Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3135

Appeal PA08-122-2

University of Ottawa

November 27, 2012

Summary: The appellant sought access to all records held by the University of Ottawa relating to the "UofOWatch blog." The university granted partial access to the records and denied access to the remainder pursuant to the exclusionary provision in section 65(6) (labour relations), the discretionary exemption at section 49(a) (discretion to disclose a requester's own information), read in conjunction with section 19 (solicitor-client privilege), and section 49(b) (personal privacy). The appellant claimed that the university's search for records was not reasonable. This order upholds the university's search and access decision.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 2(1) (personal information), 10, 19, 24, 49(a), 49(b), 65(6).

Orders and Investigation Reports Considered: Orders M-909, PO-2915.

Cases Considered: *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457 (Div.Ct.).

OVERVIEW:

[1] The appellant is a former professor with the University of Ottawa (the university). He has submitted numerous requests to the university under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for records relating to him or initiatives that he organized during the time that he was employed by the university. For the most part, in his requests the appellant identifies either a specific

initiative or university employee or official who may have created, received, or sent records referring to him or his activities. To date, this office has processed almost two dozen appeals related to his requests. The present order is being processed with five related appeals: PA08-97-2, PA08-156-2, PA08-157-2, PA08-158-2, and PA08-159-2. Although the issues in these appeals are similar, given that many of these requests have generated voluminous records, to ensure clarity I have decided to issue separate orders for each appeal. As many of the responsive records amount to emails or other documents on which numerous people were copied, there is some overlap of records throughout these appeals. Again, given the voluminous nature of the records, to ensure consistency these duplicates have not been removed from the scope of the appeals.

[2] In the current appeal, the appellant submitted a request under the *Act* to the university seeking access to all records related to the "UofOWatch blog…or about the blog's content, including image content such as images with copyrights owned by the University of Ottawa."

[3] The university issued a decision letter advising that it did not have custody or control of the responsive records as contemplated by section 10 of the *Act*. It explained that the blog is not the property of the university.

[4] The appellant appealed the university's decision and Appeal PA08-122 was opened. During the mediation of that appeal, the appellant clarified the type of records that he was seeking access to and the university agreed that those records fall under its custody or control. It agreed to conduct a search for records responsive to the appellant's clarified request and Appeal PA08-122 was closed.

[5] The university located records responsive to the appellant's clarified request. It issued a decision letter granting access to 8 records and denying access to the remainder pursuant to the exclusion at section 65(6) (labour relations) and the exemptions at sections 17(1) (third party information), 19 (solicitor-client privilege), 21(1) personal privacy) of the *Act*.

[6] The appellant appealed the university's decision and this office opened the current appeal, Appeal PA08-122-2.

[7] During mediation, the appellant removed record 9 from the scope of the appeal and also advised that he was not pursing access to the portions of record 29 that were withheld as not responsive to his request.

[8] He also advised that he believed that additional responsive records should exist and provided a list of four individuals who he believed should have been asked to perform searches. The appellant also noted that there should be other types of records responsive to his request such as notes of meetings. Finally, he questioned whether the university had conducted a proper search through its paper record holdings.

[9] The university advised that it had searched both electronic and paper records. With respect to the four individuals identified by the appellant, the university advised that given that the Vice-President, Resources, was not involved in human resources matters he would not have any responsive records. It also advised that it would not request a search of one individual's records since, as a retired professor, they would fall outside of the university's custody or control.

[10] The university agreed to conduct a further search for electronic and paper records in the offices of the Associate Vice-President, Human Resources, the Assistant-Director, Academic Labour Relations, and the Dean of the Faculty of Graduate and Post-Doctoral Studies. It located additional records and issued a revised decision letter along with an Index of Records to the appellant.

[11] In its revised decision, the university stated that it had reconsidered its earlier decision and was now prepared to grant partial access to record 95. With respect to the additionally located records, it granted partial access to them with severances made pursuant to the exclusion at section 65(6) and the exemptions at section 17(1), 19, and 21 of the *Act*.

