Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3052

Appeal PA10-167

Carleton University

February 14, 2012

Summary: The appellant sought access to records related to controversial events on the Carleton campus in the first half of 2009 connected to Israel/Palestine issues. Carleton identified a large number of records and granted access to them in part, withholding information pursuant to sections 13(1) (advice or recommendations), 14(1)(c) & (d) (law enforcement), 19 (solicitor-client privilege) and 21(1) (personal privacy). On appeal to this office, the appellant abandoned pursuit of records withheld under sections 19 and 21(1), but continued to seek access to those withheld under sections 13(1) and 14, as well as challenging the adequacy of Carleton's search for responsive records. The adjudicator upheld Carleton's search as reasonable and also upheld the section 13(1) claim, in part, but found that sections 14(1)(c) and (d) did not apply. Carleton is ordered to disclose the non-exempt portions of the records, subject to the severance of "personal information."

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 2(1) definitions of "personal information" and "law enforcement", 13(1), 14(1)(c), 14(1)(d), 24; *Police Services Act*, ss. 53(1) and 53(3).

Orders and Investigation Reports Considered: P-363, PO-1678, PO-2028, PO-2084, PO-2400, PO-2751, PO-2967, and PO-3046.

Cases Considered: *R. v. Mentuck,* [2001] 3 S.C.R. 442.

OVERVIEW:

[1] This order addresses the decision of Carleton University (Carleton, or the university) to deny access under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to portions of the records identified as responsive to an individual's request for "all records about Israel-Palestine issues in or controlled by the offices" of 11 named individuals, as well as "all University Vice Presidents" and legal counsel. The time period of the request was January 1 to July 7, 2009.[1]

[2] Following clarification of the request, Carleton issued a fee estimate and an interim decision, based both on the actual work done and an assessment of work remaining to be done in order to process the request. After Carleton requested a 50% deposit of the required fee, the requester submitted a fee waiver request, which Carleton denied, instead proposing that the requester narrow the scope of his request. The requester chose to pay the required 50% deposit. Carleton then issued a time extension decision under section 27(1)(a) of the *Act*, due to the large number of responsive records, followed by an access decision granting partial access to the records that had been reviewed by that point.

[3] Due to the ongoing review of a high volume of records, Carleton claimed several time extensions and issued six supplementary decisions granting partial access to newly reviewed responsive records, as they were made available by the identified university departments or offices. Each decision was accompanied by an index of records describing the records for which the exemptions in sections 13(1) (advice or recommendations), 14 (law enforcement), 19 (solicitor-client privilege), and 21(1) (personal privacy) were claimed. In the final decision, Carleton provided a revised fee breakdown, which lowered the total cost for processing the request. The requester paid the remaining balance of the fee.

[4] The requester (appellant) then appealed Carleton's access decisions to this office, and a mediator was appointed to explore resolution. Through mediation, the scope of the appeal was narrowed because the appellant abandoned pursuit of the records withheld pursuant to sections 19 and 21(1).[2] Only those records, or portions of them, withheld under sections 13(1) and 14 of the *Act* remain at issue. Other records were also removed from the scope of the appeal because they were created outside the

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[1] The request specifically referred to "… the present day" as the end date. However, as it was received and acted upon on July 7, 2009, this was the end date given to the various offices. The scope of the request was subsequently clarified and narrowed some ten days later to exclude the phrase "controlled by" in the introductory wording; the original wording, Carleton advised the appellant, "could potentially cover records in the possession of hundreds of employees, and could result in prohibitive fees."

[2] As the appellant withdrew his appeal under section 19, it was not necessary for me to address Carleton's refusal to produce the records withheld under the exemption to this office. However, as I advised Carleton in the inquiry documentation, the fact that I did not address the issue of non-production ought not to convey any concession to "Carleton's position on production of the records withheld under section 19, either in the circumstances of this specific appeal, or more generally."

time period specified in the request.[3] During mediation, however, the appellant claimed that additional records related to an audio recording of a presentation he made in a specified class, on a particular day, ought to exist. Accordingly, the adequacy of Carleton's search was added as an issue in this appeal.

[5] As it was not possible to completely resolve this appeal through mediation, it was transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. I sent a Notice of Inquiry outlining the issues and seeking representations to Carleton, initially. Following an extension granted to accommodate the preparation of representations for the high volume of records, Carleton submitted representations and an updated version of the records index. I then shared Carleton's non-confidential representations with the appellant, along with a Notice of Inquiry, and subsequently received brief correspondence from him.

[6] In this order, I find that Carleton's search for responsive records was reasonable. I also find that portions of the records are exempt under section 13(1), but that sections 14(1)(c) and (d) do not apply. I order Carleton to disclose the non-exempt portions of the records to the appellant.

RECORDS:

[7] The records at issue include strings of email communications, emailed correspondence and memoranda, and various other documents. Carleton's estimate of the number of pages remaining at issue, either in whole or in part, is 413.[4]

ISSUES:

A. Preliminary matters: duplicate records and responsiveness
B. Did Carleton conduct a reasonable search for responsive records?
C. Is there "personal information" in the records at issue that ought to be removed from the scope of the appeal?
D. Does the discretionary exemption for advice or recommendations in section 13(1) apply?
E. Do the discretionary exemptions for law enforcement information in sections 14(1)(c) or (d) apply?
F. Should Carleton's exercise of discretion under section 13(1) be upheld?

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[3] This issue is addressed further as a preliminary matter, below.

[4] Based on my review of the CD-ROMs provided by the university, however, there appear to be other pages to which exemption claims were applied but not recorded in the index. I estimate the number of pages at issue to be closer to 425.

DISCUSSION:

A. Preliminary Matters

Duplicate copies of records

[8] In the index submitted to this office, Carleton identified some records as duplicate copies of other records at issue in the appeal. My own review of the records on CD ROM identified numerous other instances of duplicate records. This is not unusual, given the high volume of email correspondence and communications identified as responsive to the request.

[9] In the representations provided in Carleton's annotated index, some differences in the manner in which severances had been made between versions of the same record were acknowledged and clarification of the final position on the claimed severance was provided. In those circumstances, I am satisfied that it is not necessary for me to review the possible application of the exemptions to each of these duplicate versions of the records.

[10] As suggested, however, there were also multiple duplications not identified by Carleton in the index, some with different severances applied to different versions of the same record. I have attempted to identify all instances of duplication and make note of them on the copy of Carleton's annotated index that will be sent to the university with the order. However, there is an extremely large volume of records, and it is possible that there may be further duplicates that I did not identify because they are located in subfolders on the CD that purportedly did not contain records at issue.

[11] In the case of duplicate records where there is no variation in the severances applied to the record in subsequent incarnations, Carleton should consider my decision on the exemption claim(s) in relation to the first occurrence of the record. However, in the case of duplicates that contain handwritten notations, some are sufficiently significant that I must review these versions of the record separately from the others.

[12] Where the record is a duplicate and different severances have been applied (as identified in my annotations to Carleton's index), Carleton ought to treat my decision on exemption of the records, or portions thereof, as though I am addressing the version of the record which has the least information severed (i.e., the version that disclosed the most information to the appellant).

Records falling outside scope of the request

[13] As mentioned in the introduction to this order, records were removed from the scope of the appeal during mediation because they were created outside the time period specified in the request. During my review of the records for the preparation of

this order, however, I identified additional records within an Equity Services folder on the CD-ROM that were created in October 2008. As the stated time period of the request commences January 1, 2009, I find that these records fall outside the scope of the request.

