

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-4100

Appeal PA20-00047

University of Toronto

December 30, 2020

**Summary:** The appellant sought access to letters of reference that were provided in support of her application to graduate school and to a specific course evaluation that she completed. The university relied on the discretionary exemption in section 49(c.1)(ii) (evaluative or opinion material) to withhold the reference letters and responded that it could not locate the appellant's evaluation due to its anonymous evaluation system. The appellant attempted to amend her access request during the course of her appeal and sought access to all student evaluations of the specific course. In this order, the adjudicator upholds the university's decision to withhold the letters under section 49(c.1)(ii) and its exercise of discretion. The adjudicator also finds that the appellant's additional request for all of the course evaluations falls outside the scope of her access request.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, sections 2(1) (definition of "personal information"), 17 and 49(c.1)(ii).

**Orders and Investigation Reports Considered:** MO-2199 and PO-3089-F.

### OVERVIEW:

[1] This appeal addresses the appellant's right of access to reference letters sent to the University of Toronto (the university) on her behalf. The appellant submitted a six-part request (Items 2 to 7) to the university under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to specific records relating to her. In particular, the appellant sought access to emails she exchanged with specific university staff (Items 2, 5 and 7), reference letters submitted by four individuals in support of her application to graduate school (Items 3 and 4), and the course evaluation she

completed for a specific course (Item 6).

[2] The university issued a decision granting the appellant partial access to the records responsive to her request. It relied on the discretionary exemption in section 49(c.1)(ii) (evaluative or opinion material) of the *Act* to deny access to the four reference letters responsive to Items 3 and 4 of the request. The decision letter stated that the university did not locate any records responsive to Items 2, 5, 6 and 7 of the appellant's request.

[3] The appellant was dissatisfied with the university's decision and appealed it to the Information and Privacy Commissioner of Ontario (IPC). The IPC mediated the appeal. During mediation, the university located records responsive to Items 2 and 5 of the request, and disclosed these records to the appellant. Also during mediation, the appellant attempted to amend Item 6 of her request for access to her evaluation of a specific course by seeking access to the course evaluations completed by all of the students who took the course. The university took the position that the proposed amendment went beyond the scope of the original request and invited the appellant to submit a new access request for the course evaluations completed by all students.

[4] A mediated resolution of the appeal was not possible and the appeal was moved to the adjudication stage of the appeal process. I decided to conduct an inquiry and sent a Notice of Inquiry to the parties. I sought and received representations from the university and the appellant on the scope of the request and the application of section 49(c.1)(ii) to the four reference letters.

[5] In this order, I uphold the university's decision to withhold the four reference letters under section 49(c.1)(ii) of the *Act* and to deny the appellant's requested amendment to Item 6 because it is outside the scope of her original request.

## **RECORDS:**

[6] The records at issue in this appeal are the reference letters written by four individuals.

## **ISSUES:**

- A. Do the reference letters 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(c.1)(ii) apply to the letters?
- C. Did the university exercise its discretion under section 49(c.1)(ii), and, if so, should its exercise of discretion be upheld?
- D. What is the scope of the request?

## **DISCUSSION:**

### **A. Do the reference letters contain "personal information" as defined in section 2(1), and, if so, to whom does it relate?**

[7] To determine which sections of the *Act* apply to the records, I must first decide whether the records contain "personal information" and if so, to whom it relates. Section 2(1) of the *Act* defines "personal information" as recorded information about an identifiable individual and includes a non-exhaustive list of examples at paragraphs (a) through (h). The parties submit that the four reference letters contain the appellant's personal information. I agree. The records contain the appellant's name, details about her education history, and the four referees' views or opinions about her academic performance and aptitude, which information fits within paragraphs (b), (g) and (h) of the definition of "personal information" in section 2(1) of the *Act*. I find that the records contain the personal information of the appellant alone. Accordingly, I will determine her right of access to the records under Part II of the *Act*.

