Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4516

Appeal PA21-00291

University of Western Ontario

May 10, 2024

Summary: The appellant sought access to all university records during a specific period regarding his appointment to a position with an external organization while he was a professor at the university. The university located responsive records and granted the appellant access to most of them. To withhold some records and information, the university relied on the discretionary exemption in section 49(a) (discretion to refuse requester's own information), read with section 13(1) (advice or recommendations). It also withheld information that was not responsive to the request.

The appellant challenged the university's decision and asserted that the withheld information should be ordered disclosed under section 23 because disclosure is in the public interest.

In this order, the adjudicator upholds the university's decision that the information it withheld under section 49(a) read with section 13(1) is exempt from disclosure. She also concludes that the public interest override does not apply because the withheld information does not relate to the public interest the appellant cites; rather, the withheld information relates to a university resources allocation matter.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSO 1990, c. F31, sections 2(1) (definition of "personal information"), 13(1), 13(2)(a) and 49(a).

Cases Considered: *John Doe v. Ontario (Finance)*, 2014 SCC 36.

OVERVIEW:

[1] This order addresses the application of the discretionary exemption in section 49(a) read with section 13(1) (advice or recommendations) of the *Freedom of Information and Protection of Privacy Act* (the *Act*) to deny an individual access to his own personal information.

[2] The appellant seeking access under the *Act* is a former professor at the University of Western Ontario (the university). The access request is for all university records created between March 1, 2016, and June 30, 2019, regarding the appellant's appointment to a position with an external organization; specifically, all records exchanged between university administrators and faculty, staff, alumni, students, donors, and any individuals and organizations outside the university regarding the appellant's appointment and role.

[3] After conducting a search and locating records responsive to the request, the university issued two access decisions. In its first decision, the university granted partial access to some of the responsive records, which it disclosed to the appellant. The first decision stated that the university had withheld information under the exemptions in sections 13(1) and 21(1) (personal privacy) and the exclusion in section 65(6) (labour relations or employment records), and information that was not responsive to the request.

[4] After it notified affected individuals about the remaining responsive records, the university issued a second decision. In its second decision the university granted the appellant partial access to the remaining responsive records. The second decision stated that the university relied on the exemptions in sections 13(1) and 21(1), and the exclusion in section 65(6), and claimed non-responsiveness to withhold information in the remaining responsive records.

[5] The appellant was dissatisfied with the university's decisions and appealed both to the Information and Privacy Commissioner of Ontario (the IPC).

[6] The IPC attempted to mediate the appeal. During mediation, the appellant removed personal information of other individuals withheld under section 21(1) from the scope of the appeal. Accordingly, the personal privacy exemption in section 21(1) and the information withheld under it are no longer at issue. Also not at issue is the responsiveness of the withheld name that appears at the top of various emails, since the appellant removed this information from the scope of the appeal. I address responsiveness in my preliminary finding below.

[7] During mediation, the university clarified that it relies on the discretionary exemption in section 49(a) (discretion to refuse requester's own information) read with section 13(1) to withhold information that it claims qualifies as advice or recommendations. Also, the appellant challenged the reasonableness of the university's

search for handwritten meeting notes of the Dean. Accordingly, the reasonableness of the university's search was added as an issue in the appeal.

[8] A mediated resolution was not achieved. The appeal was moved to the adjudication stage, where an adjudicator may conduct an inquiry. I conducted an inquiry, inviting representations from the parties on the issues set out below. The university provided representations and asked that portions of them be kept confidential from the appellant. The university's representations included an affidavit, sworn by a legal assistant in the Office of the University Legal Counsel, detailing the searches conducted by the university to locate responsive records.

[9] I shared the university's non-confidential representations with the appellant, who also provided representations. In his representations, the appellant confirmed that, having reviewed the university's representations, he was now satisfied with the university's search for responsive records. As a result, the reasonableness of the university's search is no longer an issue, and I do not address it further in this order. The appellant also confirmed in his representations that he does not challenge the university's decision to withhold information on page 30 in its second decision, or the university's claim that pages 96, 100-102 and 107 are excluded under section 65(6) of the *Act*. As a result, those pages of the records and section 65(6) of the *Act* are no longer at issue, and I do not address them further.

