Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4106

Appeal PA18-408

University of Toronto

January 26, 2021

Summary: On behalf of an anonymous individual, a lawyer submitted a request to the University of Toronto (the university) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records related to a named medical resident in the university's Graduate Medical Education Department. The university denied access to the responsive records in full, under the mandatory exemption at section 21(1) (personal privacy), and the discretionary exemption at section 19 (solicitor client privilege) of the *Act*. The requester, now the appellant, appealed the university's decision. At mediation, the appellant produced a consent from the named medical resident regarding the disclosure of his personal information. The university then issued a supplementary decision disclosing some records to the appellant, but continued to withhold other records under section 21(1), and other grounds which are not within the scope of the appeal. The appeal moved to adjudication solely on the issue of access to records withheld under section 19. In this order, the adjudicator upholds the university's decision and dismisses the appeal.

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

Orders Considered: Orders PO-218, P-1499, PO-1755, PO-3126, MO-1243, MO-2486, MO-2778 and MO-3409.

Case Considered: *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997) 102 O.A.C. 71, 46 Admin L.R. (2d) 115, [1997] O.J. No. 1465 (Div. Ct).

OVERVIEW:

[1] On behalf of an anonymous client, a lawyer submitted a request to the University of Toronto (the university) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The request was for access to information related to a named medical resident in the university's Graduate Medical Education Department.

[2] The university inquired with the lawyer about whether their client was the medical resident named in the request.[1] The law firm declined to identify their client.

[3] In response to the request, the university located a number of responsive records. Without being able to ascertain the identity of the lawyer's client,[2] the university denied access to the records in full, under the mandatory personal privacy exemption at section 21(1). It also claimed the discretionary exemption at section 19 (solicitor client privilege) of the *Act*.

[4] The requester, now the appellant, appealed the university's access decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC, or this office).

[5] During the mediation process, the appellant provided a consent form signed by the named medical resident authorizing the disclosure of the medical resident's personal information to the appellant. Based on the consent, the university issued a supplemental decision providing partial access to the responsive records. In the supplemental decision, portions of the records were withheld as being exempt from disclosure under section 19. The university provided a narrative description of the records withheld under section 19, and the legal authorities upon which it relied for its position. Portions of the records were also withheld (in full or in part) as being exempt under section 21(1) of the *Act* because they contain the personal information of individuals other than the named medical resident. In addition, portions of the records were withheld under section 49(c.1)(ii) of the *Act*, as letters of academic reference used to determine suitability, eligibility or qualifications for admission to an academic program of an education institution. A small portion of the records was also withheld as being non-responsive to the request.

[6] After receiving the supplemental decision, the appellant advised the mediator that he continues to seek access to the portions of the records withheld in accordance with section 19 of the *Act*.

[7] However, the appellant advised the mediator that he is not appealing the

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[1] According to the university's representations during the inquiry, which were not contested by the law firm representing the requester on this point.
[2] According to the university's representations during the inquiry.

university's decision to withhold non-responsive information or information withheld under sections 21(1) or 49(c.1)(ii) of the *Act.* As a result, those issues were removed from the scope of the appeal.

[8] The file then moved to the adjudication stage of the appeal process, where an adjudicator may conduct a written inquiry under the *Act*.

[9] Before beginning the inquiry, I wrote to the appellant to advise him of a key preliminary issue: the apparent continued anonymity of his client, both to the university and to this office. The appellant's client chose to remain anonymous. I will discuss the importance of this preliminary issue later on in this order.

[10] Having confirmed that the identity of the appellant's client is unknown, I began an inquiry under the *Act* by sending out a Notice of Inquiry, which set out the facts and issues on appeal, to the university. The university provided representations in response, and agreed to sharing them with the appellant. I then sought and received written representations from the appellant in response to the Notice of Inquiry and the university's representations. In the university's reply to the appellant's representations, it offered to provide affidavit evidence in support of its position if it might be of help in determining whether section 19 applies. I asked for such an affidavit, and the university provided one from its general counsel. The university's reply representations and affidavit evidence were shared with the appellant, who then provided representations in response.

[11] For the reasons that follow, I uphold the university's decision and dismiss the appeal.

RECORDS:

[12] The records at issue were not provided to this office. However, the university described the records in its representations and provided a supporting affidavit from the university's general counsel, which describes the records and their purpose.

[13] The records at issue consist of emails between the university and its legal counsel, or for its legal counsel, with respect to the medical resident named in the request.

ISSUES:

A. Does the discretionary exemption at section 19 apply to the records?

B. Should this office uphold the university's exercise of discretion under section 19?

DISCUSSION:

Issue A: Does the discretionary exemption at section 19 apply to the records?