### **B. Does the discretionary exemption at section 49(c.1)(ii) apply to the letters?**

[8] Section 49 in Part II of the *Act* provides a number of exemptions from individuals' general right under section 47(1) to access their own personal information held by an institution. Under section 49(c.1), the university may refuse to disclose evaluative or opinion material in certain circumstances. The university relies on section 49(c.1)(ii), which states:

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

(c.1) if the information is supplied explicitly or implicitly in confidence and is evaluative or opinion material compiled solely for the purpose of,

(ii) determining suitability, eligibility or qualifications for admissions to an academic program of an educational institution[.]

### ***The university's representations***

[9] The university asserts that the four letters of reference are exempt under section 49(c.1)(ii) because they are evaluative or opinion material supplied in confidence and compiled solely for determining the appellant's suitability for admission to graduate studies programs. It states that the four referees supplied the letters, in support of the appellant's application to two different Master's programs, explicitly or implicitly in confidence, consistent with its long-standing and vital practice that such records be treated as highly confidential. The university argues that the referees understood this

established practice and candidly provided their evaluative or opinion information about the appellant with the expectation that it would remain confidential and that it would not be disclosed to the appellant. The university states that applicants to both Master's programs are told that they must supply information from referees as part of the application process and, therefore, it is also the expectation of applicants that the information is supplied explicitly in confidence. Finally, the university submits that the two Master's programs the appellant applied to are academic programs of an educational institution.

[10] In support of its assertion that the discretionary exemption at section 49(c.1)(ii) applies to all of the withheld information in this appeal, the university relies on Order PO- 3089-F, which, it argues, is analogous. It states that the adjudicator in Order PO- 3089-F, at paragraph 28, found that letters of reference for a candidate's application for admission to a PhD program were exempt from disclosure under section 49(c.1)(ii) because they contained "precisely" the type of evaluative and assessment information at which section 49(c.1)(ii) is aimed. The university submits that the discretionary exemption at section 49(c.1)(ii) clearly and precisely applies to the reference letters in this appeal.

### ***The appellant's representations***

[11] In her representations, the appellant states that she acknowledges "the letters and conventions of section 49(c.1)" but rejects "the principles and the practice that follows, in its entirety." She submits that the university "is to follow the principles and practices of informed consent in medicine." She argues that she should be fully aware of the four referees' evaluation of her ability and potential in the field before she invests the time and resources required to pursue graduate studies, the same way she should be informed of a physician's expert evaluation of her medical conditions, potential solutions and outcomes prior to undergoing medical treatment. She concludes by asserting that the "asymmetry" she points out between medicine and university education "is to be made symmetrical."

### ***Analysis and finding***

[12] I accept and agree with the submissions of the university, in their entirety. The letters at issue in this appeal contain evaluations and opinions about the appellant, supplied explicitly or implicitly in confidence by the referees, and compiled by the university solely for determining the appellant's suitability, eligibility or qualifications for admission into an academic program, as required for the application of the section 49(c.1)(ii) exemption.

[13] The appellant does not directly address the section 49(c.1)(ii) exemption in her representations other than to acknowledge it and reject "the principles and practice" of how this office determines its application. I do not accept the appellant's arguments—that the university must follow "the principles and practice" of informed consent in medicine and disclose the evaluations to her—because they disregard the wording of

section 49(c.1)(ii) and the university's statutory authority to withhold the records under that section. I find that the records qualify for exemption under section 49(c.1)(ii) of the *Act*, subject to my review of the university's exercise of discretion below.

**C. Did the university exercise its discretion under section 49(c.1)(ii), and, if so, should its exercise of discretion be upheld?**

[14] The section 49(c.1)(ii) exemption is discretionary and permits the university to disclose information, despite the fact that it could withhold it. The university must exercise its discretion, and, in doing so, must consider only relevant factors. On appeal, I may determine whether the university failed to exercise its discretion, or that it erred in exercising its discretion where it did so in bad faith or for an improper purpose, it took irrelevant considerations into account, or it failed to take into account relevant considerations.