[14] Carleton seeks to withhold under section 13(1) notations made on responsive records that indicate the university's position on the application of exemptions under the *Act*. In my view, it is not necessary for me to consider the possible application of section 13(1) to this particular type of notation because the notations themselves were applied at a later point in time to the responsive records. Since I conclude that these handwritten notations fall outside the time period stated in the request, I find that they are also not responsive to the request.

[15] In addition, there is an email located within one of the subfolders attributed to Carleton's University Secretary to which a claim of section 13(1) has been made. Based on my review of this email, I find that it falls outside the scope of the request as it relates to a matter involving a graduate student's terms of employment and is not reasonably related to the appellant's request.

[16] I will not be reviewing the records referred to above any further in this order. These particular records are identified on the annotated index provided to the university with this order. FIPPA 2008-2009, pp. 66, 80, 85, 89; Sec 2009-12 Atkinson_f3, p. 15

B. Did Carleton conduct a reasonable search for responsive records?

[17] Throughout the inquiry, the appellant has maintained that Carleton's search for responsive records was not adequate because the university failed to locate an audio recording of a presentation he made in a specific class on an identified date.

[18] In appeals such as this one that involve a claim that additional responsive records exist, the issue to be decided is whether the institution has conducted a reasonable search for the records, as required by section 24 of the *Act*. If I am satisfied that the search carried out by Carleton was reasonable in the circumstances, I will uphold it. If I am not satisfied, I may order further searches.

[19] The *Act* does not require Carleton to prove with absolute certainty that further records do not exist. However, Carleton was required to provide me with sufficient evidence to show that it made a reasonable effort to identify and locate responsive records. A "reasonable search" has been explained as being one in which an experienced employee expends a reasonable effort to locate records that are reasonably related to the request.[5]

[5] Orders M-282, P-458, M-909, PO-1744 and PO-1920.

[20] Furthermore, although an appellant will rarely be in a position to indicate precisely which records the institution has not identified, the appellant still must provide a reasonable basis for concluding that such records exist.

[21] In this particular appeal, the appellant is certain that he obtained his copy of the specified audio recording through this access request and, consequently, that related background information ought to exist. However, although the appellant maintained this position during mediation, he did not offer representations in support of the existence of additional responsive records in the brief submissions sent in response to the Notice of Inquiry.

[22] Carleton maintains that no additional responsive records exist that are related to the audio recording, or the request otherwise, and provided detailed written submissions in support of this position. Carleton's evidence is summarized as follows:

- Following clarification of the scope with the appellant, the offices named in the request were all contacted using the same letter describing the requested search;[6]
- The following offices conducted searches for, and provided "a large number of records in paper form" to the Privacy Office: the Office of the President, including her Executive Assistant and her Appointment Secretary, the Office of the Director of Student Affairs, the Executive Assistants to the former Vice President (Research and International), who was also former Interim Provost, Office of the Provost and Vice President (Academic), Office of the Vice President (Finance and Administration), Office of the Director of University Safety, Director of Equity Services, Equity Advisor, Assistant Vice President (Facilities Management and Planning), and the University Secretary;
- Carleton's Department of Computing and Communication Services provided an estimate to produce copies of email communication for other individuals named in the request but no longer at the university: the former Director of University Communications, former Vice President (Research and International) and former Interim Provost;
- The Privacy Office (also named in the request) already had possession of many records identified through the processing of prior access requests on the same "broad topic;"
- Specifically regarding the audio recording alleged by the appellant to exist, Carleton describes its review of the responsive records in this request and in a previous, similar request, to find such a recording but with negative results;
- Although the corporate archivist "found several references to audio files, none matched the description provided" by the appellant;
- Carleton observes that while an audio file is mentioned as an attachment to several responsive emails, these were not Carleton records but rather "were

[6] Exhibit "A" to Carleton's search affidavit consisted of the template (sample) of this letter.

audio clips ordered from the CBC," which have been broadcast and are in the public domain;[7]

- Carleton's affidavit lists and describes the four audio items identified by this request;

[23] In the concluding parts of Carleton's representations on the search issue, the archivist states:

> I believe that the audio recording identified by the [appellant] was not released as a responsive record in the present request. In light of the broad nature of the searches directed and carried out during the processing of this request, and in light of my further failed efforts to identify or locate a copy of the audio recording in question, I also believe that the further records sought by the request do not exist. … I [also] believe that it is unlikely that the records sought by the [appellant] once existed but have since been destroyed.

[24] Carleton submits that in spite of the appellant's "lingering doubts" about the reasonableness of the search conducted, he has not provided a reasonable basis upon which I, as adjudicator, could conclude that additional responsive records exist.

Analysis and findings

[25] The appellant sought access to "all records about Israel-Palestine issues" in the offices of 11 named individuals, as well as all university vice presidents and legal counsel. A large number of records were identified as responsive to the request. The appellant has not taken issue with the broader searches conducted, but rather has expressed concern about the adequacy of Carleton's search for an audio recording of – or other records related to - a presentation he made in a specific class on a certain date.

[26] As noted previously, in situations where an appellant takes the position that additional records ought to exist, that individual must provide sufficient evidence to establish a reasonable basis for the belief that such records exist.

[27] In this appeal, however, the appellant has not done so. In the absence of evidence to support his position regarding the existence of the specified audio recording or additional associated records, Carleton's detailed representations on the issue of its searches are uncontroverted. In my view, they are also sufficient for me to uphold Carleton's search as reasonable. In reaching this decision, I considered that the employee who coordinated the search for responsive records, the corporate archivist, was an experienced employee. I am also satisfied that this individual expended a

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[7] The archivist continues by noting that "in all cases the items are described in the body of the message in sufficient detail to allow the Requester to obtain copies from the CBC if he so wished."

reasonable effort to locate responsive records in places these could be expected to be found.

[28] Based on the information provided to me by Carleton, therefore, I am satisfied that Carleton made a reasonable effort to identify and locate any existing records that might be responsive to this part of the appellant's request. Accordingly, I am satisfied that Carleton's search for records responsive to the request was reasonable in the circumstances, and I will uphold it.

C. Is there "personal information" in the records at issue that ought to be removed from the scope of the appeal?

[29] As stated in the overview section of this order, the appellant does not seek access to information withheld under section 21(1), the mandatory personal privacy exemption that is intended to protect the privacy interests of individuals.

[30] Section 21(1) of the *Act* requires an institution to refuse to disclose "personal information to any person other than the individual to whom the information relates," unless the personal information fits within certain exceptions. The most frequently applicable exception is section 21(1)(f), which provides that the personal information may be disclosed if the disclosure does not constitute an unjustified invasion of personal privacy. The factors and presumptions in sections 21(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 21(1)(f).

[31] Given the narrowing of the scope, the records before me did not, for the most part, include those that had been withheld under section 21(1). However, there were some records included on the CD-ROMs from which Carleton had severed information under section 21(1), citing the consideration and presumption in sections 21(2)(h) and 21(3)(h), in particular.[8] However, for information to qualify for exemption under section 21(1), it must first be found to qualify as "personal information" as that term is defined in section 2(1) of the *Act*. "Personal information" is defined in section 2(1) as "recorded information about an identifiable individual" and includes, for example, information about an individual's age, sex, race, religion, address, and identifying number, such as a student number.