[10] In this order, I uphold the university's decision to withhold non-responsive information and the information it has withheld under section 49(a). I also find that the public interest override in section 23 does not apply in the circumstances of this appeal.

RECORDS:

[11] The records at issue are the withheld portions of emails found at pages 2, 17, 19, 21, 23, 24, 92, 97 and 103, and of a report at page 113 (first decision) and page 44 (second decision). Page 103 is a duplicate of page 92.

ISSUES:

A. Do pages 2, 19, 21, 92, 97 and 103 of the records contain the "personal information," as defined in section 2(1), of the appellant?

B. Does section 49(a), read with section 13(1), apply to exempt the withheld information in pages 2, 19, 21, 92, 97 and 103 from the appellant's right of access?

C. Did the university properly exercise its discretion under section 49(a)?

D. Does the public interest override in section 23 apply to the withheld information?

DISCUSSION:

Preliminary finding – the scope of the request

[12] Regarding the information withheld on the basis that it is not responsive to the request, the appellant asks me to confirm that this information is, in fact, not responsive. To be considered responsive, records must reasonably relate to the request. I have reviewed the information withheld as not responsive at pages 17, 23, 24 and 113, and I confirm that none of it reasonably relates to the appellant's request. I find that the information the university withheld as non-responsive falls outside the scope of the access request, and I uphold the university's decision to withhold it.

[13] I also find that page 44 of the records does not reasonably relate to the appellant's access request. Although the university has partially disclosed page 44 and claimed that the withheld information is exempt under section 21(1) or 13(1) of the *Act*, page 44 does not reasonably relate to the appellant's request for access to records about his appointment and role with an external organization. Accordingly, I do not consider it further in this order.

Issue A: Do pages 2, 19, 21, 92, 97 and 103 of the records contain the "personal information," as defined in section 2(1), of the appellant?

[14] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual." Information is "about" the individual when it refers to the individual in a personal capacity, revealing something of a personal nature about the individual. Paragraphs (a) through (g) of section 2(1) lists examples of personal information, including the following examples that are relevant in this appeal:

> "personal information" means recorded information about an identifiable individual, including,
>
> > (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,
> >
> > (g) the views or opinions of another individual about the individual, and
> >
> > (h) the individual's name if 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.

[15] Generally, information about an individual in a professional capacity is not considered to be "about" the individual.[1] Section 2(3) of the *Act* states that personal information does not include the "name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity." However, information about an individual in a professional capacity may be "personal information" if it reveals something of a personal nature about the individual.[2]

[16] If the record contains the appellant's own personal information, his access rights are greater than if it does not.[3] I note that if the records did not contain the appellant's personal information, as asserted by the appellant, his right of access would be determined under Part II of the *Act* (instead of Part III).

[17] The university submits, and I agree, that all the records at issue contain the "personal information" of the appellant as that term is defined in section 2(1) of the *Act.* Pages 2, 19, 21, 92, 97 and 103 of the records contain the appellant's personal information, including the views or opinions of other individuals about the appellant [paragraph (g) of the definition in section 2(1)], and information about him in a professional capacity that reveals something personal about him.

[18] While the records contain professional information about the appellant, in his role as a professor and his appointment to an external role, they also reveal something personal about him within the meaning of paragraphs (b), (g) and (h) of the definition of "personal information" in section 2(1) of the *Act*. I find that all the records at issue contain the personal information of the appellant.

[19] Because the records contain the appellant's personal information, his right of access to these records is under section 47(1) of the *Act*, subject to any discretionary exemptions from that right under section 49. Below, I consider the university's claim of the discretionary exemption in section 49(a) read with section 13(1) to withhold some information in the records.

Issue B: Does section 49(a), read with section 13(1), apply to exempt the withheld information in pages 2, 19, 21, 92, 97 and 103 from the appellant's right of access?

