Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3134

Appeal PA08-97-2

University of Ottawa

November 27, 2012

Summary: The appellant sought access to all records held by the University of Ottawa relating to the Ottawa Cinema Politica film series, dating from October 30, 2006. The university denied access to some of the responsive records pursuant to the exclusionary provision in section 65(6) (labour relations), and the discretionary exemptions in section 49(a) (discretion to withhold 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), 19, 24, 49(a), 49(b), 65(6).

Orders and Investigation Reports Considered: Order M-909.

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: PA08-122-2, 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 clarity 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 emails received or sent by the Dean of the Faculty of Science related to the Ottawa Cinema Politica film series, dating from October 30, 2006.

[3] The university issued a decision letter granting partial access to the responsive records, withholding portions pursuant to the exclusion at section 65(6) (labour relations) and the exemptions at sections 19(a) and (c) (solicitor-client privilege) of the *Act*.

[4] The appellant appealed the university's decision.

[5] During the initial processing of the appeal, this office requested all relevant documents from the university and it was discovered that it had not kept a copy of the responsive records that it had identified and disclosed, in part, to the appellant. The university therefore conducted a new search for responsive records and provided a copy to both the appellant and this office. The appellant subsequently advised this office that there was a significant difference in the number of pages of records provided to him as a result of the two separate searches but that the records had been stolen and therefore, could not be compared. The university agreed to resend him copies of the responsive records located by the search.

[6] During mediation, the appellant advised that he believed that there should be additional records responsive to his request and that he should have received an index of records that identified which exemptions were being claimed for the withheld records and portions of records. The university agreed to prepare the index of records and provided a copy to both the appellant and this office.

[7] As a result of discussions in mediation, the university issued a revised decision letter granting partial access to some records that had previously been withheld. The university also identified that severances had been made pursuant to the exemption at section 19 (solicitor-client privilege) and some records had been withheld due to the application of section 10 (custody or control) as the records related to a decision of a

labour relations arbitrator. The university also provided the appellant and this office with a revised index of records and a copy of the newly disclosed documents.

[8] The appellant maintained that the university had not conducted a reasonable search for responsive records and that additional records must exist. The university advised that as the Freedom of Information Coordinator who had initially dealt with the request was no longer employed by the university, it could not speak to the original search. However, it agreed to conduct a third search. The university also agreed to clarify its position with respect to the records that it claimed were not under its custody or control.

[9] As a result of the third search, additional records were located and the university issued a revised decision letter and index of records granting partial access to the additional records. The university advised that records, or parts of records, were being withheld pursuant to the exclusion at section 65(6) and the exemptions at sections 19 and 21(1) (personal privacy). It also advised that it is no longer claiming that any of the responsive records are outside of its custody or control pursuant to section 10.

[10] The appellant maintained that there were 21 additional records that had been provided to him as a result of the original search that had still not been provided to him in subsequent searches and for that reason he continues to question the reasonableness of the university's search.

[11] The university advised that it had exhausted all search possibilities for this appeal and that the index of records dated March 4, 2009 is a complete and final index of all responsive records. However, the university reconsidered its decision with respect to a number of records and agreed to disclose them.

[12] In turn, the appellant advised that he was no longer pursuing access to a number of records in their entirety and to the severed portions of others. Specifically, those records are records 44, 45, 75, 100, and 222, in part, and records 20, 25, 32, 64-70, 72-74, 76-79, 84-87,90-91, 101-103, 106-108, 112-115, 119, 121-125, 135, 137-138, 140, 158, 167-170, 172, 181-183, 185-186, 188, 197-199, 203, 206 and 216-221, in their entirety. However, the appellant advised that he wishes to pursue access to all of the records remaining and disputes the reasonableness of the university's search.

[13] As the records may contain the personal information of the appellant, the mediator raised the possible application of the discretionary exemptions at sections 49(a) and (b) (discretion to refuse a requester's own information) and they were included as issues in this appeal.

[14] Further mediation was not possible and the file was transferred to the adjudication stage of the appeal process. During the inquiry into this appeal I sought

representations from the university and the appellant. Both parties submitted representations.