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[8] Section 21(2)(h) states: "A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether … the personal information has been supplied by the individual to whom the information relates in confidence."
Section 21(3)(h) states: "A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information … indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations."

[32] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[9] Moreover, to qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[10]

[33] Accordingly, I reviewed Carleton's severances on this basis to determine if they contained "personal information" according to the definition of that term in section 2(1) of the *Act*. My review of the records identified two related matters: first, Carleton severed information, even entire pages, under section 21(1) [labelled section 21(2)(h)] that does not qualify as "personal information" according to the definition of the term; and second, "personal information" is contained in some of the records for which the other exemptions claimed do not apply. Examples of the information I find to fit within the definition of "personal information" in section 2(1) of the *Act* include individuals' names, addresses, student numbers, religion, and views, according to paragraphs (a), (c), (d), (e) and (h).

[34] Therefore, where records have been withheld in part, or in their entirety, based on section 21(1) but do not actually contain "personal information," and no mandatory exemption applies, I will order disclosure of this information. Furthermore, in instances where the other claimed discretionary exemptions do not apply, but the record contains "personal information," I will be ordering those records disclosed, subject to the severance of "personal information."

[35] My findings on the personal information issue are detailed in the annotated index that accompanies this order.

D. Does the discretionary exemption for advice or recommendations in section 13(1) apply?

[36] Carleton claims that section 13(1) applies to the withheld portions of the records. For the reasons that follow, I uphold Carleton's decision, in part.

[37] 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.

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[9] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

[10] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[38] The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure.

[39] "Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised. Advice or recommendations may be revealed in two ways: the information itself consists of advice or recommendations; or the information, if disclosed, would permit one to accurately infer the advice or recommendations given.[11]

[40] Previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information (Order PO-2681). The types of information that have been found not to qualify as advice or recommendations include: factual or background information; analytical information; evaluative information; notifications or cautions; views; draft documents; and a supervisor's direction to staff on how to conduct an investigation.[12]

[41] Sections 13(2) and 13(3) create a list of mandatory exceptions to the section 13(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 13.

[42] Carleton provided submissions on the application of section 13(1) described both in a set of written representations and in a detailed appendix to its written representations. Carleton's representations can be summarized as follows:

- The withheld records consist mainly of messages, memoranda and draft documents circulated by email between Carleton employees and, in some cases, an external consultant "with respect to a course of action in responding to internal and external inquiries regarding events on campus relating to Israel/Palestine issues;"
- Some of the records are draft versions which, Carleton acknowledges, the IPC has previously ruled do not necessarily qualify for exemption under section

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[11] Orders PO-2028, PO-2084, 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 *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.

[12] Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, *supra*, footnote 11; Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, upheld on judicial review, as cited in footnote 11.

13(1). However, all withheld portions meet the requirements of section 13(1) because they contain confidential advice or recommendations from Carleton employees. Different records contain multiple drafts of the same items and disclosure would permit accurate inferences to be drawn about the exempt advice or recommendations;

- Many of the withheld records consist of drafts of responses to inquiries, the disclosure of which Carleton submits would allow the appellant to accurately infer the advice or recommendations given "through the evolution of the drafts."
- Most of the records withheld under section 13(1) are emails that were exchanged between "key decision makers during a critical moment" and section 13(1) ought to available to protect the right of decision makers to seek frank and confidential advice from employees using email as the means of deliberative decision-making, particularly in the university context;
- Although the emails exchanged in the course of this type of decision-making may be of a less formal tone and may contain some factual material for context, this does not detract from the fact that they contain specific recommendations for a course of action, requests for advice or recommendations or references to recommendations previously given. Neither the tone nor the medium ought to remove these records from the ambit of section 13(1) given the "the high degree of confidentiality" university decision makers require in consulting staff;
- The decisions in this matter were "made efficiently and effectively because decision makers could rely on the fact that the advice they were receiving from Carleton employees was (and would remain) confidential. Such confidence ensured that the advice was "offered freely and frankly, without filter or hesitation;"
- The exception for factual material in section 13(2)(a) does not apply because any information that may viewed as factual is intertwined with the advice or recommendations contained in the records, and cannot reasonably be severed (Order 24). Furthermore, any factual material that was separate and distinct from the advice or recommendations was duly released.[13]

[43] Carleton also provided submissions referring to the discretionary solicitor-client privilege exemption in section 19 of the *Act* in relation to records originating from the university secretary. Notably, these records are only subject to an exemption claim under section 13(1). Respecting an email exchanged between the university president and the university secretary, for example, Carleton submits:

> While Carleton has not explicitly withheld these records as solicitor-client privileged, they arguably fall under both solicitor-client and litigation privilege. … [I]n his capacity as university secretary (in-house counsel for the university), [the identified individual] provides recommendations with respect to drafting the response to a human rights complaint lodged

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[13] Carleton also provided representations arguing why the exceptions in sections 13(2)(j),(k) and (l) do not apply to the records at issue in this appeal.

> against the university by an organization. The appellant is a spokesperson for the organization in question. Even if the records are not found to be solicitor-client privileged, the university submits that they are nonetheless advice or recommendations by an employee of the university, offered in the process of preparing a response to a human rights complaint. …

[44] The appellant's representations respecting section 13(1) do not directly respond to those provided by Carleton in support of the exemption claim; however, he disputes the characterization of "essentially draft documents as 'recommendations and advice'." More generally, the appellant also submits that Carleton has applied the exemptions "too extensively."

Analysis and findings

[45] The rationale for what was to be the section 13(1) exemption was canvassed in the Williams Commission Report,[14] as follows:

> Although the precise formula for achieving a desirable level of access for deliberative materials has been a contentious issue in many jurisdictions in which freedom of information laws have been adopted or proposed, there is broad general agreement on two points. First, it is accepted that some exemption must be made for documents or portions of documents containing advice or recommendations prepared for the purpose of participation in decision-making processes. Second, there is a general agreement that documents or parts of documents containing essentially factual material should be made available to the public. If a freedom of information law is to have the effect of increasing the accountability of public institutions to the electorate, it is essential that the information underlying decisions taken as well as the information about the operation of government programs must be accessible to the public. We are in general agreement with both of these propositions (page 288).

[46] The section 13(1) exemption has been considered in past orders of this office, many of which pre-date the inclusion of universities in the access to information scheme of the *Act* in 2006. In my view, the general principles developed in these orders are equally applicable in the university context.

[47] In Order PO-2084, former Assistant Commissioner Tom Mitchinson laid out the following approach for determining whether information contained in records constitutes "advice or recommendations" for the purpose of section 13(1) of the *Act*:

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[14] Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy, 1980, vol. 2 (Toronto: Queen's Printer, 1980).

> A great deal of information is frequently provided and shared in the context of various decision-making processes throughout government. The key to interpreting and applying the word "advice" in section 13(1) is to consider the specific circumstances and to determine what information reveals actual advice. It is only advice, not other kinds of information such as factual, background, analytical or evaluative material, which could reasonably be expected to inhibit the free flow of expertise and professional assistance within the deliberative process of government.