[20] Section 49(a) provides exemptions from the general right of access individuals have, under section 47(1) of the *Act,* to their personal information held by an institution. Section 49(a) of the *Act* reads:

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[1] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[2] Orders P-1409, R-980015, PO-2225 and MO-2344.
[3] Under sections 47(1) and 49 of the *Act,* a requester has a right of access to their own personal information, and any exemptions from that right are discretionary, meaning that the institution can still choose to disclose the information even if the exemption applies.

> 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, 15.1, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

[21] The discretionary nature of section 49(a) 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 own personal information.[4]

[22] Section 13(1) of the *Act* exempts certain records containing advice or recommendations given to an institution. This exemption aims to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policymaking.[5] Section 13(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

[23] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to a suggested course of action that will ultimately be accepted or rejected by the person being advised. Recommendations can be express or inferred.

[24] "Advice" has a broader meaning than "recommendations." It includes "policy options," which are the public servant or consultant's identification of alternative possible courses of action. "Advice" includes the views or opinions of a public servant or consultant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.[6] "Advice" involves an evaluative analysis of information. Neither "advice" nor "recommendations" include "objective information" or factual material.

[25] Section 13(1) applies if disclosure would "reveal" advice or recommendations, either because the information itself consists of advice or recommendations or the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.[7]

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[4] Order M-352.
[5] *John Doe v. Ontario* (*Finance*), 2014 SCC 36, at para. 43. (*John Doe*)
[6] *John Doe*, cited above, at paras. 26 and 47.
[7] Orders PO-2084, PO-2028, upheld on judicial review in *Ontario* (*Ministry of Northern Development and Mines*) *v. Ontario* (*Assistant Information and Privacy Commissioner*), [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario* (*Ministry of Transportation*) *v. Ontario* (*Information and Privacy Commissioner*), [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

The parties' representations

[26] The university relies on *John Doe* to argue that section 13(1) applies to all the records for which it has been claimed. It notes that "recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised and can be express or inferred; and "advice" may be no more than material that permits the drawing of inferences about a suggested course of action but does not recommend a specific course of action. The university asserts there is no requirement under section 13(1) that the university be able to demonstrate that the record went to the ultimate decision maker. It submits that advice and recommendations in the form of options that are part of the deliberative process leading to a decision are protected by section 13(1).

[27] The university states that the withheld information contains advice or recommendations from various employees about public communications about the appellant's appointment to an external role. It explains that given the potential for public and media attention regarding the appointment, it was important for university leaders to rely on the confidential advice and recommendations of their colleagues. It adds that the ability to make objective choices based on frank recommendations from colleagues was crucial in the environment, given the polarized views on the subject matter of the appellant's appointment and his previous scholarship and commentary on related issues, and the confidentiality of advice was essential to informed decision making.

[28] The university's representations include detailed information about specific pages of the records that I do not repeat here. The university's main submission is that all the information it has withheld is either: advice or recommendations; or information that would permit the drawing of accurate inferences about the nature of the actual advice or recommendations if it were disclosed.

[29] The appellant states that he accepts the definitions of "advice" and "recommendations" have been established by the Supreme Court of Canada in *John Doe*. However, he notes that the Court emphasized, in paragraph 52 of its decision, that section 13(1) is "a discretionary decision and that heads of institutions much be careful to exercise their discretion lawfully, as observed in *Ontario v. Criminal Lawyers Association*."[8] The appellant submits that, because he has no access to the information withheld by the university, I must carefully assess whether the withheld information truly meets the definition of "advice" or "recommendations." He argues that these definitions must not be interpreted so broadly by the university as to defeat the purposes of the *Act* in permitting information to be available to the public, and to the individual concerned.

Analysis and finding

[30] I have reviewed the information withheld by the university under section 49(a)

[8] 2010 SCC 23, at paragraph 71.

read with section 13(1) and I am satisfied that it all falls within the meaning of "advice" in section 13(1) of the *Act*. As I explain below, all the withheld information is either the actual advice provided or information that would permit the drawing of accurate inferences about the actual advice if disclosed.