[14] The university relies on section 19 to withhold all of the records at issue. For the reasons set out below, I uphold that decision.

[15] Before beginning the inquiry, I tried to ascertain the identity of the appellant's client because the *Act* accords special status to individuals requesting their own personal information.[3] I set this out in a letter to the appellant, and also explained that it is not the general practice of this office to disclose the identity of a requester to a third party, or in a public order, unless there is express consent to do so. Since the appellant's client chose not to confirm his or her identity, I am required to treat the request at issue in this appeal as a general request for records under section 10 of the *Act,* and not a request for the requester's own personal information under section 47(1).

[16] The appellant also submits that this office should have all responsive records in order to "validate or verify" the university's position. His representations repeatedly contain the argument that, because the IPC does not have the records, the IPC cannot determine whether section 19 applies to the records. However, this office has issued decisions on the question of section 19 in the absence of having possession of the records when the institution has provided sufficient evidence such that the issue of section 19 can be decided even without reviewing the records. That is the case here, as I will explain below.

[17] Section 19 of the *Act* says:

> 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
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> (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.

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[3] 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.

[18] 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.

[19] Here, the university submits that both branches apply to the records at issue. Given my findings below, that Branch 2 applies, it is not necessary for me to discuss Branch 1.

Branch 2: statutory privileges

[20] 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."

Statutory solicitor-client communication privilege

[21] The university submits that the records are exempt under that statutory solicitor-client communication privilege of Branch 2 (set out in section 19(c)) because the records were prepared by or for counsel employed or retained by the university (which is an educational institution) for use in giving legal advice.

[22] In my view, it is useful to set out some background information about the creation of the records in assessing the university's position.

[23] The evidence before me from the university consists of the university's representations and an affidavit of its general counsel. In his affidavit, counsel explains that he has been employed as legal counsel at the university since 2002. The university is his only client. In his capacity as legal counsel, he provides legal advice on various issues to the university (acting through its faculty, staff, and administrative offices). He states that he makes his affidavit on the basis of his direct involvement in giving legal advice to university officials, in connection with the records at issue. Counsel also states that he has knowledge of the records at issue and of the matters to which they pertain, and provided legal advice with respect to those matters, at the time when the records were created. In light of the direct involvement and knowledge described by counsel, I accept this affidavit evidence.

[24] The request itself relates to a medical resident (who was named in the request). According to the representations and affidavit provided by the university, the university learned about criminal charges that had been laid against that medical resident through a Toronto Police press release. The university's representations state that the records reveal either directly or indirectly the substance of the legal advice given or being sought about the matter. The affidavit states that the records are communications beginning on the date that the university first learned of the criminal charges and that in light of the seriousness of the matter, the university sought legal advice. Counsel describes the records as "emails recording exchanges between [u]niversity employees

and [u]niversity legal counsel, seeking legal advice from counsel." Furthermore, his affidavit notes that "[c]ounsel responded in emails and engaged in discussion with the client." Counsel also described the subject of the requests for legal advice and the legal advice itself as dealing with:

- an assessment of the university's initial response upon learning of the criminal charges against the medical resident,
- completion of that resident's [specified] evaluation in light of the criminal charges, and
- legal guidance to the university in responding to this unusual and difficult situation.

[25] Counsel also states the following in his affidavit:

> In every instance the communications recorded in the records were with counsel, or were information intended to be shared with or questions for counsel, or were communications of the legal advice itself to faculty and/or staff who needed to know it in order to deal with the situation that was the subject of the legal advice.

[26] The university's representations are consistent with this, so I will not repeat them. However, I would like to set out other details provided by the university in its representations about the records that also significantly support its position.

[27] The university explains that 103 of the 300 pages withheld under section 19 are from the file of legal counsel for the Faculty of Medicine, and that the remaining 191 pages contain significant duplication of email threads. When these duplicates are removed, the university states that the total number of unique pages is 62. This number is supported by the affidavit of the university's general counsel, who states that he reviewed the records at issue and is personally familiar with them.

[28] In its representations, the university further explains that the 62 unique pages can be separated into three distinct instances when the Faculty of Medicine and a specified department asked for the advice of legal counsel, after learning of the criminal charges. The three categories are:

- advice regarding the initial communication that was sent to relevant trainees regarding the doctor's arrest, including legal review of the draft communication;
- advice regarding how a specified department should complete the [named] evaluation report relating to the doctor, in light of the charges against him, which pertain to actions alleged to have happened during the period of evaluation; and

- advice regarding a communication to be sent to the doctor about his [named evaluation], in light of the advice given in item 2.