[12] The appellant continued to maintain that a search of the records of the Vice-President, Resources should be conducted as well as a search of the records of the retired professor. The university agreed to conduct a search of the records belonging to the Vice-President, Resources. One additional record was located and the university issued a decision letter granting partial access to it with severances made pursuant to the exemptions at sections 19 and 21(1) of the *Act*. The university also granted partial access to additional records and provided the appellant and this office with a revised Index of Records. The university did not however, agree to conduct a further search of the records belonging to the retired professor as it maintains that they are outside of the scope of its custody or control.

[13] At the conclusion of mediation, the appellant confirmed that he wished to pursue access to all of the remaining records and portions of the records. He also confirmed that the reasonableness of the university's search is still at issue as he continues to believe that additional responsive records might exist. Finally, he advised that he is disputing the university's position that records belonging to the retired professor are outside of its custody or control.

[14] As the records appear to contain the personal information of the appellant, the mediator included sections 49(a) (discretion to refuse a requester's own information) and (b) (personal privacy) of the *Act* as issues in this appeal.

[15] Further mediation was not possible and the file was transferred to the adjudication stage. During the inquiry into this appeal, I sought representations from the university and the appellant. Both parties submitted representations.

[16] In its representations, the university advised that it was withdrawing its claim that section 17(1) applied to any of the records. Accordingly, section 17(1) has been removed from the scope of the appeal.

RECORDS:

[17] The records at issue, along with their corresponding exemptions, are outlined on two indexes dated August 24, 2009, that were provided to both the appellant and this office. The records that remain at issue consist of:

- On the disclosed records index the following records have been withheld in part: records 75-77, 79-81, 88 and 95.

- On the undisclosed records index the following records have been withheld in full: records 10-35, 42-74, 78, 82-87, 89-94, and 96.

ISSUES:

A. Did the university conduct a reasonable search for responsive records?

B. Are the records related to the retired professor in the custody or under the control of the university pursuant to section 10(1)?

C. Does the labour relations exclusion at section 65(6) exclude the records from the scope of the *Act*?

D. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

E. Does the discretionary exemption at section 49(a), read in conjunction with the solicitor-client privilege exemption at section 19, apply to the records?

F. Does the discretionary exemption at section 49(b) apply to the records?

G. Should the university's exercise of discretion under section 49(a) and/or section 49(b) be upheld?

DISCUSSION:

A. Did the university conduct a reasonable search for responsive records?

[18] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a

reasonable search for records as required by section 24.[1] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[19] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[2] To be responsive, a record must be "reasonably related" to the request.[3]

[20] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[4]

[21] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[5]

[22] Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

Representations

[23] At the outset of the mediation process, the appellant raised the issue of reasonable search and identified a number of individuals who should have been asked to perform searches, including a professor who had retired from the university. He also questioned whether the university conducted a proper search of paper records. During the course of mediation, the university agreed to conduct two additional searches and more records were located. Supplementary decisions were issued. At the conclusion of mediation, the appellant advised that he continues to believe that there should be additional records responsive to his request. In particular, he advised that additional responsive records should be found in the office of the Vice-President, Resources and in the office of the President and maintained that the records of the retired professor should also be searched.

[24] In his representations, the appellant states that he "maintain[s] all of the issues raised at mediation," but does not make any specific representations on the issue of whether the university's search was reasonable or why he believes that additional records may exist.

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[1] Orders P-85, P-221, and PO-1954-I.
[2] Orders P-624 and PO-2559.
[3] Order P-2554.
[4] Orders M-909, PO-2469, and PO-2592.
[5] Order MO-2185.

[25] The university submits that it has conducted a reasonable search for all records responsive to the request. In its representations, the university reviews the searches that it conducted for both paper and electronic records. It identifies the dates on which these searches were conducted and the employees who conducted them. These include searches conducted in the following locations:

- Office of the Dean,
- Office of the Vice-President Academic and Provost,
- Office of the President,
- Office of the Secretary of the University,
- Office of the Associate Vice-President and Director,
- Office of the Dean of Graduate Studies, and
- Office of the Vice-President, Resources.

