Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3562

Appeal PA14-151

Ryerson University

December 23, 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 either in full or in part pursuant to a number of exemptions under the *Act*. The appellant appealed the university's decision that the exemption in section 19 (solicitor-client privilege), in conjunction with section 49(a) (discretion to refuse requester's own information) applied to four records. He also claimed that additional records should exist. In this order, the adjudicator upholds the university's decision to deny access to the four records, 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, and 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 [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 January 2005 to the present, including but not limited to the following:

[2] The request then listed specific types of records in Items i to xxi. 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; correspondence related to the requester's applications to the university and course enrollment; and records related to conversations, meetings and other correspondence between the named individual and five other named individuals.

[3] The university conducted a search and located 34 responsive records. The university granted full access to 29 of the responsive records and partial access to one of the responsive records, with severances pursuant to sections 21 and 49(b) (personal privacy) of the *Act*. The university denied access to four records pursuant to sections 49(a) (discretion to deny requester's own information) and 19 (solicitor-client privilege) of the *Act*.

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

[5] During mediation, the university provided the appellant with an index of records. The appellant advised that he believed additional responsive records should exist and that he was pursuing access to the four records that were withheld pursuant to sections 49(a) and 19 of the *Act*. The appellant confirmed that he was not pursuing access to personal information withheld under sections 21 and 49(b) of the *Act*.

[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 began my inquiry by seeking written representations from the university on the application of the solicitor-client privilege exemption and the reasonableness of the university's search for responsive records.

[7] While preparing its representations, the university identified 12 additional responsive records. The university then issued a supplementary decision to the appellant, which included the following:

> We note that [the identified individual had conducted] a second search for records … and did not identify any additional records. On March 27, 2015 [the individual] conducted a third search for records, and *searched in one new location*, a filing cabinet used to store older files located outside her office.

[8] The university indicated that the additional records were all found in this new location, and that none of the previously searched locations yielded any additional records. The university granted the appellant full access to all 12 of the additional records. The university also provided representations to this office addressing the issues in this appeal.

[9] I then sent the Notice of Inquiry, along with the university's representations and supporting affidavits, to the appellant, who provided representations on the issues.

[10] For the reasons that follow, I find that the four records at issue are 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:

[11] There are four records at issue in this appeal, which are identified as records 4, 7, 13 and 14 in the index of records that was prepared by the university. The records consist of email correspondence.

ISSUES:

A. Do the records 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 records at 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?

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

DISCUSSION:

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

[12] 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;

[13] 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]

[14] 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]

[15] 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

[16] The university submits that records 4, 7, 13 and 14 contain personal information as defined in section 2(1) of the *Act*. It states that the information relates to the appellant's education at the university, including various legal demands that the appellant made related to his education.

[17] On my review of the records, I agree with the university that the records contain the personal information of the appellant, as they include information relating to his education at the university [paragraph (b) of the definition]. I also find that the records contain the appellant's name as it appears 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 records at issue?

[18] 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.

[19] 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.

[20] 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]

[21] 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.

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

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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

[23] 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.

[24] 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

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

Solicitor-client communication privilege

[26] 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]

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

[28] 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

[29] 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

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

[31] 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.

[32] The university then refers to each of the records remaining at issue. The university submits that each record was prepared for use in giving legal advice and, considered in its context, is part of the "continuum of communications" that sustains a solicitor-client relationship. In particular, the university submits that records 4 and 7 are emails in which a university administrator provides information to a solicitor for the purpose of obtaining legal advice; that record 13 contains the legal advice of two solicitors; and that record 14 contains feedback on the solicitor's legal advice so that it can be adapted appropriately. The university submits that each of these communications goes to the core of the solicitor-client relationship and is therefore entitled to protection.

[33] In the affidavit sworn by the individual named in the request, this individual affirms that the four records at issue involve correspondence between university staff, including the university's General Counsel and Secretary, and outside legal counsel. The affiant states that she is a party to the communications because of her responsibilities to the university as Registrar, and that the correspondence relates to various legal demands made by the appellant. The affiant also confirms that she has kept the communications confidential and that she believes others have done the same.

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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.)

[34] The university submits that there has been no waiver of the privilege attaching to the records.

[35] The appellant requests that I review the records to determine whether the university's position on solicitor-client privilege is justifiable.

Analysis and findings

[36] On my review of the records at issue, I confirm that they consist of emails or email chains involving university administrators and the university's outside legal counsel. I also confirm that these emails relate to legal advice sought by or received from legal counsel. On my review of the records, I am satisfied that they either contain legal advice (Record 13) or form part of the continuum of communications aimed at keeping both external legal counsel and the client informed so that advice may be sought and given as required. In my view, disclosing the records would reveal the confidential privileged communications. Accordingly, I find that the four records qualify for exemption on the basis of solicitor-client privilege.

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.

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.

[38] 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

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

[11] Order MO-1573.

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 and findings

[40] The university submits that it properly exercised its discretion in deciding to apply the exemptions to the four records at issue. It states that, in making its decision, it considered 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;

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

- 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.

[41] The university submits that, after weighing these considerations, it decided to withhold the records from the appellant.

[42] On my review of the university's representations and the records, I am satisfied that the university properly exercised its discretion in deciding not to disclose the records 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 full or partial access to many responsive records, and only chose to deny access to records 4, 7, 13 and 14 on the basis of sections 49(a) and 19. In the circumstances, I find that the university property exercised its discretion to apply the exemption in sections 49(a) and 19 to the records.

SEARCH FOR RESPONSIVE RECORDS

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

[43] 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.

[44] 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).

