Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4014

Appeal PA17-500

University of Western Ontario

December 10, 2019

Summary: In this order, the adjudicator upholds the university's decision to deny access, under section 19(c), to emails exchanged between its legal counsel and counsel to the federal Department of Justice in relation to litigation that was reasonably contemplated at the relevant time. The appeal is dismissed.

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

OVERVIEW:

[1] This order addresses the issues raised in an appeal arising from an individual's request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to Western University (Western or the university) for access to all correspondence, including electronic communications, between a named university employee and the Department of Justice, Civil Litigation section in Ottawa, from January 1, 2016 to January 1, 2017.

[2] Western issued an access decision denying access to the records identified as responsive, which consisted of 76 pages of emails, in full under the discretionary exemption for solicitor-client privileged records in sections 19(a) and (c) of the *Act*.

[3] The requester, now the appellant, appealed the decision to this office and Appeal PA17-500 was opened. A mediator was appointed to explore the possibility of resolving the appeal. During the mediation stage, the university issued a revised decision and

granted access to pages 57-73 of the records. Western also provided an index of records to this office, although it did not provide copies of the records themselves. As a mediated resolution of the appeal was not possible, the appeal was transferred to the adjudication stage for an inquiry.

[4] As the adjudicator, I began my inquiry by sending a Notice of Inquiry to invite submissions from the university. I asked it to provide an affidavit regarding the records at issue under section 19. I received Western's representations, which included an affidavit from the legal counsel named in the request and a detailed index of records.[1] I then provided a copy of these submissions in their entirety to the appellant, inviting representations on the issues, which I received. Subsequently, I sought reply and sur-reply representations from the university and appellant, respectively.

[5] In this appeal, I find that Western has provided sufficient evidence to establish that the responsive email records are exempt under section 19(c), in their entirety, and I uphold its decision to deny access. I dismiss the appeal.

RECORDS:

[6] The records consist of email chains (59 pages), as described in the university's detailed five-page index of records.[2]

ISSUES:

A. Does the discretionary statutory litigation privilege exemption at section 19(c) apply to the records?

B. Did the university properly exercise its discretion under section 19?

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[1] Based on the evidence provided to me by Western, I concluded that it would be possible to decide the question of privilege and the university's section 19 exemption claim without having copies of the records before me.

[2] For each email record, the index gives the number of pages, the author and recipient, a general description of its content, the date, the subject line, the access decision (all remaining were withheld in full), exemption applied (all were section 19), and comments/explanations about the claim ("common interest litigation privilege").

DISCUSSION:

Issue A: Does the discretionary statutory litigation privilege exemption at section 19(c) apply to the records?

[7] Although Western originally claimed sections 19(a) and 19(c) to deny access, it clarified in its representations provided during the inquiry that it is no longer relying on section 19(a). Section 19(c) of the *Act* states:

> A head may refuse to disclose a record,
>
> > 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.

[8] Section 19 contains two branches, the first based on the common law, while the second is a statutory privilege which arises from section 19(b), or in the case of an educational institution or a hospital as here, from section 19(c). Western was required to establish that one or the other (or both) branches apply.

[9] 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.

Statutory litigation privilege

[10] This privilege applies to records prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital "in contemplation of or for use in litigation." It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[3]

[11] Common law litigation privilege generally comes to an end with the termination of litigation.[4] Unlike the common law privilege, however, termination of litigation does not end the statutory litigation privilege in section 19.[5] Some principles from the common law litigation privilege are relevant in the application of statutory litigation

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[3] See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, cited above.
[4] *Blank v. Canada (Minister of Justice)*, cited above.
[5] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, cited above.

privilege, as discussed below.

[12] In the circumstances, and for the following reasons, I am satisfied that the university has provided sufficient evidence to establish that the records at issue are exempt because the statutory litigation privilege under section 19(c) of the *Act* applies to them and that privilege has not been waived.

Representations

Western's representations

[13] Western submits that the records are subject to the statutory privilege recognized by section 19(c) because they are communications that were: (i) prepared by or for counsel employed by an educational institution; (ii) in contemplation of litigation; and (iii) carry the requisite degree of confidentiality because the federal Crown (with whom Western's legal counsel was corresponding) shared a common interest in the litigation with the university.

[14] According to the university, the withheld records were prepared by or for counsel employed by an educational institution as contemplated under section 19(c), because the emails are communications prepared by or for the individual named in the request, who is employed by the university as legal counsel. Western adds that it is an "educational institution," as defined in section 2(1) of the *Act*.

[15] Western states that its lawyer reasonably contemplated litigation by the time he contacted the federal Crown and did so to assist the university in addressing, and developing a strategy for, the litigation he reasonably contemplated. Western's legal counsel affirms in his affidavit that the withheld records were all sent and received as part of "gather[ing] information and insights that would inform my litigation strategy."