[26] The university submits that the searches that were conducted in the above-mentioned locations by identified employees were reasonable and explains that each of those employees were experienced in their respective offices. With its representations, it also enclosed memos from the individuals who conducted the searches outlining the nature and scope of their efforts.

[27] The university submits that reasonable efforts were expended to identify and locate records responsive to the appellant's request.

Analysis and findings

[28] Having reviewed the representations of the parties, I find that the university has conducted a reasonable search for the records responsive to the appellant's request.

[29] As noted above, the issue for me to determine is whether the university has taken *reasonable* steps to search for records responsive to the appellant's request. A reasonable search is one in which an experienced employee, knowledgeable in the subject matter of the request expends a *reasonable* effort to locate records which are reasonably related to the request. An institution is not required to go to extraordinary lengths to search for records responsive to a request.

[30] In Order M-909, Adjudicator Laurel Cropley made the following finding with respect to the obligation of an institution to conduct a reasonable search for records. She found that:

> In my view, an institution has met its obligations under the *Act* by providing experienced employees to expend a reasonable effort to conduct the search, in areas where the responsive records are likely to be located. In the final analysis, the identification of responsive records must

> rely on the experience and judgment of the individual conducting the search.

[31] I adopt the approach taken in the above order for the purposes of the present appeal. I also note that, in order to make a finding that a reasonable search was conducted, it is not necessary that every individual named in a request or identified during an appeal be contacted.[6]

[32] Based on the information provided by the university, I am satisfied that the university's searches for records responsive to the request were reasonable.

[33] In my view, the university makes it clear in its representations, and has demonstrated in its willingness to conduct additional searches, that it has spent a considerable amount of time and effort searching for any responsive records. The university has provided written memoranda from individuals who conducted searches and has identified why each of those individuals had the requisite experience necessary to search for records in their respective offices. I accept that the individuals who conducted the searches were familiar with the records and record-keeping practices of their respective offices. Also, the searches generated a significant number of responsive records which, in my view, indicates that a reasonable effort has been expended.

[34] As previously stated, although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response, an appellant must, nevertheless, provide a reasonable basis for concluding that such records exist. In the circumstances of the current appeal the appellant does not make any submissions that would provide a basis upon which to conclude that additional records responsive to the request either may exist or may have existed, particularly in the offices of the President and of the Vice-President, Resources.

[35] Regarding the appellant's position that the records of the retired professor should be searched, I rely on the reasoning expressed by Adjudicator Frank DeVries in Order PO-2915 where he addressed a similar issue. In that appeal, the appellant requested access to all records relating to a statement made in a letter sent from a dean at the university to him. The appellant took the position that records of the same former professor, who at the time was acting as a labour relations consultant for the university, should be searched. As in the current appeal, the university took the position that those records fell outside of its custody and control.

[36] In Order PO-2915, Adjudicator DeVries found that any emails received from or sent to the consultant had been located in the email accounts of university employees and were identified and indicated in the index of records. He stated:

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[6] Order MO-2143-F.

> Some of the records at issue (all of which are emails) are indeed email messages between the consultant and the employees of the university who were involved in the matter Because of the nature of the appellant's request (records relied on by the dean to make a statement in a letter which, by definition, would have to have been received by the university), and because it is only the consultant's email correspondence that is at issue (which, by definition, is between two or more parties), I am satisfied that the searches conducted by the university, as evidenced by the affidavits, are sufficiently broad that they also captured email messages between employees of the university and the consultant that formed the records relied on by the dean. Accordingly, I am satisfied that the search conducted for records of this consultant are reasonable.
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> Having found that the searches conducted for responsive records were reasonable, in the circumstances it is not necessary for me to consider the issues regarding custody or control or whether any additional records would, in any event have been excluded from the scope of the *Act* under section 65(6)3.