RECORDS:

[15] The responsive records are outlined in the index of records dated March 4, 2009, as well as the supplementary index provided to the appellant on July 20, 2009. Specifically, those that remain at issue are the following:

- In part: 38, 39, 41, 164 and 165
- In full: 46-63, 71, 80-83, 88, 89, 92-95, 97-99, 104, 109-111, 116-118, 120, 126-134, 136, 141-146, 150, and 229-266.

ISSUES:

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

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

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

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

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

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

DISCUSSION:

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

[16] 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.

[1] Orders P-85, P-221, and PO-1954-I.

[17] 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]

[18] 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]

[19] 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]

[20] 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

[21] The university submits that it conducted three searches for responsive records. It submits that the initial search was conducted by the Dean of the Faculty of Science and the keyword "cinema politica" was used to search his electronic records. The university issued a decision letter granting partial access to the responsive records.

[22] The university submits that following the initiation of the appeal by the appellant, the university provided this office with a copy of the partially disclosed emails, as well as copies of the undisclosed emails. It was discovered, however, that the university had not kept a copy of the responsive records provided to the appellant. Consequently, the university conducted a new search for responsive records. The university subsequently provided the appellant and this office with an index of the responsive records and the records generated from the new search.

[23] The university further submits that during mediation, it re-examined the responsive records and issued a revised decision granting partial access to some of the records that had previously been withheld. The university states that a revised index was also provided.

[24] As the appellant continued to take the position that additional records must exist, the university agreed to conduct a third search for responsive records. The search was conducted by the Dean of the Faculty of Science, with the assistance of his

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

administrative assistant, the freedom of information coordinator and the assistant to the freedom of information coordinator, for emails using a number of different keywords. The university submits that a search of the Dean's paper records was also conducted at this time.

[25] As a result of the third search, the university submits that it issued a revised decision granting partial access to additional documents that were found during the third search.

[26] The university submits that the searches were conducted by the Dean and his assistant, both of whom are experienced employees who are familiar with the operation of, and filing systems within their respective offices. Together with its representations it provided an affidavit sworn by the Dean of the Faculty of Science detailing his search efforts, on three occasions, for records responsive to the request. The university also submits that it expended reasonable efforts in conducting a search for records reasonably related to the request and that it is not aware of any possibility that there were other responsive records that may have previously existed but no longer exist.

[27] The appellant maintains that the university did not conduct a reasonable search and takes the position that records were improperly destroyed, as evidenced by the fact that 21 of the records that were provided to him initially were never found again. He submits that these are "sensitive documents that the appellant has a compelling need to receive yet they were only available in this first batch and not via any subsequent attempts to get disclosure."

[28] The appellant submits that "at best, the university is being disingenuous in advancing that it performed a reasonable search and that at worst the Dean destroyed responsive records and lied in affidavit." He explains his position:

> Since the later searches appear to have been very extensive and involved the additional help of two other individuals on site and since the 21 records in question are sensitive documents and represent almost one fifth of the records in the first batch, the appellant submits that the Dean destroyed responsive records and lied in affidavit.

[29] On reply, the university specifically denies the appellant's allegations that the university destroyed responsive records and that the searches were incomplete. It also specifically denies the appellant's allegations that the affidavit sworn by the Dean of the Faculty of Science is false. It further specifically denies the appellant's allegations that it is being disingenuous in claiming that it performed a reasonable search. In conclusion, the university submits that it has conducted reasonable searches for the responsive records.

Analysis and finding

[30] Having carefully reviewed and considered the evidence presented to me in the parties' representations, I find that the university has conducted a reasonable search for the records responsive to the appellant's request. I acknowledge the appellant's concerns regarding the discrepancies between the three searches, however, I am satisfied that the university has provided me with sufficient evidence to demonstrate that it has discharged its responsibilities under the *Act* and has performed a reasonable effort to identify and locate records responsive to the appellant's request.

[31] 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 identify and locate any records that are reasonably related to the request. An institution is not required to go to extraordinary lengths to search for records responsive to a request.

[32] 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 stated:

> 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.

[33] 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]

[34] In my view, the university makes it clear in its representations and the affidavit sworn by the Dean of the Faculty of Science, the primary individual who conducted the searches, that it has spent a considerable amount of time and effort in searching for records responsive to the appellant's request. It details the three searches that were conducted and identifies the keywords that were used in the searches for electronic records.