[13] Orders M-282, P-458, P-535, M-909, PO-1744, PO-1920 and PO-3535.

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

[46] 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.

[47] 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

[48] The university provided representations in support of its position that it conducted a reasonable search for responsive records.

[49] Attached to its representations, the university provided an affidavit sworn by the individual named in the appellant's request describing the searches that she conducted. In the affidavit, the named individual confirms that she understood the request was for all records between January 1, 2005 and the date of the request held by her that relate to the appellant, including records in any medium. The affiant states that she assumed her current role as university Registrar in 2013, but that she has had responsibility for undergraduate admissions since 2005. She confirms that she had dealings with the appellant because of her responsibilities.

[50] The affiant swears that in response to the initial request for records, she personally searched the following locations for responsive records:

i. physical files and loose papers;

ii. desktop and laptop computers;

iii. Ryerson email account; and

iv. Paper log books of phone messages.

[51] In addition to the searches described above, the affiant also asked her staff to search for responsive records in the university's student administrative system. In total, 34 responsive records were initially located.

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[14] See, for example, Orders PO-3114, PO-3494 and PO-3527.

[52] The affiant swears that, during the processing of this file, she realized that she had not searched a locked filing cabinet located outside her office that she uses to hold files. She affirms that she then searched this cabinet and found some responsive records, including a number of records which were duplicates of those located in the initial search. She states that, in total, 12 new responsive records were located.

[53] The affiant then swears that she did not destroy or delete any records between the date of the request and the date that she swore the affidavit. She also affirms that she does not recall destroying or deleting any responsive records before the date of the request. She also swears that she believes the 46 records located as a result of the searches "are the only responsive records" in her possession.

[54] In its representations in support of its position that the searches conducted for responsive records were reasonable, the university refers to the affidavit and submits that the named employee's searches were logical, thorough and reasonable. The university notes that the employee named in the appellant's request is the Registrar of the university. It submits that the Registrar oversees multiple functions, roles and employees related to student records, applications and financial aid; however she does not "hold" all of the records. It then notes that, in addition to conducting her own search for all responsive records that she "held", the named employee also asked her staff to search the university student system. The university states that the searches carried out by the Registrar's staff were voluntary and done in good faith, but were not searches for responsive records as required by the *Act*.

[55] The university also states that the request is for records dating back to 2005, and notes that the university requires records containing personal information to be retained for a minimum of one year from the date of last issue. The university submits that while the affiant does not recall destroying or deleting any responsive records before the date of the request, any such records would not be responsive to the request because they are not "held" by the named individual on the date of the request.

[56] The appellant takes the position that the university has not conducted a reasonable search for responsive records. His main argument in support of his position is that there appear to be "gaps" in the correspondence.[15] The appellant refers to a number of the records which were disclosed to him, and argues that the content of those records suggest that additional documentation should exist. For example, the appellant submits that some records lack preceding documentation that he believes would have initiated the email correspondence, but that such preceding documentation has not been provided. The appellant also submits that a number of records would have required follow-up documentation and responses, which has not been provided.

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[15] The appellant also indirectly raises a privacy concern, which I will not address in this order.

Analysis and findings

[57] As set out above, 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 the 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] 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] I have considered the parties' representations and have reviewed the records that the university located and disclosed to the appellant. 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 the university located a number of responsive records relating to the appellant and disclosed the majority of them to him. I have reviewed the records that were provided by the appellant in support of his submissions, and I am satisfied that they are responsive to the request. As a result, I find that the university understood the appellant's request and was able to conduct a targeted search for responsive records.

[61] Second, I find that the university's representations and, in particular, the affidavit provided by the named individual who conducted the searches, adequately address the requirements of section 24 of the *Act*. The representations indicate that the search was conducted by the individual named in the appellant's request and that the individual would be the one with the greatest access to and knowledge of the requested records. The named individual provides a sworn affidavit in which she describes where and how she searched for responsive records, and swears that she did not destroy or delete any responsive records before or after receipt of the access request. Based on this sworn evidence, I am satisfied that the search conducted was reasonable. I am also satisfied

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[16] Order M-909.

that the search was conducted by an experienced employee, who was knowledgeable in the subject-matter of the request and familiar with the relevant record-keeping practices.

[62] Third, I have considered the appellant's arguments regarding the apparent absence of additional documentation which might be suggested by the wording of some of the records. On my review of the records received by the appellant from the university and provided to me by him in the course of this appeal, I accept that some of them appear to refer to prior communications between the named individual and other university employees; however, I also note that some of these actually refer to telephone or other ways of communicating with these parties (see, for example, record 6). I also note that some of these records may have been copied to the named individual due to her role as the Registrar. To the extent that these records refer to or arise from other communications, I am satisfied that these may well have arisen from or resulted in face-to-face meetings or telephone conversations, for which no additional documentation was created. I also note that four of the email communications were withheld on the basis of the solicitor-client privilege exemption. In addition, I am also satisfied by the affiant's sworn statement that she did not destroy or delete any responsive records before or after the access request. In these circumstances, I am not satisfied that the lack of possible preceding or follow-up documentation means that the search conducted by the named individual was not reasonable.

[63] Lastly, I acknowledge that the appellant may be wary of the thoroughness of the searches, given that a subsequent search identified 12 additional responsive records. However, I am satisfied that the evidence provided in the affidavit recounting how these additional 12 records were located, and why they were not located earlier, adequately addresses this issue.

[64] As a result, based on the evidence provided by the parties, and particularly the affidavit provided by the named individual who conducted the searches as described above, I 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: December 23, 2015

Frank DeVries
Senior Adjudicator