[37] Similarly, in the current appeal, I note that index of undisclosed records identifies that the retired professor has been copied on a significant number of the already identified responsive records. In my view, any records that may have been responsive to the appellant's request that were received by or sent to the retired professor by the university related to the "UofO Watch Blog" would have been received by at least one, if not more, of the university's employees. As such, I find that any search for responsive records would necessarily have encompassed records received by or sent to the retired professor. As I am satisfied that the university conducted a reasonable search for responsive records it is not necessary for me, in this case, to address the issue of whether records held by the retired professor are in the custody or control of the university.

[38] In conclusion, based on all of the evidence provided to me, I am satisfied that the university's searches conducted for responsive records were reasonable.

B. Are the records related to the retired professor in the custody or under the control of the university pursuant to section 10(1)?

[39] As noted above, as I have found that the university conducted a reasonable search for responsive records, including those related to the retired professor, it is not necessary for me to determine whether records relating to the retired professor are in the custody or under the control of the university pursuant to section 10(1) of the *Act*.

C. Does the labour relations exclusion at section 65(6) exclude the records from the scope of the *Act*?

[40] The university takes the position that the *Act* does not apply to a large number of the responsive records because they fall within one or both of the exclusions listed at sections 65(6) 1 or 3. Those sections state:

> Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
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> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
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> …
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> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[41] In its representations, the university states that the records to which the exclusions at section 65(6) apply, were collected and prepared by employees and/or agents on behalf of the university in relation to anticipated proceedings before a tribunal relating to labour relations and the employment of the appellant (section 65(6)1), as well as meetings, consultations, discussions, or communications about labour relations or employment related matters in which the university has an interest (section 65(6)3).

[42] The appellant does not make any specific representations on the possible application of the exclusion at section 65(6) to the records at issue in this appeal.

Section 65(6): general principles

[43] If section 65(6) applies to the records, and none of the exceptions found in section 65(7) apply, the records are excluded from the scope of the *Act*.

[44] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 1, 2, or 3 of this section, it must be reasonable to conclude that there is "some connection" between them.[7]

[7] Order MO-2589, *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner,* 2010 ONSC 991 (Div. Ct.).

[45] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.[8]

[46] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.[9]

[47] If section 65(6) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.[10]

[48] The type of records excluded from the *Act* by section 65(6) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.[11]

Section 65(6)3: matters in which the institution has an interest

[49] For section 65(6)3 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

Requirement 1: were the records collected, prepared, maintained or used by the university or on its behalf?

[50] The university submits that all of the records that it has identified as being excluded from the application of the *Act* pursuant to section 65(6) "were collected and prepared by employees and/or agents on behalf of the university" and that those

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[8] *Ontario (Minister of Health and Long Term Care) v. Ontario (Assistant Information and Privacy Commissioner),* [2003] O.J. No. 4123 (C.A.), Order PO-2157.
[9] Order PO-2157.
[10] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.
[11] *Ibid.*

records were maintained by the university for subsequent use in matters related to the employment of the appellant.

[51] Having reviewed the records carefully, I find that they consists primarily of emails and other communications between university employees and officials, including university legal counsel, the Dean of the Faculty of Science, the Vice-President Academic and the Associate Vice-President, Human Resources. I accept that all of the records for which the exclusion at section 65(6)3 was claimed were collected, prepared, maintained and used by the university, as contemplated by the first requirement.

Requirement 2: were the records collected, prepared, maintained and/or used in relation to meetings, consultations, discussions or communications?

[52] The university submits all of the records for which section 65(6) was claimed were collected, prepared, maintained and/or used in relation to meetings, consultations, discussions or communications amongst various university staff regarding the employment of the appellant.

[53] On my review of the content of the records, I accept that they were collected, prepared, maintained and/or used in relation to meetings, consultations, discussions or communications. As previously mentioned, the records amount primarily to emails and other communications between employees of the university and, in my view, it is clear that they represent discussions, consultations, or communications between those employees, the dean and the university's legal counsel. Some of the other records relate to meetings and discussions between university staff, including legal counsel and still others relate to communications prepared by the university. Accordingly, I accept that the second requirement of the test for the exclusion at section 65(6)3 has been met.

Requirement 3: were the meetings, consultations, discussions or communications about labour relations or employment related matters in which the university has an interest?