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[6] Order MO-2143-F.

[35] In this case, I accept that the Dean of the Faculty of Science is a knowledgeable and experienced employee who has the requisite knowledge and experience to search for records responsive to the request.

[36] I also accept that the university provided sufficient evidence to demonstrate that it expended a reasonable effort to identify and locate all of the records sent or received by the Dean of Science related to the Ottawa Cinema Politica film series, dating from October 30, 2006 to the date of the request.

[37] Although, as previously stated, 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, I find that the appellant has not provided me with sufficient evidence to establish a reasonable basis for concluding that additional records responsive to the request either may exist or may have existed. As noted above, the *Act* does not require an institution to prove with absolute certainty that additional records do not exist. An institution is only required to provide sufficient evidence to show that it has made a *reasonable* effort to identify and locate records responsive to the request.

[38] Finally, I find that the appellant has provided me with no evidence to support his allegation that responsive records were willfully destroyed by the Dean of the Faculty of Science or that he lied in his affidavit.

[39] Accordingly, I find that the university has provided a thorough explanation of the reasonable efforts made by an experienced employee to identify and locate any responsive records, in both electronic and paper format. Therefore, I am satisfied that the university's searches were reasonable.

B. 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 records 46-50, 97-99, 109, 116-118, 120, 129-136, 142-146, 229-239, 241-244, 246-249, 252 and 254-266 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:
>
> 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.

…

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 submits generally 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. However, he does state that he requires access to the records for the purpose of participating in several labour arbitrations related to his employment with the university as well as an application before the Ontario Labour Relations Board.

Section 65(6): general principles

[43] If section 65(6) applies to the records, and none of the exceptions found in section 65(7) applies, 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]

[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]

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

[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] Section 65(6) may apply where the institution that received the request is not the same institution that originally "collected, prepared, maintained or used" the records, even where the original institution is an institution under the *Municipal Freedom of Information and Protection of Privacy Act*. [11]

[49] The exclusion in section 65(6) does not exclude all records concerning the actions or inactions of an employee simply because this conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees.[12]

[50] 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.[13]

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

[51] 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?

[52] 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 prepared by

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[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] Orders P-1560, PO-2106.
[12] *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).
[13] *Ibid.*

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

[53] Having reviewed the records carefully, they amount primarily to emails and other communications between university employees and officials including university legal counsel (both external and internal), 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 or 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?

[54] The university submits that 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.

[55] 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?

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

- a job competition[14]
- an employee's dismissal[15]
- a grievance under a collective agreement[16]

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

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

- an organizational or operational review[17]
- litigation in which the institution may be found vicariously liable for the actions of its employee[18]

[58] 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.[19]

[59] 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.[20]

[60] 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. It 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). It submits that the university and the appellant were engaged in several labour-relations or employment related matters, such as disciplinary proceedings against the appellant and grievances filed by the appellant, under the collective agreement. It submits that in the collection, preparation, maintenance, and use of the records, the university was acting as an employer and conditions of employment were at issue.

[61] 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, *inter alia,* the university's legal counsel, the university's human resources employee and the Dean of the Faculty of Science, in relation to labour and employment-related matters (more specifically, disciplinary matters) involving the appellant. It submits that for the university, "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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[17] Orders M-941, P-1369.
[18] Orders PO-1722, PO-1905.
[19] *Solicitor General, supra,* note 9.
[20] *Ministry of Correctional Services, supra,* note 11.

[62] Previous orders of this office, including the decision in *Solicitor General*[21] 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.

[63] 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)[22] 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.

[64] 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."

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

[66] Having reviewed the substance of the records for which section 65(6)3 has been claimed, I accept that they collected, prepared, maintained or used in relation to meetings, consultations, discussion 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 previous orders identified above, I find that these types of

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[21] *Supra,* note 9.
[22] *Supra,* note 9.

matters clearly amount to 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.

[67] 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* pursuant to section 65(6)3. Accordingly, it is not necessary for me to determine whether the exclusion at section 65(6)1 applies in the circumstances of this appeal.