[15] Relevant considerations may include the purposes of the *Act*, including the principles that individuals should have a right of access to their own personal information, exemptions from the right of access should be limited and specific, and the privacy of individuals should be protected. Relevant considerations may also include, the wording of the exemption and the interests it seeks to protect, whether the requester seeks her own personal information, the relationship between the requester and any affected persons, the nature of the information and its significance or sensitivity, and the historic practice of the university with respect to similar information. Additional unlisted considerations may also be relevant.<sup>1</sup>

***The university's representations***

[16] The university submits that in denying access to the records, it exercised its discretion based on careful consideration of all relevant factors. It asserts that it did not consider any irrelevant factors and that it exercised its discretion in good faith and for a proper purpose. The university states that it considered the purposes of the *Act*, including the principles that the appellant should have access to her own personal information and that exemptions from this right should be limited and specific, and it disclosed as much of the appellant's personal information responsive to her request as possible. The university also submits that it has no evidence that the appellant has a sympathetic or compelling need for the information and it considered this factor too.

[17] The university states that it also considered the purposes of the exemption—protecting the interests of referees who provide evaluations and opinions in confidence, and the integrity of academic admissions processes that depend on the provision, compilation and evaluation of candid and complete information about applicants. The

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<sup>1</sup> Orders P-344 and MO-1573.

university submits that it also considered the nature of the information and the extent to which it is significant or sensitive to the university and the referees. It asserts that the information is significant and extremely sensitive to the referees, and to the university and its processes, and it is imperative that the records remain confidential in accordance with its historical practice. The university argues that disclosure of the reference letters would have a chilling effect on the completeness and frankness of materials provided for admission purposes, and would be contrary to Canadian university norms of keeping academic references provided by referees for admission purposes confidential.

[18] The university adds that the confidentiality of the reference submission process is explained on the graduate studies website, which directs applicants to provide an institutional email address for their referees who will then be invited to complete an online reference form for the applicant. It states that the confidentiality of reference letters is also reinforced in section 3(a) of its *Guidelines Concerning Access to Official Student Academic Records*, which states that students may not examine or have copies made of "letters of reference which have been provided or obtained on the expressed or implied understanding that they shall be maintained in confidence."

[19] The university concludes by submitting that public policy is served by the provision of candid references, a fact that has been recognized by courts and tribunals. An example of this recognition, it submits, is Order PO-3089-F discussed above, which upheld the university's exercise of discretion in applying section 49(c.1)(ii) to letters of reference submitted as part of an application for admission to a PhD program.

### ***The appellant's representations***

[20] The appellant submits that she has a compelling need to receive the information in the records in order to make an informed choice about her professional path to pursue graduate degrees outside of Canada. She explains that she has learning disabilities and mental health challenges and is eligible to receive accommodations through the university's equity services office. However, she submits that hostility toward her accommodations needs from graduate studies chairs and some course instructors at the university has left her with no choice but to pursue graduate studies in the United States at a significant cost.

[21] The appellant states that the two references submitted for her application to one program are evaluations of her competence by tenured faculty members with decades of work experience, while the other two references are evaluations of her competence by less experienced faculty members who are leaders in the profession. Accordingly, she considers the information in the records to be a credible and reliable guide to help steer her decision-making in her professional life. The appellant concludes by arguing that the integrity of the admissions process will be fully satisfied when the candor contained in the reference letters is shared with her. She asserts that disclosing the information to her "would be a positive change."

### ***Analysis and findings***

[22] The university's representations establish that it exercised its discretion under section 49(c.1)(ii) when it decided to withhold the reference letters. They also establish that the university considered relevant factors when it exercised its discretion.

[23] I am satisfied that the university appropriately considered the purposes of the *Act*, including the principles that the appellant should have a right of access to her own personal information and that exemptions from this right should be limited and specific. In addition, the university properly considered the wording of the evaluative and opinion material exemption and the important interests it seeks to protect, namely, the efficacy and integrity of academic admissions processes. Another factor that the university appropriately took into account is the confidential nature of the information and its significance to the appellant as the applicant, and to the referees who authored it with the expectation of confidentiality. Finally, the university correctly considered its historic practice of guarding the confidentiality of academic letters of reference and the importance of continuing this practice in accordance with accepted Canadian university norms.