[29] In response to the affidavit evidence, the appellant acknowledges that counsel for the university attested to a number of points, including: counsel's direct knowledge of the records, his provision of legal advice with respect to them, and his characterization of the records as emails between university employees and university legal counsel, starting on [a specified date].

[30] The appellant's representations regarding section 19 also relate to the sufficiency of the university's search for responsive records. He argues that the university's submissions and affidavit do not establish that the university has identified all responsive records. He questions whether the withheld records would disclose or reference other relevant records that should be disclosed. However, the adequacy of the university's search for records is not at issue in this appeal. The Mediator's Report neither indicates that it was raised at mediation, nor lists it as an unresolved issue for adjudication. Instead, the Mediator's Report indicates which information the appellant was no longer pursuing,[4] and identified the only issue moving to adjudication as being the application of section 19 to the records withheld on that basis.

[31] The appellant had an opportunity to raise any errors or omissions in the Mediator's Report with the mediator before the appeal was transferred to adjudication, and there is no indication on file that he did this.[5] Accordingly, I will not address the question of whether the university conducted a reasonable search in this order other than to say that that question has no bearing on whether or not the records withheld are exempt under section 19.[6]

[32] The appellant also submits that the university's mention of the number of unique pages "does not disclose" whether the remaining records are or should be exempt on account of privilege, should be severed, or disclose or reference other relevant records that should properly be disclosed. While mention of the unique number of pages withheld "does not disclose" these things, I find that it is not necessary that it do so. The university's representations and the affidavit address whether the 62 pages are exempt on account of solicitor-client privilege.

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[4] The Mediator's Report indicates that the appellant was not appealing the university's decision to withhold information in accordance with sections 21 and 49(c.1)(ii), or information withheld as non-responsive.

[5] An unredacted email exchange on file between the appellant and the mediator indicates this. I am not privy to any communications between the mediator and the parties to which mediation privilege applies.

[6] This office has previously considered the role of mediation in the appeal process. It has taken the approach that, generally, the results of mediation define the scope of the issues left to adjudicate. The rationale for this was explained in Order PO-1755. Also see, for example, Orders PO-3126 and MO-2778.

[33] The appellant's representations also address severances, and describe the university's rationale in withholding the 62 unique pages (59 full pages and portions of 3 other pages).

[34] In any event, the Ontario Divisional Court has stated that "[o]nce it is established that a record constitutes a communication to legal counsel for advice, . . . the communication *in its entirety* is subject to privilege"[7] and that the privilege "protects the entire communication and not merely those specific items which involve actual advice."[8] Past orders of this office have also recognized that records containing direct solicitor-client communications relating to the seeking or receiving of legal advice are subject to a "class-based privilege," and therefore, are not subject to severance.[9] Given the nature of the records, as described above, I apply that principle in this case. This principle does not prevent an institution from exercising its discretion to disclose information that is subject to this privilege, but that is a separate question (Issue B, in this order).

[35] Taking into consideration the parties' representations and the affidavit evidence before me, I find that the university has sufficiently established that the records were prepared by or for counsel employed by an educational institution (the university), for use in giving legal advice in relation to the medical resident and the Toronto Police press report. I accept that this process of giving and receiving legal advice was conducted confidentially, given the sensitivity and seriousness of the matter, as the university understood it from the Toronto Police press report. Therefore, I find that the records are subject to the statutory solicitor-client communication privilege under Branch 2, which is found in section 19(a) of the *Act*.

Loss of Privilege

[36] The university states that it has not waived privilege with respect to these records in the past, nor does it do so presently. It also states that the records have been kept confidential as between legal counsel and the officials seeking legal advice and providing information for counsel in the seeking of the advice, and not shared with others, nor at any time made public.

[37] Based on these submissions, and the affidavit of general counsel stating that privilege has not been waived, I am satisfied that the university has not waived its privilege over the records.

[38] Since I have found that the university has sufficiently established that the records are exempt under Branch 2 of section 19, and that privilege was not waived, it

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[7] *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997) 102 O.A.C. 71,46 Admin L.R. (2d) 115, [1997] O.J. No. 1465 (Div. Ct.).
[8] *Ibid.*
[9] See, for example, Orders MO-3409 and MO-2486.

is not necessary to consider whether the records are also exempt under Branch 1.

Issue B: Should this office uphold the university's exercise of discretion under section 19?

[39] In denying access to the record, I find that the university properly exercised its discretion under section 19, for the reasons set out below.