[54] The phrase "labour relations or employment-related matters" has been found to apply in the context of:

- a job competition[12]
- an employee's dismissal[13]
- a grievance under a collective agreement[14]

[12] Orders M-830, PO-2123.
[13] Order MO-1654-I.
[14] Orders M-832, PO-1769.

[55] The phrase "labour relations or employment-related matters" has been found *not* to apply in the context of:

- an organizational or operational review[15]
- litigation in which the institution may be found vicariously liable for the actions of its employee[16]

[56] The phrase "in which the institution has an interest" means more than a "mere curiosity or concern," and refers to matters involving the institution's own workforce.[17]

[57] The records collected, prepared, maintained or used by an institution are excluded only if the meetings, consultations, discussions or communications are about labour relations or "employment-related" matters in which the institution has an interest. Employment-related matters are separate and distinct from matters related to employees' actions.[18]

[58] The university takes the position that the meetings, consultations, discussions or communications in which the records were used were about labour relations or employment-related matters in which the university has an interest.

[59] The university submits that at the time that the records were created and at the time that the request for information that was the origin of this appeal was filed, the appellant was a full time professor at the university and a member of the Association of Professors of the University of Ottawa (APUO) and involved in several labour-relations or employment related matters, such as disciplinary and grievances under the collective agreement. It submits that in its collection, preparation, maintenance, and use of the records, the university was acting as an employer and conditions of employment were at issue.

[60] The university further submits that it has an interest in matters involving its own workforce and, in particular, matters pursuant to the collective agreement, which it strives to abide by. It submits that the records were prepared and maintained in connection with consultations, discussions and communications between the Dean of the Faculty of Science, the university's legal counsel, the university's human resources employee and the Vice President Academic, in relation to labour and employment-related matters (more specifically, disciplinary matters) involving the appellant. It submits that "as for any employer, disciplinary actions and grievances filed under the Collective Agreement are serious matters which must be solved as efficiently as possible as they affect the working environment which is a matter in which the university has an interest."

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[15] Orders M-941, P-1369.
[16] Orders PO-1722, PO-1905.
[17] *Solicitor General, supra,* note 9.
[18] *Ministry of Correctional Services, supra,* note 11.

[61] Previous orders of this office, including the decision in *Solicitor General*[19] have found that disciplinary actions involving an employee are employment-related matters. In addition, a number of previous orders have established that grievances initiated pursuant to the procedures contained in the collective agreement are, by their very nature, about labour relations matters.

[62] With respect to the scope of the exclusionary provision, Swinton J., for a unanimous Court, wrote in *Ontario (Ministry of Correctional Services) v. Goodis* (2008)[20] that:

> In *Reynolds v. Ontario (Information and Privacy Commissioner),* [2006] O.J. No. 4356, this Court applied the equivalent to s. 65(6) found in municipal freedom of information legislation to documents compiled by the Honourable Coulter Osborne while inquiring into the conduct of the City of Toronto in selecting a proposal to develop Union Station. The records he compiled in interviewing Ms. Reynolds, a former employee, were excluded from the *Act*, as Ms. Osborne was carrying out a kind of performance review, which was an employment-related exercise that led to her dismissal (at para. 66). At para 60, Lane J. stated,
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> > It seems probable that the intention of the amendment was to protect the interests of institutions by removing public right of access to certain records relating to their relations with their own workforce.

[63] Cautioning that there is no general proposition that all records pertaining to employee conduct are excluded from the *Act*, even if they are in files pertaining to civil litigation or complaints by a third party, Swinton J. also pointed out that "[w]hether or not a particular record is 'employment related' will turn on an examination of the particular document."

[64] I agree with the analysis set out above and adopt it for the purpose of making my determinations in this appeal.