[24] The appellant argues that two factors are relevant and the university should have considered these and exercised its discretion differently. The two factors are her right to access records containing her personal information and her compelling need to access the records. I accept that the appellant believes she has a compelling need to know what the referees wrote about her aptitude for graduate studies. However, the reasons she provides—that she needs the letters to decide whether to pursue graduate studies outside of Canada and that she should have access to them because she is eligible for accommodations on account of her learning and mental health challenges—do not establish a compelling need. In the circumstances, it was open to the university to conclude that the appellant does not have a compelling need to access the letters of reference.

[25] While the appellant expresses concerns about how she has been treated by graduate studies chairs and some graduate course instructors, she does not claim that the university exercised its discretion under section 49(c.1)(ii) in bad faith or for an improper purpose. For all of the above reasons, I find that the university exercised its discretion under section 49(c.1)(ii) in deciding to withhold the letters of reference, that it considered all relevant factors in its exercise of discretion, and that it did not exercise its discretion in bad faith or for an improper purpose.

### **D. What is the scope of the request?**

[26] Section 17 of the *Act* imposes obligations on requesters and institutions when submitting and responding to requests for access to records. Section 17(1)(b) requires requesters to provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record. Section 17(2) requires an institution to inform the requester if the request does not sufficiently describe the

record sought, and to offer the requester assistance in reformulating the request to comply with section 17(1).

[27] In Item 6 of her access request, the appellant sought access to the course evaluation she submitted for a specific course during the Winter 2018 session. In response to Item 6, the university advised the appellant that the course evaluation system is anonymous, and, as a result, course evaluations submitted by individual students cannot be identified. The university stated in its decision letter that there is no record responsive to Item 6 of the appellant's request.

[28] The appellant then challenged the reasonableness of the university's search for her course evaluation and told the university to look for a specific term that she used in her evaluation. The university responded that due to the anonymous course evaluation system, it had no way to confirm whether a course evaluation with the specific term was indeed submitted by her. After receiving this explanation, the appellant attempted to amend Item 6 of her request and sought access to "all course evaluations submitted by students enrolled" in the specific course. The university submits that this proposed amendment constitutes a new request since it has a far broader scope and involves many more records.

[29] The university asserts that the appellant's request was clear from the outset and did not include the complete set of evaluations for the specific course. It relies on Order MO-2199 to argue that if a request is clear, a requester cannot argue later that additional or other records are included in the request where they clearly were not, even on a liberal interpretation. The university submits that the appellant's new request in respect of Item 6 falls outside the scope of the original request. It invites the appellant to make an additional access request, which it says it will process accordingly.

[30] The appellant argues that the university did not respond to her request with a liberal interpretation of her words, which, she states, would entail a broader scope. She submits that the university took too narrow an interpretation of her request considering she is unfamiliar with its "extremely intricate and absurdly detailed operations." The appellant states that she did not know about the "back of house operation separating students' course evaluations by some specific and idiosyncratic rule selected by the university" when she submitted her request. The appellant concludes by asking for a broader version of the record she requested relying on the "purpose and spirit" of the *Act* and the practice of resolving access request ambiguity in the requester's favour.

### ***Analysis and finding***

[31] Item 6 of the appellant's request states that she seeks access to her evaluation of a specific course. There is no ambiguity in this request for a specific, single course evaluation authored by the appellant. I am not persuaded by the appellant's arguments that the university interpreted her request too narrowly and that her request should include all of the course evaluations provided by the enrolled students.



[32] Applying a liberal interpretation, I find that Item 6 of the request was clearly framed by the appellant and was limited to her course evaluation alone. The complete set of course evaluations submitted by all students who took the course is not reasonably related to the appellant's request, even on a liberal interpretation. Accordingly, I find that the scope of the request does not include all of the course evaluations. If the appellant wishes to pursue access to all of the course evaluations for the identified course, she will need to file an additional request with the university.

[33] I uphold the university's determination that the appellant's request for all course evaluations falls outside the scope of the request. Having also upheld the university's decision to withhold the letters of reference under section 49(c.1)(ii) and its exercise of discretion under section 49(c.1)(ii), I dismiss the appeal.

**ORDER:**

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

Original signed by: \_\_\_\_\_  
Stella Ball  
Adjudicator

December 30, 2020 \_\_\_\_\_