[16] Western says, in particular, that its lawyer believed the appellant would sue the university for copyright infringement and knew that the federal Crown was already involved in this type of litigation with the appellant. Western provides additional information and supporting documents related to the interactions between the appellant's business and a manager within Western's business school to support this position. The university submits that these interactions were followed by the appellant filing a freedom of information request to obtain evidence that the business school staff member had improperly distributed material obtained from the appellant's business. Western notes that research conducted by its legal counsel indicated that the appellant had taken this same tack with another party, which had been found liable to the appellant;[6] the similarity in sequence of events contributed to the lawyer forming the

[6] The university provided, as an attachment to the affidavit, a copy of a Globe and Mail article.

opinion that the university would likely be sued.

[17] As the university puts it: "All appearances were that the University was being set up by a 'copyright troll'." Western maintains that several weeks before its lawyer contacted the federal Crown, the appellant had already taken on the appearance of a real potential adversary, thus creating a legitimate need for the zone of privacy provided by section 19(c). Western relies on *Carlucci v Laurentian Casualty Co. of Canada*, where the Ontario Superior Court of Justice held that litigation need not be a "certainty" for litigation privilege to arise; there need be only a "reasonable prospect" that goes beyond a "suspicion."[7]

[18] Western submits that because the prospect of litigation was more than speculative, its legal counsel contacted the federal Crown who acted for the federal government in related copyright infringement litigation with the appellant as part of his effort to craft a well-informed litigation strategy.[8]

[19] Regarding confidentiality, the university relies on *General Accident Assurance Company v Chrusz,*[9] where the Ontario Court of Appeal held that litigation privilege may be maintained over documents that are shared with "an outsider" who shares a common adversary. Western argues that the principles from *Chrusz* apply directly to this matter because the appellant was a common adversary to both the university and to the federal Crown. As Western explains it, the appellant "had targeted the University as it had earlier targeted the federal Crown, and the University was exposed to a threat of the same litigation that currently faced the Crown. The two parties' interests were strongly aligned against the requester, which supported a legitimate and reasonable expectation of confidence."

The appellant's representations

[20] In response, the appellant maintains that it "did not, will not, and never intended to sue the University."

[21] Referring to the university's submission that it believed he (the appellant) would sue on the basis of the freedom of information request filed, the appellant suggests that Western has "ascribed [an improper] motive to my exercise of a statutory right, then used the supposition to withhold records."

[22] The appellant submits that Western seeks to "justif[y] its concealment of records on the fact our company has litigated intellectual property rights. There is no other

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[7] 1991 CarswellOnt 444 (Gen Div). Western also relies on *Hamalainen (Committee of) v Sipola*, 1991 CanLII 440 (BC CA).
[8] Western provided the citations for this case, which was affirmed by the Federal Court of Appeal.
[9] 1999 CanLII 7320 (ON CA).

remedy under the Copyright Act. Copyright owners have no choice but to sue infringers." Further, regarding the university's reference to the appellant's business as a "'copyright troll' on the basis of a newspaper article[,] [t]his is not a cause of action in the Copyright Act. It does not exist in Canadian law."

[23] The appellant also refers to, and challenges the relevance of the Federal Court decision in which he was involved, which was mentioned by the university, noting that the judgment was issued nine months after the email correspondence Western seeks to withhold. He points out that the judge in that case warned that the judgment should not be taken to endorse "arguably blameworthy conduct in the form of unlawful technological breaches of a paywall, misuse of passwords or widespread exploitation of copyrighted material to obtain a commercial or business advantage." The appellant also provided an article on the Federal Court ruling. Western's response is that neither the article, nor the judge's comments, are relevant to the issue of whether or not the exemption applies to the withheld records.

[24] The appellant suggests that the fact that Western's legal counsel and the federal Crown with whom he corresponded are public office holders is important. According to the appellant, Western's lawyer and the federal Crown communicated "about our family business. They said unpleasant things about our company." The appellant submits that while Western's lawyer and the federal Crown may be entitled to their private opinions, it does not follow that this should take place "on the taxpayers' time." Specifically,

> [Western's lawyer] and [the federal Crown] cannot in their public function exchange correspondence castigating our company with aggressive language, and then conceal the fact on the supposition they were exchanging legal advice in litigation that never happened.

[25] In the appellant's view, the university lawyer's "exaggerated fear of a non-existent lawsuit" does not form a credible basis for withholding the records.

Western's reply representations

[26] Whether the appellant is a "copyright troll" is not at issue, states Western in reply; what matters, the university says, is that its legal counsel was aware the appellant was enforcing copyright through litigation against other parties and the appellant's dealings with the university matched the facts in those litigated cases. Western adds that the intent of the appellant to sue the university is not relevant, because the legal test is whether it was reasonable to contemplate litigation in the circumstances and the evidence establishes that it was so.

[27] Western refutes the appellant's suggestion that the university's belief the appellant would sue was based solely on the access request. The university maintains that its representations describe a pattern of behaviour by the appellant that occurred at the university and which was echoed in the federal court actions, and this includes more than just requests for information by the appellant.

[28] The university refers to the appellant making several "unfounded comments" about the content of the records and reiterates that the records being withheld are communications between its legal counsel and counsel for the federal Crown, sent and received for the purpose of gathering information and insights that would inform the litigation strategy for Western. According to the university, the appellant has not submitted any contrary evidence.