[48] In Order PO-2028, the former Assistant Commissioner also reviewed the other types of information that might be found in records passed between government employees in the decision-making context.[15] Addressing specific records at issue in that order, he wrote:

> The severances on pages 4 and 5 each consist of a paragraph listed under the heading "Potential Issues". The Ministry submits that they contain advice, and states:
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> > With respect to the severed "Potential Issues", there is certainly an implied suggestion that these are matters which the decision-makers should take into consideration in reaching a decision on whether or not to approve the project for funding. The suggested course of action in this section is that the decision-makers should take the issues into account during the deliberative process.
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> I do not accept the Ministry's position on these two severances. In my view, these paragraphs simply draw matters of potential relevance to the attention of the decision-maker. They do not advise or recommend anything, nor do they permit one to accurately infer any advice given.

[49] In Order PO-2400, Adjudicator John Swaigen discussed the distinction between advice or recommendations for the purpose of section 13(1) and “mere” information”, including factual, background and contextual, analytical and/or evaluative information:

> [A] moderate degree of discussion, assessment, comparison or evaluation of options or alternatives does not necessarily constitute “advice”. There is a fine line between description and prescription. Whether discussion of options crosses that line and becomes a blueprint or road map directing the decision-maker to a preferred option may depend to some extent on matters such as whether the number of options identified is large or small, the tone of the language used to describe and discuss each of them, the

[15] See footnote 11.

> strength of the views expressed, and whether the discussion is balanced or skewed.[16]

[50] Order P-363 addresses a situation that appears to be common in the records before me for which Carleton has claimed section 13(1): the seeking and giving of clarification and direction.[17] Order P-363 contains a review of whether a direction given by a supervisor to an investigator constituted "advice or recommendations" for the purpose of section 13(1). He stated:

> [The record] consists of a ... memo from the investigating human rights officer to her supervisor, together with the supervisor's reply. The [first] memo simply seeks direction regarding how the investigation should be handled which, in my view, places it outside the ambit of section 13(1). As for the [identified] response, it just outlines the supervisor's direction on how the investigation should proceed. It does not contain any information that can properly be characterized as "advice or recommendations" as these words are used in section 13(1). The supervisor does not set out a suggested course of action which may be either accepted or rejected in the deliberative process; he simply provides direction to the officer under the terms of the Commission's governing legislation. In my view, the ... response also does not qualify for exemption under section 13(1).

[51] I accept the general approach taken in these orders, and I have adopted it in my determination of whether the records (or portions thereof) at issue in this appeal are exempt under section 13(1) of the *Act*.

[52] The main thrust of Carleton's representations is that section 13(1) ought to apply to the records – many of which are emails - to protect "the ability of the President to have recourse to frank and unfiltered advice, with assurances of confidentiality, in order for her to make an informed decision as to the best possible course of action for the University." Carleton argues that the confidentiality of the email exchanges between the president and senior university staff was crucial to the efficiency and effectiveness of the decision-making in the fluid and developing situation that provided the context to their creation. The university makes a related submission that the use of email as the mode of communication, and its informal tone, does not necessarily mean that the records ought not to be protected under section 13(1).

[53] Most of the records at issue were created during what was, as previously noted, a dynamic and developing situation on the Carleton campus, as well as during later consequential events. Many decisions were required to be made regarding what steps to take, and how to respond to inquiries from the university community, external

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[16] Adjudicator Swaigen based his review on other orders such as Orders PO-2355, PO-2028, P-1631, P-1037, P-1034 and P-529. See also Order MO-2433.

[17] Upheld on judicial review; see footnote 11.

stakeholders, and the media with respect to the so-called "poster issue" and the human rights complaint against the university that resulted.

[54] I accept that Carleton's president and her senior staff were entitled to the benefit of a free-flowing exchange of communication as they sought to respond to the situation. I also accept that the tone or mode of the communication (i.e., email) ought not to automatically preclude the application of section 13(1). However, as the discussion of the exemption outlined above confirms, it is the content of the records that is determinative and that content must satisfy the requirements of the exemption.

[55] Based on my review of the records, I am satisfied that some of the withheld information constitutes advice or recommendations for the purposes of section 13(1). The volume of records at issue in this appeal renders it impractical to set out a record-by-record description in this decision regarding the application of the exemption. All records, or parts of records, which I find exempt under section 13(1) are identified in the annotated index of records that will accompany Carleton's copy of this order. Where I have upheld section 13(1) only in part, a highlighted copy of the record is provided to the university as well.

[56] The reasons that follow explain my decision to uphold or reject Carleton's claim with respect to section 13(1) for certain categories of records or types of information contained in them.

[57] To begin, there are several memoranda or longer emails which are exempt under section 13(1) because they contain advice or recommendations with a suggested course of action that the ultimate decision-maker could accept or reject. For example, a memorandum written by the university secretary to the university president contains a set of six recommendations for the president to consider in setting the university's course of action for "Israeli Apartheid Week" in March 2009.[18] This record also contains an explanation for each of the recommendations. I am satisfied that these portions of the record qualify for exemption under section 13(1). However, there is also a section containing "General Observations" which are not directly related to the recommendations. In keeping with Order PO-2028, I find that these seven paragraphs "simply draw matters of potential relevance to the attention of the decision-maker," the university president, but "do not advise or recommend anything, nor do they permit one to accurately infer any advice given." Accordingly, I find that these portions are not exempt under section 13(1), and I will order them severed and released to the appellant.

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[18] COMM Gorham_3, pp. 36-41; duplicated in multiple other places, including STSERV Flannigan_c, pp. 40-45 and EQUITY Senior Management_2, pp. 14-19. The first duplicate contains a severance to the introductory paragraph appearing before the Recommendations section that does not appear in the other two versions. This information is not exempt under section 13(1) and appears already to have been disclosed to the appellant in any event.

[58] In my view, many of the records for which Carleton claims section 13(1) do not contain "advice or recommendations" or any suggested course of action at all that could be either accepted or rejected in the deliberative process. Indeed, the withheld information frequently consists of only one or two lines of text, relating to administrative or operational matters, which do not set out a suggested course of action for the ultimate decision marker. Indeed, what these snippets reveal are the seeking of clarification by, or direction to, staff (see Order P-363), the conveying of a minor decision, or an acknowledgement of those things. I find that this type of information is not exempt under section 13(1).

[59] As I noted in the introductory section of this discussion, for information to be exempt under section 13(1), it must be "more than mere information."[19] Other information that I find is not exempt under section 13(1) amounts merely to factual or background information, notifications or cautions, views, or draft versions of documents that do not contain any suggested course of action. I find that - with very few exceptions - section 13(1) does not apply to the withheld portions of emails conveying approval or agreement, or providing brief comments, on a draft of one of the letters, emails or other responses that were prepared for communicating with the university community or specific groups that had contacted the university as a result of the controversy over the poster issue.[20] Except in the case of a very few instances, I find that disclosure of these emails communicating views or cautions on draft communications would not permit the reader to infer advice or recommendations for the purpose of section 13(1).

[60] As for the draft versions of those letters or communications themselves, Carleton has correctly noted that this office has previously found them not to qualify for exemption under section 13(1). In reviewing each of these records, the question is whether disclosure of these different versions would reveal advice or recommendations or permit the inference of advice or recommendations? Many of the versions do not contain any comments or even a notation that would identify an author and where they do, I find that except for a few draft versions, these comments or views do not amount to, and would not permit inferences about, advice or recommendations for the purpose of section 13(1).[21] Importantly, I found above that section 13(1) does apply to some information contained in a few exceptional emails that were exchanged along with the various draft versions of letters and communications. Given that finding, I am satisfied that without disclosure of the advice contained in those few exempt portions of records, it is not possible to infer the advice or recommendations inherent in the progressive versions of the draft documents themselves.