[31] The withheld information in page 2 appears in an email exchange between the Dean of Law (Dean) and the Associate Vice-President of Communication and Public Affairs (Associate VP). The email exchange begins with the Dean seeking "guidance" from the Associate VP about the university's communications regarding the appellant's external appointment and role. I note that the university has granted the appellant a copy of that initial email from the Dean. The withheld information in page 2 contains the views of the Associate VP on factors that the Dean should consider in making a decision about the university's communications and allocation of university resources, and options as to what the decision may be. Pages 19 and 21 are an email exchange between the Dean and a Communications Officer about a decision to be made. The withheld information in page 19 is duplicated in page 21 and contains the views of the Communications Officer and information she advises should be considered by the Dean in making a decision. If disclosed, the withheld information in pages 2, 19 and 21 would permit the drawing of accurate inferences about the actual advice. I find that this withheld information qualifies as "advice" within the meaning of section 13(1).

[32] The withheld information in pages 92, 97 and 103 is the same passage repeated in different email exchanges. It is the response of the university's Associate VP to an email from the Acting Associate Dean (Research) of the Faculty of Law asking for "advice." I note that the university has also granted the appellant access to this original email containing the request for "advice." The request for advice arose after the appellant sought approval to use a specific university resource for his external appointment and role. The withheld information consists of the views of the Associate VP and the factors and information that the Acting Associate Dean is advised to consider in making a decision. If disclosed, this withheld information would reveal the actual advice provided or permit the drawing of accurate inferences about the actual advice. I find that this withheld information qualifies as "advice" within the meaning of section 13(1).

[33] Having found that the information withheld under section 49(a) read with section 13(1) qualifies as "advice" within the meaning of section 13(1), I will now consider the university's exercise of discretion in withholding that withheld information under section 49(a) of the *Act.*

Issue C: Did the university properly exercise its discretion under section 49(a)?

[34] The section 49(a) exemption is discretionary, meaning that the university can decide to disclose information even if the information qualifies for exemption. The university must exercise its discretion. In assessing whether the university properly exercised its discretion, I may determine whether it failed to do so. I may also determine

that it erred in exercising its discretion if it did so in bad faith or for an improper purpose, relied on irrelevant considerations, or failed to take relevant considerations into account.

[35] The university submits that in denying access to the withheld information, it exercised its discretion under section 49(a). The university explains that it considered the purposes of the *Act*, including the principles that: information should be available to the public, the appellant should have a right of access to his personal information and exemptions from that right of access should be limited and specific. It submits that it also considered the wording of the section 49(a) and 13(1) exemptions and the interests they seek to protect and the fact that the appellant seeks his personal information. It states that it also considered whether the appellant has a sympathetic or compelling need to receive the information and whether disclosure will increase public confidence in the operation of the university. The university says it also considered the nature of the information, its historic practice with similar information and whether there is a compelling public interest in disclosure of the information that clearly outweighs the purpose of sections 49(a) and 13(1).

[36] The university argues that an important factor it considered in withholding information containing the advice of its employees is the effect that disclosure could have on the provision of full, free, and frank advice. It submits that it is important to the functioning of the university that its employees can freely advise senior administrators and colleagues on issues with significant public relations implications without concern that such advice may be subject to an access request. It further submits that the appellant has no sympathetic need to see such advice and no compelling interest that would warrant the disclosure of such information.

[37] The appellant acknowledges the legitimate public interest in protecting decision making with public institutions like the university, but he challenges the university's exercise of discretion. He submits that there is a compelling public interest in disclosure of the withheld information that clearly outweighs the purpose of sections 49(a) and 13(1), thus raising the possible application of the public interest override in section 23 of the *Act*. I address the appellant's claim of section 23, below.