[40] 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.

[41] 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.

[42] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[10] This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

Relevant considerations

[43] Relevant considerations may include those listed below. Not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[11]

- 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, and 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

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

- 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.

[44] The appellant's client's decision not to confirm his or her identity means that the university could not apply the part of the *Act* relating to records containing the personal information of the requester, and could not consider any of the factors involving a requester's request for their own personal information in the exercise of the university's discretion.

[45] The university submits that it properly and carefully exercised its discretion to apply the section 19 exemption, in full consideration of all relevant factors, including the following:

- one of the overarching purposes of the *Act*, namely the principle that information should be available to the public;
- the purpose of the exemption in general;
- the anonymity of the requester's client, weighing an anonymous requester's right of access against the purpose of the exemption at section 19;
- the fact situation itself, which it described as "highly sensitive, involves criminal proceedings, and significantly impacts on a regulated profession" and which had the "profile and potential for litigation at various levels";
- information that is already known to the appellant and to the medical resident himself about a specified topic, given specified documentary evidence provided to the medical student; and
- whether there is a public interest in disclosure of the records.

[46] The university's representations show that it considered the purpose of the exemption, both on its own, and in relation to other factors listed above.

[47] The university notes that the purpose of the exemption at section 19 is to protect the confidential nature of the solicitor-client relationship. It states that this

confidentiality is essential to enable clients to communicate freely with their legal advisors without fear that their communications will be shared, and highlights that the Supreme Court of Canada[12] has upheld the inherent value of this privilege as fundamental to the proper functioning of the justice system.

[48] The university also states that, based on the facts that were available to it, where the identity of the appellant's (requester's) client was (and remains) unknown, the university determined that the purpose of section 19 outweighs the requester's right to access. In this context, it also considered the fact situation itself, its inherent sensitivity, and what the university perceived as its significant impact on a regulated profession. The university explains that it was, therefore, "demonstrably entitled to avail itself of the important discretion protected by [section] 19," relying on Supreme Court of Canada case jurisprudence recognizing solicitor-client privilege as "all but absolute" due to "the high public interest in maintaining the confidentiality of the solicitor-client relationship." [13] The university states that its internal deliberations about how to respond to this sensitive matter, with "the profile and the potential for litigation of various kinds, clearly merited legal input and are a solid example of the kinds of information exchanges between legal counsel and their client that are at the heart of solicitor-client privilege."

[49] With respect to the information already known to the appellant and the medical resident on a specified matter, given an email sent to the medical resident about it, the university found that disclosure would provide minimal new information to the appellant. The university was not persuaded that the value of disclosure of the records to the appellant would outweigh the value of solicitor-client privilege.

[50] In considering whether there was a public interest in disclosure, the university considered whether news media coverage of the serious charges against the medical resident would weigh in favour of public interest in the records. However, the university states that it determined that these records are primarily personal in nature and disclosure would not serve the public interest in transparency.

[51] Lastly, the university states that it did not take into account any irrelevant considerations in exercising its discretion under section 19.

[52] The appellant's representations regarding the university's exercise of discretion repeat his position that, without providing the records to the IPC, the university has not established that section 19 applies. However, whether or not an exemption applies is a separate issue. An institution's exercise of discretion regarding a discretionary

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[12] Citing *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 (CanLII), [2006] 2 SCR 319.
[13] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), [2010] 1 SCR 815.

exemption is not reviewed by this office if the exemption itself has not been established, and in this case, I have found that it has been.

[53] The appellant's representations on the exercise of discretion also revisit the issue of the anonymity of his client. I am not persuaded that they demonstrate any error in the university's exercise of discretion.

[54] The consent of the medical student to the release of his own personal information to the appellant is not evidence that the university failed to consider a relevant consideration, or considered an irrelevant consideration. The university was obligated by the *Act* to determine if the records contain the requester's personal information in order to know which part of the *Act* applies, and it attempted to do so. Without clarity about the requester's identity, it was open to the university to determine that the purpose of section 19 outweighs the unknown requester's right to access. As mentioned, this office may not substitute its own discretion for that of the institution.

[55] Finally, I see no error in the university's assessment of the appellant's statement that he did not intend to publish the records.

[56] Having considered the parties' representations on the exercise of discretion, I find that the university considered relevant, and not irrelevant, considerations in exercising its discretion. I also find no evidence before me that the university exercised its discretion in bad faith or for improper purposes.

[57] As a result, I uphold the university's exercise of discretion under section 19.

ORDER:

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

Original Signed by: January 26, 2021
Marian Sami
Adjudicator