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[19] Orders 118 and PO-2681.

[20] The "poster issue" refers generally to the removal by university administration of a certain poster advertising a specific event on campus.

[21] For the most part, the exceptions are found in the COMM Gorham_2b or Gorham_3 folders.

[61] Here, in response to a particular submission of Carleton's, I note that the possibility that the disclosed information may be misinterpreted or may contain content that is inaccurate is not determinative of whether section 13(1) applies.[22]

[62] Other records withheld under section 13(1) include those that consist of proposed responses to anticipated questions about the events surrounding the poster issue on campus. Past orders of this office, such as Orders P-1006 and PO-1678, have held that records containing proposed responses to questions do not qualify for exemption under section 13(1) since they generally contain only factual information and not advice or recommendations about a specific course of action that could be accepted or rejected as part of the deliberative process. In Order PO-1678, former Assistant Commissioner Tom Mitchinson found that the information provided in the "Response" sections of House Book notes was not advice or recommendations within the meaning of section 13 because the "information was provided to Ministers for the specific purpose of making it available to the public if called upon to do so as part of open legislative debate."[23] I am satisfied that the proposed house book responses at issue in Order PO-1678 and the proposed responses to anticipated questions in the present appeal are comparable. In my view, the proposed responses in the records at issue in this appeal contain mainly factual or evaluative information that was also intended to be made public in response to anticipated questions about the university's actions regarding the poster issue. Accordingly, I find that the draft or proposed responses contained in some of the records at issue do not constitute information that relates to a course of action which the ultimate decision-maker might either accept or reject as part of the deliberative process.[24] Accordingly, I find that section 13(1) does not apply to them.

[63] Some of the records for which Carleton claims section 13(1) relate to the application (complaint) filed with the Ontario Human Rights Tribunal (HRTO) respecting the university's actions surrounding the poster issue. In particular, Carleton claims that a seven-page draft response to the complaint drafted by the university secretary is exempt on this basis.[25] In my view, however, this record does not set out a recommended course of action that may be accepted or rejected in the deliberative decision-making process. Rather, I find that the draft response contains a combination of factual content and evaluation that amounts to description, rather than prescription, and that it is not a "blueprint or road map directing the decision-maker to a preferred option (Order PO-2400)." Here, I would also observe that HRTO application files are open to the public. In this context, I have concluded that this record bears a greater resemblance to the proposed responses contained in house note books (Order PO-1678), and I find that section 13(1) does not apply to it. I will address Carleton's

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[22] Examples of records that Carleton submitted contain inaccurate information that may be prone to misinterpretation if disclosed were found in the Communications Moody folder.
[23] See also Order PO-2707.
[24] For example, COMM Gorham_3, pp.81 -82.
[25] SEC Atkinson_d, pp. 1-8.

suggestion that section 19 (solicitor-client privilege) ought equally to apply to this same record in a later part of these reasons.

[64] Several records that Carleton seeks to withhold under section 13(1) are, in my view, more properly classified as guidelines, or "internal laws." The inclusion of this type of information under the proposed "advice or recommendations" exemption was considered by the Williams Commission, which stated the following with respect to the U.S. experience based on judicial interpretation of the equivalent exemption in the U.S. statute:

> … the courts have decided that the exemption does not extend to materials containing advice and recommendations that have acquired the status of "internal law" within the agency (in the sense that the document is used by agency personnel as a guideline or precedent in the making of determinations affecting individuals) [page 293].[26]

[65] I agree. Therefore, I find that records such as the internal document that sets out Guidelines for Booking and Display in the University Centre/Atrium [title disclosed to appellant][27] are not exempt under section 13(1) of the *Act.*

[66] Still other records for which Carleton claims section 13(1) consist of handwritten or typed notes made by the university president herself, including a draft response to the university community[28] and comments on the human rights complaint.[29] In some cases, these notes appear to have been considered and incorporated by senior university staff in drafting other documents, such as the proposed response to the human rights complaint by the university secretary that I found, above, is not exempt under section 13(1). In my view, however, the notes made by the president do not fit within the scope of the exemption in section 13(1). The intent of section 13(1) is to protect advice or recommendations that "flow upwards" to the ultimate decision-maker who is in a position to accept or reject it. In the case of information or records drafted by the particular individual who has the final say, I conclude that section 13(1) is not available, and I find that it does not apply to these records.

[67] Finally, I will address Carleton's argument, contained within its section 13(1) submissions, that the solicitor-client privilege exemption in section 19 was also "technically available" and could have been claimed with respect to a number of the records, including the draft HRTO response, created by the university secretary, who is

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[26] "Internal law as a source of guidance or policy for the making of decisions concerning individuals" is discussed further in Chapter 12 "Obligations of Government," Section B of the Williams Commission Report (pp. 253-259). The rationale was apparently that individuals are entitled to know and understand the contextual basis upon which decisions are made.
[27] COMM Moody_a, pp. 50-53.
[28] This draft response appears at COMM Gorham_3, p.48 and is duplicated at SEC Atkinson_4, p. 7.
[29] SEC Atkinson_d, pp. 13-14.

a lawyer. First, I note that the mere fact that this draft response to the human rights complaint was prepared by a lawyer does not necessarily mean that section 19 would apply, even if it had been claimed.[30]

[68] Importantly, and as mentioned in an earlier part of this order, section 19 was previously claimed in relation to other records identified by the university as responsive to the request. However, these records were removed from the scope of the appeal during mediation because the appellant advised that he would not pursue access to records withheld on the basis of the solicitor-client privilege exemption. Not only are those records not before me for adjudication, they were never provided to this office, as Carleton declined to produce them. Given that section 19 had been removed from the scope of the appeal, I did not address Carleton's refusal to produce copies of the records that had been withheld under that exemption, although I surely would have done so had the issue of section 19 exemption remained live before me.

[69] In any event, sections 13(1) and 19 are distinct exemptions that do not share identical purposes, although they both serve to protect the free flow of advice in a general sense.[31] In my view, the scope of the protection afforded by the solicitor-client privilege exemption is both greater and deservedly more robust than the exemption for advice or recommendations.[32] In Order PO-3046, Adjudicator Frank DeVries reviewed and compared sections 13(1) and 19 of the *Act* and found that they could not be applied equally to the same type of record because of the difference in their purpose. Adjudicator DeVries specifically found that it would not be appropriate to sever and disclose records withheld under section 19 in the same manner as if section 13(1) applied instead.

[70] Furthermore, whether or not section 19 is "technically available" or not with respect to records withheld under section 13(1) is not relevant to my determination of whether such records qualify for exemption under the latter provision. Both sections 13(1) and 19 are discretionary exemptions. Carleton was obliged to exercise its discretion in choosing whether or not to claim them with respect to each record. The fact remains that Carleton did not claim section 19 for these records and that I have no representations supporting such a claim. Accordingly, I will not review the possible application of section 19 to the records identified by Carleton in this manner.

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[30] It would have to be established that the preparation of the record was for the purpose of providing legal advice: see Order PO-2895-I where counsel for the institution drafted the response at the request of her client to permit representations to the Ontario Human Rights Commission respecting the institution's legal obligations to the appellant. In that appeal, section 19 was upheld.