[65] Having considered the substances of the records for which section 65(6)3 has been claimed, I accept that they were collected, prepared, maintained or used in relation to meetings, consultations, discussions or communications about labour relations or employment related matters in which the university has an interest. Specifically, the records address existing and anticipated disciplinary proceedings initiated by the university in relation to the appellant's conduct and existing and anticipated grievances initiated by the appellant in relation to the university's actions, filed under the collective agreement. In keeping with the principles enunciated in the

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[19] *Supra,* note 9.
[20] *Supra,* note 9.

previous orders identified above, I find that these types of matters clearly represent labour relations or employment related matters in which the university has an interest, as contemplated by the third requirement of the test for the exclusion at section 65(6)3 of the *Act*. Accordingly, I find that the third requirement has been met.

[66] As I have found that all requirements of the test for the exclusion at section 65(6)3 has been met for all of the records for which it has been claimed, I find that they are, therefore, excluded from the scope of the *Act*. Accordingly, it is not necessary for me to determine whether the exclusion at section 65(6)1 also applies to these records.

[67] Once the records for which section 65(6)3 has been found to apply have been removed from the scope of the appeal, only three records remain at issue: portions of record 95, and records 12 and 13 in their entirety. The university claims that section 49(a), read in conjunction with the solicitor-client privilege exemption at section 19, applies to exempt those three remaining records from disclosure.

D. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[68] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
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> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
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> (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,
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> (c) any identifying number, symbol or other particular assigned to the individual,
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> (d) the address, telephone number, fingerprints or blood type of the individual,

> (e) the personal opinions or views of the individual except if they relate to another individual,
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> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
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> (g) the views or opinions of another individual about the individual, and
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> (h) the individual's name where 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;

[69] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[21]

[70] Sections 2(3) and (4) also relate to the definition of personal information. These sections state:

> (3) 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.
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> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[71] 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.[22]

[72] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[23]

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[21] Order 11.
[22] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[23] Orders P-1409, R-980015, PO-2225 and MO-2344.

[73] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[24]

[74] The university submits that the records contain "personal information" as defined in the definition of that term in section 2(1) of the *Act*. The university submits that some of the records contain the personal information of identifiable individuals other than the appellant. In its representations, it points to specific examples in the records that it submits constitutes the personal information of other individuals.

[75] The appellant does not make any submissions on whether the information at issue contains personal information belonging to him or to others.

Analysis and findings

[76] I have reviewed the three records remaining at issue and find that all of them contain the personal information of the appellant. Although this information is about the appellant in a professional capacity, I find that because the subject matter relates to grievances and disciplinary hearings into his conduct, the information reveals something of a personal nature about him.[25] Additionally, I agree with the university that some of the records also contain the personal information of individuals other than the appellant.

E. Does the discretionary exemption at section 49(a), read in conjunction with the solicitor-client privilege exemption at section 19, apply to the records?

[77] While section 47(1) gives individuals a general right of access to their own personal information held by an institution, section 49 provides a number of exemptions from this right.

[78] Section 49(a) reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
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> > where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

[24] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).
[25] Orders PO-2524, PO-2633, PO-3045.

[79] Section 49(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give an institution the power to grant requesters access to their personal information.[26]

[80] In this appeal, the university relies on section 49(a) to deny access to certain records which it claims qualify for exemption under the solicitor client exemption at section 19 and which also contain the personal information of the appellant. Specifically, of the records that remain at issue, those that the university claims are exempt pursuant to section 49(a), read in conjunction with section 19, are record 95, in part, and records 12 and 13, in their entirety.

Solicitor-client privilege

[81] Section 19 of the *Act* reads as follows:

> A head may refuse to disclose a record,
>
> (a) that is subject to solicitor-client privilege;
>
> (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or
>
> (c) 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.

[82] Section 19 contains two branches as described below. The university must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

[83] Branch 1 of the section 19 exemption appears in section 19(a) and encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue.[27]

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[26] Order M-352.
[27] Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.).