[68] Once the records for which the exclusion at section 65(6)3 has been found to apply are removed from the scope of the appeal, only the following records remain at issue: 38, 39, 41, 51-63, 71, 80-83, 88, 89, 92-95, 104, 110, 111, 127, 128, 141, 150, 164, 165, and 240.

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

[69] 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,
>
> (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,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (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,

> (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,
>
> (g) the views or opinions of another individual about the individual, and
>
> (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;

[70] 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.[23]

[71] 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.
>
> (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.

[72] 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.[24]

[73] The university submits that the records contain the personal information of individuals other than the appellant. The appellant takes the position that all of the information at issue amounts to his personal information.

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

Analysis and findings

[74] As a result of the application of the exclusion at section 65(6)3, only the following records remain at issue in this appeal: records 38, 39, 41, 51-63, 71, 80-83, 88, 89, 92-95, 104, 110, 111, 127, 128, 141, 150, 164, 165, 240, 245, 250, 251, and 253. I have reviewed these records 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, the information reveals something of a personal nature about him.[25]

[75] In addition to containing the personal information of the appellant, I find that records 39, 41, and 245 also contain the personal information of other individuals, specifically, their names where they appear with either other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual, within the contemplation of paragraph (h) of the definition of "personal information" in section 2(1).

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

[76] 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.

[77] Section 49(a) reads:

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

[78] 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]

[79] The university submits that the majority of the remaining records, specifically, records 38, 51-63, 71, 80-83, 88, 89, 92-95, 104, 110, 111, 127, 128, 141, 150, 164,

[25] Orders PO-2524, PO-2633, PO-3045.
[26] Order M-352.

165, 240, 250, 251, and 253 are subject to the discretionary exemption at section 49(a), read in conjunction with section 19.

Solicitor-client privilege

[80] 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.

[81] 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

[82] 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]

Solicitor-client communication privilege

[83] 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]

[84] 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]

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[27] Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.).
[28] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[29] Orders PO-2441, MO-2166 and MO-1925.

[85] 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]

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

[87] 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

[88] 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 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

[89] 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 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:

> 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.

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[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.).

[90] 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.

[91] 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.

[92] 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.

[93] 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

[94] I have carefully reviewed records 38, 51-63, 71, 80-83, 88, 89, 92-95, 104, 110, 111, 127, 128, 141, 150, 164, 165, 240, 250, 251, and 253 for which the exemption at section 49(a), read in conjunction with section 19(c), has been claimed. I find that all of them were sent or copied, in confidence, to the university's legal counsel. Moreover, in my view, their content reveals either advice provided by or sought from that legal counsel. Therefore, I accept that they represent written communications of a confidential nature, between university legal counsel and officers and/or agents of the university for use in giving legal advice with respect to its approach regarding disciplinary and grievance proceedings involving the appellant. Accordingly, I find that the statutory privilege at section 19(c) applies to the records identified above.

[95] Additionally, I note that record 245 is an email from university legal counsel to university officers and staff members enclosing an attachment. The university has not claimed section 19(c) applies to this record but has denied access to it pursuant to the personal privacy exemption at section 21. The email provides university counsel's legal advice to the university as to how to respond to the attached document. As this information is clearly subject to the statutory solicitor-client privilege outlined in section 19(c) and the university has claimed section 19(c) applies to all other emails containing the legal advice of university counsel, I accept the fact that the university inadvertently omitted to claim section 19(c) to the record and find that the privilege also applies to record 245.

[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] 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 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 university counsel is involved in investigating labour relations matters related to himself, 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] As I have found that records 38, 51-63, 71, 80-83, 88, 89, 92-95, 104, 110, 111, 127, 128, 141, 150, 164, 165, 240, 245, 250, 251, and 253 are subject to the statutory solicitor-client privilege outlined in section 19(c), and that the university has not waived

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

that privilege, subject to my review of the university's exercise of discretion below, I find that those records qualify for exemption under section 49(a), read in conjunction with section 19.

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

[100] The university submits that the remaining records, records 39 and 41, contain the personal information of individuals other than the appellant and they should not be disclosed pursuant to the mandatory exemption at section 21(1). As I have found that these records also contain the personal information of the appellant, the more appropriate exemption is the discretionary exemption at section 49(b), which is informed by section 21(1).