[31] The relevant exemption here is section 19(c) of the *Act*, which states that: "A head may refuse to disclose a record, that was prepared by or for counsel employed or retained by an educational institution for use in giving legal advice or in contemplation of or for use in litigation.

[32] Confidentiality is an essential component of the privilege. Therefore, for section 19 to apply, an institution is required to demonstrate that the communication was made in confidence, either expressly or by implication: see General *Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

[71] Having concluded the discussion of section 13(1), I note once again that there are mandatory exceptions to section 13(1) in sections 13(2) and 13(3). In my view, section 13(3) has no application in the circumstances of this appeal. Further, I also find that none of the exceptions in section 13(2) apply. In this respect, I accept Carleton's evidence on the exception for factual material in section 13(2)(a). While some portions of certain records to which section 13(1) applies contain information which may be disclosed pursuant to section 13(2)(a), I find that any information that should be disclosed under section 13(2)(a) is so intertwined with the advice or recommendations that it is not possible to disclose the non-exempt information without also disclosing exempt information.[33] In the circumstances, I find that severance pursuant to section 10(2) of the *Act* is not possible.

[72] As none of the information that I have found exempt under section 13(1) fits within the mandatory exceptions in sections 13(2) and 13(3), I uphold Carleton's exemption claim, in part, and as detailed in the attached annotated index of records, subject to my review of the exercise of discretion, below.

E. Do the discretionary exemptions for law enforcement information in sections 14(1)(c) or (d) apply?

[73] Carleton claims the discretionary exemptions in section 14(1)(c) and (d) of the *Act* in relation to certain responsive records identified by the Student Services, Equity and University Safety departments. For the reasons that follow, I do not uphold Carleton's decision under section 14.

[74] The relevant parts of section 14(1) state:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement; …
> >
> > (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source.

[75] The term "law enforcement" is used in several parts of section 14, and is defined in section 2(1) as follows:

> "law enforcement" means,

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[33] Orders 24, PO-2097 and MO-1494.

(a) policing,

(b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or

(c) the conduct of proceedings referred to in clause (b)

[76] The term "law enforcement" has been found to apply to a municipality's investigation into a possible violation of a municipal by-law that could lead to court proceedings (Orders M-16 and MO-1245) and a police investigation into a possible violation of the *Criminal Code* (Orders M-202 and PO-2085). Conversely, the term "law enforcement" has been found not to apply to a Coroner's investigation or inquest under the *Coroner's Act*, which lacked the power to impose sanctions (Order P-1117).

[77] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[34]

[78] To meet the burden of proof in section 14(1)(c) and (d), Carleton is required to provide "detailed and convincing" evidence to establish a "reasonable expectation of harm" with disclosure of the information. Evidence amounting to speculation of possible harm is not sufficient.[35]

[79] Carleton submits that it has withheld portions of records from the Student Services, Equity and University Safety departments because their disclosure would reveal investigative techniques expected to be used in law enforcement or would disclose the identity of a confidential source of information.

[80] According to Carleton, investigations by the Equity Services and University Safety departments constitute "law enforcement" investigations. Carleton submits that:

> The university has a responsibility to protect the physical and psychological safety of its students. This responsibility imposes an obligation on the university to ensure that laws are enforced on the university campus, that measures are taken to ensure that the interior and exterior areas of the campus are secure, and that adequate steps are taken to investigate and respond to incidents which potentially threaten the security of members of the Carleton community.

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[34] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

[35] Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.); *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

> This responsibility is carried out by … Equity Services, which has the responsibility for upholding the Ontario *Human Rights Code* on campus, and … University Safety, which has responsibility for protecting the physical security of members of the university community and of university property. These departments work closely with and are often coordinated through the Department of Student Services.

[81] Carleton's representations provide a detailed description of the role of Equity Services in responding to, and investigating, complaints alleging breaches of Carleton's Human Rights Policies and Procedures.[36] Carleton notes that individuals who are pursuing a complaint through Equity Services may also elect to file a concurrent complaint with the Human Rights Tribunal of Ontario (HRTO). Carleton submits that investigations by Equity Services can lead to proceedings before a tribunal, either through an independent investigator appointed by the university, or a complaint to the HRTO. Carleton notes that sanctions can result from either type of proceeding.

[82] Carleton submits that University Safety works with the Ottawa Police Service to ensure enforcement of federal and provincial laws on campus. According to Carleton, some University Safety officers are sworn peace officers and designated special constables by arrangement with the Ottawa Police Service. Carleton argues that since University Safety investigations may result in penalty or sanction, either internally for breach of Carleton policy or externally for criminal matters, these investigations fall within the definition of "law enforcement" under the *Act.*

[83] With specific reference to section 14(1)(c), Carleton submits that disclosure of the portions of the records withheld under this exemption would reveal investigative techniques and procedures and would prejudice their use by Carleton in future investigations. Within the detailed records index, Carleton explains that the withheld emails contain information about "security precautions to be taken to prevent, investigate and respond to potential [future] incidents of violence on … campus." According to Carleton:

> These security measures are the first step in any investigation into incidents on campus which threaten the safety of Carleton community members. Disclosing those arrangements would have the effect of disclosing the measures which the university prepared to investigate any incidents occurring during these events. Similarly, disclosure of the detailed report[s] would disclose the steps taken by University Safety to investigate reports and complaints of incidents on campus.

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[36] At Tab 10 of its representations, Carleton provided a full copy of the policies and procedures document, which has been in effect since May 1, 2001.

[84] Carleton claims that some withheld records are "detailed report[s] of an investigation" by the Department of University Safety. The example provided by Carleton is a record from Equity Services that it says contains the results of an investigation into a complaint about an offensive online posting that could result in a hearing before a university tribunal as to whether discipline should be imposed on the students involved.

[85] Regarding the one page for which section 14(1)(d) is claimed (in addition to section 14(1)(c)), Carleton's representations were held in confidence. However, for the purpose of explaining my reasons for decision in this order, it may be stated that the university's position is that disclosure of the information would reveal the identity of a confidential informant who is effective *because* his identity is confidential.

[86] The appellant's views on the university's claim of section 14(1) are similar to those expressed with respect to section 13(1): that is, he submits that the law enforcement exemption has been applied "excessively."

Analysis and findings

[87] To meet the burden of proof for the application of sections 14(1)(c) and (d), Carleton was required to provide "detailed and convincing" evidence to establish a "reasonable expectation of harm" with disclosure of the information withheld under these discretionary exemptions.

[88] Before setting out my reasons, however, discrepancies in the section 14(1) claim ought to be noted. For example, the index entry for one Equity Services sub folder indicates only that portions of pages 4-5 and 16 are withheld, but my review of that folder revealed severances from pages 4, 5, 6, 15, 16 and 20 under section 14(1). Accordingly, my findings in this section apply to all information marked as withheld under section 14 on the records themselves. I have recorded any additions to the index prepared by Carleton that are required on the annotated version of it provided to the university with this order.

[89] I must first consider whether the records at issue in this appeal, which were created by Carleton's Student Services, Equity and University Safety Departments, are eligible for exemption under sections 14(1)(c) or (d) of the *Act.* This eligibility requires the matter which generated the records to fit within the definition of the term "law enforcement" as found in section 2(1) of the *Act.*

[90] Respecting records created by the University Safety department at Carleton, I note that previous decisions of this office have considered whether the activities of campus police may constitute law enforcement under the *Act.* Several orders have established that investigations led by campus police into possible violations of law fit

within the ambit of the personal privacy exemption in section 21(1).[37] Section 21(1) is a mandatory exemption that includes a presumption [section 21(3)(b)] which prohibits the disclosure of personal information gathered during an investigation into a possible violation of the law. That particular exemption is not at issue in this appeal.