Solicitor-client communication privilege

[84] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[28]

[85] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[29]

[86] The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.[30]

[87] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[31]

[88] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.[32]

Branch 2: statutory privilege

[89] Branch 2 of section 19 arises from sections 19(b) and (c). The university claims section 19(c) is applicable in this appeal as it applies to a records prepared by or for counsel for an educational institution for use in giving legal advice. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

Representations

[90] The university submits that the records contain information that amounts to legal advice sought and provided by the university's legal counsel. It submits that the records are privileged and confidential and represent confidential communications between its legal counsel and officers of the university that were prepared for the purpose of obtaining or giving professional legal advice. The university submits:

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[28] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[29] Orders PO-2441, MO-2166 and MO-1925.
[30] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[31] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[32] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

> At the university, the office of the legal counsel provides legal advice with respect to numerous situations. These communications were of a confidential nature and were produced in the context of labour-relations matters, involving the appellant. More precisely, the purpose of the confidential communications were exchanges with university legal counsel in order to assist the university in preparing for or developing its approach with respect to the disciplinary and/or grievance proceedings that had been initiated under the collective agreement involving the appellant.

[91] The university further submits:

> The solicitor-client privilege is crucial to individuals within the university, as it allows them to freely make requests for and obtain legal advice, knowing it will remain confidential. In order to protect the integrity of the office of the legal counsel, including the continuum of communications between the legal counsel and the university officers and personnel, the records must be exempt from disclosure.

[92] The university concludes with the submission that it did not take any action that constitutes a waiver of its common law and statutory solicitor-client privilege either implicitly or explicitly.

[93] In related appeals, the appellant makes the following submissions that relate to the solicitor-client privilege exemption:

> [A] university staff lawyer that is routinely involved in all aspects of the labour relations involving the appellant and that is effectively performing investigations … in the place of the dean as foreseen by the workplace Collective Agreement (CA) cannot be considered an independent legal counsel free to fully exercise her professional independence responsibilities and therefore cannot be considered a solicitor for the purposes of defining solicitor-client privilege used as an exemption regarding access. This makes a farce of solicitor-client privilege.

[94] The appellant also submits:

> The university waived its solicitor-client privilege for many matters when it showed sensitive records to student volunteer and later employed [named individual] and when [named individual] conveyed this to a friend and roommate.

Analysis and findings

[95] I have carefully reviewed the records remaining at issue for which the exemption at section 49(a), read in conjunction with section 19, has been claimed and I find that all of them were sent or copied to the university's legal counsel. In my view, their content reveals either legal advice provided by or sought from that legal counsel or forms part of the continuum of communications between lawyer and client. Therefore, I accept that the severed portions of the remaining records represent communications of a confidential nature between legal counsel and officers and/or agents of the university in order to assist the university with respect to the protection of its legal rights regarding disciplinary and grievance proceedings involving the appellant.

[96] The application of statutory privilege has been limited on the following common law grounds as stated or upheld by the Ontario courts:

- waiver of privilege by the *head of an institution,*[33] and
- the lack of a "zone of privacy" in connection with records prepared for use in or in contemplation of litigation.[34]

[97] In related appeals, the appellant takes the position that the university has waived its solicitor-client privilege by disclosing records to certain individuals. However, aside from his statement, he does not provide any evidence that the privilege attached to any of the specific records at issue has been waived, either explicitly or implicitly by the head of university or any other individuals. The university asserts that privilege has not been waived. From my review of the content of the records themselves it appears on their face that they are confidential communications to and from the university's own counsel. Given that I have not been provided with sufficient evidence to conclude that the university waived its privilege with respect to the information contained in the specific records at issue, I find that waiver does not apply and the records are subject to the statutory solicitor-client privilege exemption at section 19(c).

[98] The appellant also submits that because the university's legal counsel is involved in investigating labour relations matters related to him, she is not independent and cannot be considered a solicitor for the purposes of the solicitor-client privilege exemption. I do not accept this submission. The information for which the solicitor-client privilege is claimed was clearly prepared by or for the university counsel, who is counsel employed or retained by an educational institution for use in giving legal advice as contemplated by section 19(c). Accordingly, I find that the privilege applies.