[101] As noted above, section 49 provides a number of exemptions from an individual's general right of access to their personal information held by an institution described in section 47(1) of the *Act*.

[102] Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

[103] If the information falls within the scope of section 49(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

[104] For section 49(b) to apply, I must be satisfied that disclosure of the information would constitute an unjustified invasion of another individual's personal privacy.

[105] Sections 21(2) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold under section 49(b) is met. Section 21(2) provides some criteria to be considered in making this determination; section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

Representations

[106] The university claims that the information that remains at issue in records 39 and 41 is subject to the personal privacy exemption because they contain the personal

information of other individuals and its disclosure would constitute an unjustified invasion of those other individuals' personal privacy.

[107] The appellant states that he has a compelling need to receive his personal information for a number of reasons stating generally that "he has a natural right to know what was being said about him in the university's improper campaign against the appellant." He also states that he needs to receive his personal information for the purpose of matters in which he is involved, including labour arbitrations, an Ontario Labour Relations Board application, and a civil lawsuit.

[108] He submits that "disclosure, which he undertakes to make public, will increase public confidence in the operation of the institution because the university will be seen to be accountable via this transparency."

Analysis and finding

[109] Having reviewed the parties' representations as well as the severed portions of records 39 and 41 closely, I find that the university has properly severed this information as it is subject to the discretionary exemption at section 49(b).

[110] Records 39 and 41 are email replies sent by two professors in response to an email sent out by the Dean. The content of the emails includes personal information about the professors as they reveal the personal opinions or views of those individuals. Those views or opinions do not relate to the appellant.

[111] None of the presumptions at sections 21(3) apply to this information. I also find that section 21(4) is not applicable to the information at issue.

[112] Turning to the criteria listed in section 21(2), I find that none of the factors favouring disclosure apply. Specifically, I am not satisfied that the disclosure of the personal information at issue is relevant to the fair determination of the appellant's rights [section 21(2)(d)] nor do I accept that its disclosure is desirable for the purpose of subjecting the activities of the university to public scrutiny [section 21(2)(a)]. Rather, I accept that a factor favouring privacy applies. Specifically, that the personal information has been supplied in confidence [section 21(2)(h)] and that from the context of these records the individuals to whom this information relates would not expect the university to disclose their personal information to the appellant for his own private purposes.

[113] Accordingly, I find that disclosure of the personal information belonging to individuals other than the appellant that is found in the severed portions of records 39 and 41 would amount to an unjustified invasion of their personal privacy and the discretionary exemption at section 49(b) therefore applies.

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

[114] The exemptions at sections 49(a) and (b) are discretionary, and permit 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.

[115] In this order, I have found that records 38, 39, 41, 51-63, 71, 80-83, 88, 89, 92-95, 104, 110, 111, 127, 128, 141, 150, 164, 165, 240, 245, 250, 251, and 253, qualify for exemption under the discretionary exemptions at sections 49(a) or (b). Consequently, I will assess whether the ministry exercised its discretion properly in applying this exemption to the portions of records that have been withheld.

[116] 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.

[117] 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]

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

- 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

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

- 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

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

[120] 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 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.

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

[121] 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.

[122] The appellant submits that:

- the university's exercise of discretion should not be upheld, and
- that the university exercised its discretion in bad faith, for an improper purpose and in a manner that is inconsistent with the *Act*.

Analysis and finding

[123] I have reviewed records 38, 39, 41, 51-63, 71, 80-83, 88, 89, 92-95, 104, 110, 111, 127, 128, 141, 150, 164, 165, 240, 245, 250, 251, and 253 and have considered the information that they contain. I have also 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 severed portions of records 38, 51-63, 71, 80-83, 88, 89, 92-95, 104, 110, 111, 127, 128, 141, 150, 164, 165, 240, 245, 250, 251, and 253, pursuant to the exemptions at section 49(a), read in conjunction with section 19, and the severed portions of records 39 and 41, pursuant to the exemption at section 49(b), was proper and made in good faith. Accordingly, I uphold the university's decision to deny access to the records that I have found qualify for exemption under sections 49(a) and 49(b).

ORDER:

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

Original Signed by: November 27, 2012
Catherine Corban
Adjudicator