[91] However, in Order PO-2967, Adjudicator Steven Faughnan conducted a more detailed analysis of whether campus police at the University of Western Ontario qualified as a law enforcement agency whose activities therefore constituted "law enforcement" for the purpose of section 14 of the *Act*. Based on the adjudicator's analysis in Order PO-2967, I accept for the purpose of this appeal that the role played by Carleton's University Safety is analogous to that of Campus Community Police Service (CCPS) on the University of Western Ontario campus.[38] Specifically, I concur with Adjudicator Faughnan's reasons, as outlined at pages 31-33 of Order PO-2967. I find, therefore, that University Safety at Carleton may in certain circumstances engage in law enforcement or policing, as contemplated by the definition of "law enforcement" in section 2(1) of the *Act*.

[92] However, Order PO-2967 provides further analysis of the issue that is relevant in this appeal, given Carleton's submission that since University Safety investigations may result in penalty or sanction, either internally for breach of Carleton policy or externally for criminal matters, these investigations fall within the definition of "law enforcement" under the *Act.*

[93] In reviewing occurrence reports, Adjudicator Faughnan concluded that campus police were engaged in law enforcement with respect to these records because:

> … the matters were being investigated as potential breaches of the provisions of the *Criminal Code*, namely assault and/or harassment. When no charges were laid with respect to those events, and no investigations were continued to be conducted by the CCPS with respect to those events, the CCPS was no longer engaged in law enforcement activities pertaining to them. The process then became an investigation and proceeding under the Student Code of Conduct.
>
> In my opinion, proceedings under the Student Code of Conduct and the investigation conducted by the investigator are not law enforcement

[37] Orders PO-2722 and PO-2954.

[38] Both appear to work in conjunction with municipal police forces and to have special constables appointed. Adjudicator Faughnan explained that section 53(1) of the *Police Services Act* provides that, with the Solicitor General's approval, a municipal Police Services Board may appoint an individual as a special constable for the period, area and purpose that the Board considers expedient. He also noted that section 53(3) of the *Police Services Act* states that "The appointment of a special constable may confer on him or her the powers of a police officer, to the extent and for the special purpose set out in the appointment." Adjudicator Faughnan also reviewed the duties of "police officers" in section 42(1) of the *Police Services Act,* and "peace officers" in sections 2 and 495 in the *Criminal Code of Canada*.

> related activities. The University argues that because proceedings under the Student Code of Conduct that can be heard by tribunals that have been established pursuant to the Board of Governor's powers under section 19(k) of the University of Western Ontario Act, 1982 they amount to law enforcement activities. In my view, I cannot agree that proceedings under the Student Code of Conduct and the fact finding process conducted by the investigator which, in my opinion, are more in the nature of internal disciplinary matters, rather than regulatory (in the sense that this includes statutory, public welfare and/or by-law offences) or criminal offences, qualify as law enforcement.

[94] Following the reasoning of Adjudicator Faughnan, above, and having considered Carleton's representations, I find that the activities of Equity Services (under Student Services) with respect to "upholding the university's Human Rights Policies and Procedures" do not fit within the definition of "law enforcement" in the *Act*, regardless of whether these activities could be classified as investigatory.

[95] Early orders of this office established that investigations into complaints made under the *Ontario Human Rights Code* are properly considered law enforcement matters.[39] However, the records at issue here were not created by Equity Services in the course of investigating a complaint made under the *Ontario Human Rights Code*. Carleton sought to persuade me that a certain Equity Services record ought to be exempt because it represented an "investigation into a complaint regarding an offensive online posting that could result in a hearing before a university tribunal." However, I find Carleton's submissions on this point to be too general and speculative in nature; Carleton has not identified any specific proceeding, law enforcement or otherwise, that its "investigations" resulted in. Moreover, following the reasons of Adjudicator Faughnan in Order PO-2967, I find that the fact that "investigations [by Equity Services] can lead to proceedings before a tribunal," does not qualify Equity Services investigations as "law enforcement" investigation or imbue the actions of its staff with a law enforcement purpose, as contemplated by section 14. In addition, the mere fact that University Safety personnel may be involved in investigating matters involving Carleton's Human Rights Policies and Procedures does not thereby qualify these internal disciplinary matters as "law enforcement."

[96] As I have concluded that the activities of Equity Services do not qualify as "law enforcement," I therefore find that these records, whether they were created by Equity Services staff, or they originate with Student Services, do not qualify for exemption under section 14. Accordingly, in considering the application of the specific exemptions claimed, I will only be reviewing records that were created by University Safety staff.

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[39] See, for example, Orders 89, 178, 200 and 221.

[97] The discretionary exemption in section 14(1)(c) applies to records whose disclosure could reasonably be expected to "… reveal investigative techniques and procedures currently in use or likely to be used in law enforcement." To meet the "investigative technique or procedure" test, Carleton was required to show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. As Senior Adjudicator John Higgins stated in Order PO-2751:

> The fact that a particular technique or procedure is generally known to the public would normally lead to the conclusion that its effectiveness would not be hindered or compromised by disclosure and, accordingly, that the technique or procedure in question is not within the scope of section 14(1)(c).[40]

[98] In Order PO-2751, the records contained very detailed information about investigative methods used to investigate child pornography. The Senior Adjudicator found that section 14(1)(c) applied to many of them, explaining that "any information of this nature in the records that has not been clearly identified in the public domain, or is not a sufficiently obvious technique or procedure to clearly qualify as being subject to inference based on a "common sense perception" as referred to in *Mentuck*, falls under this exemption."[41] I agree with the Senior Adjudicator that the *Mentuck* principles are relevant in a determination of the application of section 14(1)(c) of the *Act*.

[99] Carleton argues that the portions of the records withheld under this exemption detail security precautions and measures that are the "first step in any investigation into incidents on campus." Carleton also argues that disclosing the "arrangements" described in the records "would have the effect of disclosing the measures which the university prepared to investigate any incidents occurring during these events." Based on my review of the case law and past orders, and my consideration of the information

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[40] See also Orders P-170, P-1487 and PO-2470.

[41] In Order PO-2751, Senior Adjudicator Higgins reviewed the Supreme Court of Canada case in *R. v Mentuck* ([2001] 3 S.C.R. 442), where the Court dismissed the Crown's appeal of a partial publication ban granted in criminal proceedings in relation to undercover "operational methods." Senior Adjudicator Higgins concluded that similar principles ought to be applied in the context of reviewing the law enforcement exemption in section 14(1)(c). The Supreme Court of Canada identified the potential risk to be evaluated as one in which:

> … the efficacy of present and future police operations will be reduced by publication of these details. I find it difficult to accept that the publication of information regarding the techniques employed by police will seriously compromise the efficacy of this type of operation. There are a limited number of ways in which undercover operations can be run … While I accept that operations will be compromised if suspects learn that they are targets, I do not believe that media publication will seriously increase the rate of compromise. The media have reported the details of similar operations several times in the past, including this one.

in the records that Carleton seeks to withhold, I find that section 14(1)(c) does not apply.

