the *Act* does not require [the institution] to prove with absolute certainty that records do not exist. [The institution] must, however, provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (Order M-909).

[46] I agree with this statement, and have applied this approach in previous orders.[14]

[47] Where a requester provides sufficient detail about the records that he/she is seeking and the institution indicates that records or further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that records or further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

[48] Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

Representations

[49] The university provided representations in support of its position that it conducted a reasonable search for responsive records. In its representations, the university indicates that it considered records to be responsive if they were "held" by the employee named in the request, were created within the specific dates outlined in the appellant's request and contained the appellant's personal information.

[50] The university submits that it did not need to seek clarification from the appellant about the scope of the request because the request contained sufficient detail to enable an experienced university employee to conduct a search for responsive records pursuant to section 24 of the *Act*. Specifically, the appellant identified the individual whose information was sought and asked for copies of records with the appellant's personal information that were "held" by that individual. The description included information about dates and types of records, but requested that the search not be limited to those types of records. Accordingly, the university submits that it had enough information to conduct a search as required by the *Act* without seeking

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[13] Orders M-282, P-458, P-535, M-909, PO-1744, PO-1920 and PO-3535.
[14] See, for example, Orders PO-3114, PO-3494 and PO-3527.

clarification from the appellant or narrowing the search terms.

[51] The university states that, after receiving the request, the employee named in the appellant's request was directed to perform the search for responsive records.

[52] Attached to its representations, the university provided an affidavit sworn by the named individual describing the search she conducted. In the affidavit, the named individual confirms that she understood the request was for all records dated between May 1, 2013 and January 30, 2014, which were held by her and which relate to the appellant. She confirms that the appellant was one of her students for one semester. The affiant states that about two-thirds of the way through that semester, an issue arose relating to the appellant. In dealing with that issue, the affiant had communications with the appellant and his note-taker in person and via email. The affiant states:

> In dealing with this matter, I did not make meeting notes, did not take notes of phone conversations, did not record any meetings in a calendar, did not send or receive any physical memos or correspondence.
>
> Most of my communication with [the appellant] (and his note taker) was through my personal email account – a Bell Sympatico account.

[53] The affiant confirms that the only responsive records in her custody, other than the publicly available course syllabus which was initially identified as the only responsive record, are email records. She states that she searched her Sympatico "sent" and "inbox" folders and found 25 responsive records.[15] She states that when she conducted this search, she did not search her "deleted" mail folder because she did not recall deleting any responsive emails, but that a later search of that folder did not reveal any responsive records.

[54] The affiant also states that, later in the processing of this appeal, she searched her Ryerson email account and found the ten additional responsive records.

[55] In her affidavit, the affiant then affirms that she did not destroy or delete any records between the date of the request and the date that she swore the affidavit.

[56] In support of its position that a reasonable search was conducted for responsive records, the university submits that the named employee conducted a logical and thorough search for responsive emails in both her Sympatico and Ryerson email accounts. In addition, the university submits that it is unlikely that responsive records once existed, but no longer exist. The university confirms that, although the two searches for email records were conducted "some time" after the request was received; it refers to the named employee's sworn statement that she did not destroy or delete

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[15] I note that this search was conducted while this appeal was in mediation.

any records between the date of the request and the date of the affidavit.

Analysis and findings

[57] In appeals involving a claim that additional responsive records exist, the issue to be decided is whether the university has conducted a reasonable search for records as required by section 24 of the *Act*. If I am satisfied that the university's search for responsive records was reasonable in the circumstances, the university's decision will be upheld. If I am not satisfied, I may order the university to conduct additional searches.

[58] As noted above, the university is not required to prove with absolute certainty that additional records do not exist. Rather, it must satisfy me that its searches for records were reasonable. A reasonable search is one where an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request.[16] In addition, the following excerpt from Order M-909 explains the obligation of an institution to conduct a reasonable search for records:

> […] an institution has met its obligations under the *Act* by providing experienced employees who expend a reasonable effort to conduct the search, in areas where the responsive records are likely to be located. In the final analysis, the identification of responsive records must rely on the experience and judgment of the individual conducting the search.

[59] In the circumstances of this appeal, I find that the university has provided sufficient evidence to establish that it conducted a reasonable search for responsive records, as required by section 24 of the *Act*.

[60] First, I find the appellant's request to be clear and sufficiently detailed so that clarification by the university was unnecessary. I note that over the course of three searches, the university located a number of responsive records relating to the appellant and disclosed the majority of them to him. I am satisfied that the university understood the appellant's request and was able to conduct targeted and thorough searches for responsive records.

[61] In addition, I find that the university's representations and, in particular, the affidavit provided by the named individual who conducted the searches, establish that the searches conducted by the university were reasonable. The representations indicate that the searches were conducted by the individual named in the appellant's request and that this is the individual who has access to and knowledge of the requested records. The named individual provides a sworn affidavit in which she reviews the nature of the records held by her and confirms the types of records she does not have and did not create. She also identifies that she did maintain and locate email records, identifies where they were stored, describes where and how she searched for these

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[16] Order M-909.

records, and states that she did not delete any responsive records after the date of the request. Based on this sworn evidence, I am satisfied that the searches conducted were reasonable. I am also satisfied that the searches were conducted by an experienced employee, who was knowledgeable in the subject-matter of the request and familiar with the relevant record-keeping practices.

[62] I acknowledge that the appellant may question the thoroughness of the searches because subsequent searches located additional responsive records. However, in the absence of further information, and based on the affidavit evidence provided (including the details of the searches conducted by the named employee in her Sympatico and Ryerson email accounts), I have sufficient evidence to satisfy me that the searches conducted were reasonable.

[63] Based on the evidence before me, and particularly the affidavit provided by the named individual who conducted the search for records as described above, I am satisfied that the university has taken all reasonable steps to locate records in the areas in which records would reasonably be expected to be located, and that the searches were conducted by staff who would likely know or be in a position to determine whether such records do or would likely exist. I therefore find that the university conducted a reasonable search for responsive records as required by section 24 of the *Act*.

ORDER:

I dismiss the appeal.

Original Signed by: November 30, 2015

Frank DeVries
Senior Adjudicator