[99] Accordingly, I find that the remaining records amount to records prepared by or for counsel for an educational institution for use in giving legal advice as contemplated

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[33] *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.).
[34] *Ibid.*

by section 19(c). Subject to my review of the exercise of discretion below, I find that the severed portions of record 95, as well as records 12 and 13, in their entirety, qualify for exemption under section 49(a), read in conjunction with section 19.

F. Does the discretionary exemption at section 49(b) apply to the records?

[100] As records 12, 13 and 95 were the only records that remained at issue and I have found that, subject to my review of the university's exercise of discretion, they are exempt pursuant to the discretionary exemption at section 49(a), it is not necessary for me to determine whether section 49(b) applies to any of the records.

G. Should the university's exercise of discretion to deny access under section 49(a) be upheld?

[101] The exemption at section 49(a) is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, this office may determine whether the institution failed to do so.

[102] In this order, I have found that portions of record 95 and all of the information in records 12 and 13 qualify for exemption under the discretionary exemption at section 49(a). Consequently, I will assess whether the university exercised its discretion properly in applying this exemption to the portions of records that have been withheld.

[103] This office may find that the institution erred in exercising its discretion where, for example:

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations, or
- it fails to take into account relevant considerations.

[104] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[35] This office may not, however, substitute its own discretion for that of the institution. [36]

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

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[35] Order MO-1573.
[36] Section 43(2) of the *Act*.

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic of compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.[37]

Representations

[106] The university submits that it exercised its discretion appropriately in withholding information pursuant to the discretionary exemption at section 49(a), read in conjunction with section 19, and 49(b).

[107] In its representations the university states that in exercising its discretion it did not act in bad faith or for improper purposes and identifies the considerations it took

[37] Orders P-344 and MO-1573.

into account when it chose to exercise its discretion not to disclose the records remaining at issue. Specifically, it took into consideration:

- whether the requester was seeking his own personal information,
- whether the requester had a sympathetic or compelling need to receive the information, and
- whether disclosure would increase public confidence in the operation of the university.

[108] The university submits:

> In examining the records at issue, all such records represent either a communication of a confidential nature between a solicitor and client for the purpose of providing advice, or the receipt of confidential information by a solicitor in order for the solicitor to formulate advice on an on-going legal matter. In this regard, the exchange of confidential communications between University of Ottawa legal counsel and officers of the University of Ottawa represent a continuum of communications regarding, amongst others, the development of the strategies to be implemented in dealing with labour-relation matters and the various steps that the University of Ottawa needs to follow in dealing with such matters in accordance with the disciplinary and grievance process set out under the Collective Agreement.
>
> The records at issue contain information about the appellant as they relate to labour-relations matters. On the other hand, these records also include the personal information of other individuals that relate to the appellant that was provided on a confidential basis.
>
> It is important that personal information of other individuals, for the disclosure will constitute an unjustified invasion of personal privacy in accordance with *FIPPA,* remain undisclosed. This university is not in the practice of disclosing personal information about an individual to someone other than the individual to whom the personal information relates without consent.
>
> There is no sympathetic or compelling need for the requester to receive the information. On the other hand, the protection of the confidentiality of the advice and of the personal information of the individuals provided on a confidential basis is important to the university as it provides the university with confidence that it is able to seek legal advice or exchange

information and communications with university legal counsel in the furtherance of such advice at present and in the future.

Historically, the university has never disclosed solicitor-client communications as such communications are regarded as privileged, thereby increasing public confidence in the operation of the University of Ottawa.

Hence, in an attempt to protect the integrity of the office of the legal counsel and the privacy of individuals the university sought to exercise its discretion and not disclose the relevant records.

Analysis and finding

[109] I have reviewed the records remaining at issue and have considered the university's representations on the manner in which it exercised its discretion. Based on that information, I accept that the university's exercise of discretion not to disclose the information pursuant to the exemptions at section 49(a), read in conjunction with section 19, and section 49(b) was proper and made in good faith. Accordingly, I uphold the university's decision to deny access to the information that I have found qualify for exemption under those sections.

ORDER:

I uphold the university's search and access decision and dismiss this appeal.

Original Signed by: November 27, 2012
Catherine Corban
Adjudicator