[100] Indeed, in my view, the information Carleton seeks to withhold from University Safety records does not, for the most part, contain any reference to an actual technique, method or procedure. Where a record does contain information about a technique or procedure by which University Safety law enforcement activities may be conducted, I find that the particular technique or procedure is generally known to the public. In my view, such methods as may be disclosed by the withheld information are in such common use generally as to render them nearly ubiquitous on university campuses and elsewhere. In such circumstances, I find that disclosure of this information could not reasonably be expected to hinder or compromise the effectiveness of the method.

[101] Not having been provided with the requisite "detailed and convincing" evidence to persuade me that the disclosure of this particular information could reasonably be expected to result in the alleged harm to current law enforcement techniques or procedures in section 14(1)(c), I will order the information disclosed to the appellant.

[102] I now turn to the one page from the records created by University Safety to which Carleton claims section 14(1)(d) applies. This exemption permits an institution to withhold a record where its disclosure could reasonably be expected to:

> disclose **the identity** of a confidential source of information in respect of a law enforcement matter, **or** disclose **information** furnished only by the confidential source.

[103] In order to rely on section 14(1)(d) of the *Act*, Carleton is required to establish that the withheld portion of this record could reasonably be expected to: disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source.

[104] Based on my review of the information at issue in this record, I find that it does not actually contain information that was provided by the individual who is identified, because the record itself is a report written by one of University Safety's Special Constables. In this context, I find that the information does not fit within the second part of section 14(1)(d) .

[105] However, as suggested, the withheld portion of this page does contain reference to the identity of an individual and I accept that this individual is (or was) a "confidential source." Accordingly, I must review whether this identity appears "in respect of a law enforcement matter," as section 14(1)(d) requires. The phrase "law enforcement matter" also appears in section 14(1)(a) of the *Act*. Under that exemption, the matter in question must be ongoing or in existence. The exemption does not apply

where the matter is completed, or where the alleged interference is with "potential" law enforcement matters. "Matter" may extend beyond a specific investigation or proceeding.[42]

[106] Although Carleton offered no submissions to this effect, it may be argued that this record identifies in a general way activities of University Safety that are related to its policing or law enforcement mandate. However, Carleton has not identified any existing or ongoing "law enforcement matter" for the purpose of section 14(1)(d) and the records themselves do not speak to this issue. In my view, therefore, disclosure of this portion of the record created by the Special Constable could not reasonably be expected to disclose the identity of a confidential source of information in respect of a law enforcement matter. As the withheld information does not fit within either part of section 14(1)(d), I find that it does not apply.

[107] However, as I stated in the discussion of Issue C, Personal Information, above, some of the records for which the claimed exemptions do not apply contain the personal information of identifiable individuals that will be severed, as agreed by the appellant. In this context, I will be ordering the disclosure of this particular University Safety record with the identity of the confidential source severed because it is her/her personal information and, therefore, outside the scope of the request.

F. Should Carleton's exercise of discretion under section 13(1) be upheld?

[108] After deciding that a record, or part thereof, falls within the scope of a discretionary exemption, the head is obliged to consider whether it would be appropriate to release the record, regardless of the fact that it qualifies for exemption. An institution must exercise its discretion in this regard.

[109] On appeal, the Commissioner, or her delegate, may determine whether the institution failed to do so. In addition, an adjudicator may find that the institution erred in exercising its discretion where, for example: it does so in bad faith or for an improper purpose; takes into account irrelevant considerations; or fails to take into account relevant considerations. In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations (Order MO-1573). According to section 54(2) of the *Act*, however, this office may not substitute its own discretion for that of the institution.

[110] As I have not upheld Carleton's decision to withhold information under the discretionary law enforcement exemption, I will only be reviewing its exercise of discretion in withholding information under section 13(1).

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[42] See Orders PO-2085, MO-1578; *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 4233 (Div. Ct.).

[111] Carleton submits that:

> In exercising its discretion to withhold the records… Carleton gave primary consideration to the purposes of the *FIPPA,* including … the importance of broad public access to records in the possession of public institutions as a means of promoting transparency and accountability in decision making. Carleton also understood and appreciated the principle that necessary exemptions under the *FIPPA* should be narrow and specific.
>
> Carleton was also concerned with the purposes of the exemption in s. 13(1), however. It is vital that a space be protected for a confidential process of a decision making in managing public institutions. … If there is no zone of confidentiality, employees and consultants of public institutions will be hesitant to give frank and unfiltered advice, and decision makers will have to act with less than full information.

[112] In support of its decision to withhold the confidential "minutiae" of the advice and recommendations, Carleton also refers to the significance of these particular events on campus and the degree of scrutiny to which the university was subjected as a consequence. Carleton concludes by submitting that where section 13(1) was applied to a record, it was deemed that the need to protect the space for confidential advice and recommendations outweighed the importance of public access.

[113] The appellant's representations do not directly address Carleton's exercise of discretion. However, the appellant does provide the following statement about the purpose of his request, which ties in with the purposes of the *Act*:

> As a student at Carleton University, the original intention of my FIPPA request was to shed some light on a number of decisions taken by the [university] in the winter and spring of 2009 relating to the Israel/Palestine conflict. That these decisions had an impact on Carleton students, faculty, alumni and the wider community is not in dispute. … When such controversial decisions are taken by heads of public institutions, accountability and transparency undoubtedly serve the public interest, and by extension, democracy.

[114] I have considered Carleton's representations on the factors it took into consideration in exercising its discretion to withhold the records for which it had claimed section 13(1). I have also considered the appellant's representations on the transparency and accountability purposes of the *Act*. On balance, and with overall regard for the circumstances of this appeal and Carleton's representations I find that Carleton took relevant factors into account in exercising its discretion under section 13(1) of the *Act,* and I am satisfied that it did so in good faith.

[115] The appellant will receive additional information through operation of this order. Although the information disclosed through this order may not resolve all of the appellant's concerns about the events that took place on the Carleton campus in the first half of 2009, this is not determinative of the issue of exercise of discretion. As long as the university exercises its discretion considering relevant factors, this office will not intervene. Accordingly, as suggested above, I find Carleton's exercise of discretion to be proper, and I will uphold it.

[116] Consequently, I find that the information withheld pursuant to section 13(1), as identified in the annotated index accompanying this order, is exempt from disclosure.

ORDER:

1. I uphold Carleton's decision to deny access to certain records, or portions thereof, in part, under section 13(1) of the *Act.*

   Where my finding on section 13(1) differs from Carleton's claim on a particular record, I have provided a highlighted copy of the record to show what is exempt under section 13(1).

2. I order Carleton to disclose the records, or portions of records, that I have found are not exempt under sections 13(1), 14(1)(c), or 14(1)(d) by **March 23, 2012**, but not before **March 16, 2012**.

   Before disclosing the non-exempt records or portions of them, Carleton must sever "personal information." Where I have identified personal information, I have marked this information in pink highlighter on copies of these records provided with this order, and the information is not to be disclosed.

   Conversely, where I have identified information that does not fit within the definition of "personal information" in section 2(1) of the *Act*, I have indicated this finding on copies of the records provided with this order. As no mandatory exemptions apply to this information, it must be disclosed.

3. In order to verify compliance with this order, I reserve the right to require Carleton to provide me with a copy of the records disclosed to the appellant pursuant to this order.

Original signed by: February 14, 2012
Daphne Loukidelis
Adjudicator