Appellant's sur-reply representations

[29] The appellant says that Western claims privilege though "we did not sue Western" and would not sue Western. He asks "Would the exemption be void if we cannot sue Western?" The appellant states that litigation under the *Copyright Act* is statute-barred three years from "knowledge of" and suggests that too much time has passed and it is now statute-barred from filing any such action against Western.

Analysis and findings

[30] Litigation privilege, both common law and statutory, protects records created for the dominant purpose of litigation and is based on the need to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial.[10] The statutory and common law privileges, although not identical, exist for similar reasons. For me to find that the statutory privilege in section 19(c) applies in this appeal, I must be satisfied that the records were prepared by or for counsel employed or retained by an educational institution *and* that the records were prepared in contemplation of, or for use in, litigation.

[31] The records at issue in this appeal consist of emails or email chains, many of which include duplicates and some of which have attachments. The subject line of all of these emails includes reference to the appellant's business; many subject lines also include the university's name. All of these emails were sent to or from the named legal counsel (identified as "Associate Secretary and Legal Advisor") for Western and a specific federal Crown lawyer between April 2016 and January 2017. In this context, therefore, I find that the records were prepared by or for counsel employed or retained by an educational institution.

[32] If litigation does not already exist, more than a vague or general apprehension of litigation is required to satisfy the requirement that the preparation have been "in contemplation of litigation."[11] As the university submits, relying on *Carlucci*, *supra*, there need be only a "reasonable prospect" that goes beyond a "suspicion." Based on all of the evidence, I am satisfied that litigation was reasonably contemplated at the time the

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[10] *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).
[11] Orders PO-2323, MO-2609 and MO-3161.

records at issue were created. While the appellant says, now, that he has not, and indeed could not, sue Western under the *Copyright Act*, the relevant time to assess the reasonableness of the contemplation of litigation is the time at which the records were created. I find, therefore, that at the material time, the information available to Western's lawyer was such that copyright infringement litigation by the appellant against the university was reasonably contemplated.

[33] Further, on the issue of confidentiality, the statutory litigation privilege does not apply to records created outside of the zone of privacy intended to be protected by the litigation privilege.[12] I find that the communications took place within the requisite zone of privacy. In particular, I considered that these communications were between the university and a representative of the federal government, a party external to Western. It is clear, however, that these were communications between lawyers for parties who were charged with responding to litigation by the appellant, whether real or reasonably contemplated. The federal Crown lawyer at the Department of Justice was the individual who carried the litigation on behalf of the federal minister involved in existing litigation with the appellant's business that was similar in nature to the litigation the university's lawyer reasonably contemplated. Contrary to the appellant's supposition, the confidentiality of these communications, taking place within a zone of privacy as they did, is not diminished when both legal counsel are employed by public institutions.

[34] In this context, therefore, I find that the exchange of communications between Western's legal counsel and the federal Crown took place within the zone of privacy intended to be protected by the litigation privilege. There is no evidence that this litigation privilege was waived. There being no temporal limit on statutory litigation privilege,[13] I find that the records are exempt under section 19(c) of the *Act*, subject to my review of Western's exercise of discretion.

Issue B: Did the university properly exercise its discretion under section 19?

[35] The section 19 exemption is discretionary, and permits 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.

[36] 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

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[12] See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, cited above.

[13] See Order PO-3627, pages 5-8, for discussion of the statutory litigation privilege waiver issue in *Big Canoe (2006)* and *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, (2002) 62 O.R. (3d) 167 (C.A.).

considerations.

[37] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[14] This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

[38] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[15]

- 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.

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[14] Order MO-1573.
[15] Orders P-344 and MO-1573.

Representations

[39] The university's representations on its exercise of discretion are brief and to the point. Western claims it exercised its discretion after considering all proper factors and no improper factors. The university submits that it decided to claim section 19 to withhold the records after considering the appellant's right of access and the purposes of the *Act.* Western also submits that it considered the university's need to preserve a zone of privacy in which to address the contemplated litigation, the risks of such litigation and the consequences disclosure could have on the contemplated litigation and other related legal matters.

[40] The appellant's submissions do not directly address Western's exercise of discretion in denying access to the records under section 19. However, the appellant's explanation about why he is seeking access to these particular records suggests a desire to scrutinize the communications because it was his business being discussed.

Analysis and findings

[41] I have considered the university's representations on the factors it took into consideration in exercising its discretion to not disclose the records for which it claimed exemption under section 19. I accept that the university considered the appellant's right of access, but that it placed more emphasis on its need to maintain litigation privilege over these records in the specific circumstances of the request. The importance of maintaining privilege and the legitimate interests protected by the section 19 exemption are relevant factors that the university was entitled to consider.

[42] The evidence before me is sufficient to support a finding that Western exercised its discretion regarding disclosure of records responsive to the appellant's access request in good faith and that it considered relevant factors in doing so. On the evidence, I find that Western properly exercised its discretion to withhold the records under section 19(c) in this appeal, and I uphold this exercise of discretion.

ORDER:

I uphold Western's decision to deny access to the records at issue under section 19(c) of the *Act*, and I dismiss the appeal.

Original signed by	December 10, 2019
Daphne Loukidelis Adjudicator	