[38] Regarding the university's exercise of discretion, I note that a few sentences comprise the information that the university has withheld under sections 49(a) and 13(1) that I accepted, above, qualifies as advice. The university has disclosed most of the responsive records (totalling roughly 140 pages) to the appellant. The withheld information that remains is advice that the university is entitled to withhold under section 49(a) read with section 13(1). The advice concerns the university's response to the appellant's request to use university resources for his external appointment and role. The withheld information is significant to the appellant. The appellant does not suggest that the university exercised its discretion in bad faith and there is nothing before me to support such a conclusion. In whole, the university's submissions establish that it took relevant considerations into account in exercising its discretion. Accordingly, I am satisfied that the university exercised its discretion appropriately and I uphold its decision to

withhold the information that I have found exempt under section 49(a) of the *Act.*

Issue D: Does the public interest override in section 23 apply to the withheld information?

[39] Section 23 of the *Act* is the "public interest override" that provides for the disclosure of records that would otherwise be exempt under another section of the *Act*. It states:

> An exemption from disclosure of a record under sections 13, 15, 15.1, 17, 18, 20, 21 and 21.1 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[40] For section 23 to apply, two requirements must be met:

- there must be a compelling public interest in disclosure of the records; and
- this interest must clearly outweigh the purpose of the exemption.

[41] The *Act* does not state who bears the onus to show that section 23 applies. The IPC therefore reviews the records to determine whether there could be a compelling public interest in disclosure that clearly outweighs the purpose of the exemption.

[42] I sent a Supplementary Notice of Inquiry to the appellant inviting his representations on section 23 of the *Act*. The appellant provided representations and I summarize them below. I determined that it was not necessary to share the appellant's representations with the university.

[43] In considering whether there is a "public interest" in disclosure of a record, the first question the IPC asks is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government[9] – in this case, the university. In previous orders, the IPC has stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of the institution at issue, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[10]

[44] A "public interest" does not exist where the interests being advanced are essentially private in nature.[11] However, if a private interest raises issues of more general application, the IPC may find that there is a public interest in disclosure.[12]

[45] In his representations, the appellant submits that there is a compelling public

[9] Orders P-984 and PO-2607.
[10] Orders P-984 and PO-2556.
[11] Orders P-12, P-347 and P-1439.
[12] Order MO-1564.

interest in disclosure of the information at issue because the geopolitical issue that underlies his appointment is "the most highly visible human rights conflict in the modern world." He states that the university took great steps to distance itself from his appointment following comments from public figures, university donors and lobby organizations who stand on the side opposite to his on the geopolitical issue. He asserts that this matter is not solely, or even primarily, about his private interests. To support his position, he describes the initial controversy surrounding his appointment as "one of the most public discussions" of the geopolitical issue "at Canadian universities and in the wider Canadian public realm." He explains that his intention in seeking disclosure of the withheld information goes to the accountability of the university, which receives public funding, to appropriately justify its public-facing decisions.

[46] As I noted above, the information that I have upheld as exempt under section 49(a) read with section 13(1) is minimal and concerns advice on decisions university administrators made after the appellant's external appointment and role, including the university's communications about it and its response to the appellant's request to use a specific university resource for his external appointment and role. I also note that the university has granted the appellant access to a significant amount of information in the records that are responsive to his request, including the email communications in which the university administrators ask for advice on the university's communications and response to the appellant's request to use university resources. The appellant's representations do not address how disclosure of the discrete advice, that I have found exempt under section 49(a) ready with section 13(1) – what the university's communications should be and whether or not the appellant should be granted approval to use a specific university resource (and/or other university resources) for his external appointment and role – would serve the purpose of informing or enlightening the citizenry about the activities of the university, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.

[47] I agree with the appellant that there is a compelling public interest in the geopolitical issue that is the focus of his representations. However, the withheld information does not relate to the geopolitical issue as the appellant believes it does; it relates to university resources issues (communications and other resources) following his appointment and role to an external organization. Thus, the withheld information does not relate to the compelling public interest relied on by the appellant. Its disclosure would not shed light on the operations of the university regarding the geopolitical issue or inform the citizenry about the university's decisions regarding the geopolitical issue. As the first requirement of the test for the application of the public interest override is not met, I find that section 23 does not apply.

ORDER:

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

Original signed by: May 10, 2024

Stella Ball
Adjudicator