Information and Privacy Commissioner,
Ontario, Canada

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

# ORDER PO-3136

Appeal PA08-156-2

University of Ottawa

November 27, 2012

**Summary:** The appellant sought access to all records held by the University of Ottawa relating to him that were produced, sent, or received by the Dean of the Faculty of Science since November 30, 2006. The university denied access to the records pursuant to the exclusionary provision in section 65(6) (labour relations), and the discretionary exemptions in section 49(a) (discretion to refuse a requester's own information), read in conjunction with section 19 (solicitor-client privilege) and section 49(b) (personal privacy). The university also denied access to some records on the basis that they were not responsive to the request. 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. 10, 19(c), 24, 49(a), 49(b), 65(6)3.

**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: PA08-97-2, PA08-122-2, 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 are 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 about him that were produced, sent by, or received by the Dean of the Faculty of Science, since November 30, 2006.

[3] The university issued a decision letter granting partial access to the responsive records, withholding portions pursuant to the exemptions at sections 17(1) (third party information), 19 (solicitor-client privilege), 21(1) (personal privacy), and 22 (publicly available), as well as the exclusion at section 65(6) (labour relations) of the *Act*.

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

[5] During mediation, the appellant advised that he had not been provided with an index of records identifying which exemptions were being applied for each withheld record or portion of record. As a result, the university prepared and provided both the appellant and this office with three indexes: the first identifying the disclosed or partially disclosed records, the second identifying the undisclosed records, and the third identifying grievance records. All of the indexes identify the exemptions or exclusions being claimed for the portions of the records or the records that were not disclosed.

[6] Also during mediation, the appellant advised that he is of the view that additional records should exist. Accordingly, the university conducted an additional search and located 13 additional records. It issued a supplementary decision letter together with a supplementary index. The university granted partial access to the additional records with severances made pursuant to the exclusion at section 65(6), and the exemptions at sections 19, 49(a) (discretion to refuse a requester's own information), and 21(1) of the *Act*. Also, portions of one of the additional records were severed as not responsive to the appellant's request.

[7] The appellant confirmed that in addition to appealing the denial of access to the records or portions of records withheld pursuant to the exemptions and the exclusion, or based on non-responsiveness, despite the university's additional search, he continues

to believe that additional records must exist. Accordingly, the reasonableness of the university's search remains as an issue in this appeal.

[8] Mediation did not resolve this appeal and it was transferred to the adjudication stage of the appeal process. During the inquiry, I sought and received representations from the university and the appellant which were shared in accordance with the practices of this office.

[9] In its representations, the university advised that upon review of the records during the preparation of its submissions, it no longer claims the exemptions at sections 17(1) or 22 apply to any of the records. As a result, these issues have been removed from the scope of the appeal.

## RECORDS:

[10] The records at issue in this appeal are outlined on the various indexes that were provided to both the appellant and this office. As the result of the university withdrawing its claim that sections 17(1) and 22 apply, some records were removed from the scope of the appeal. The records that remain at issue consist of:

- On the disclosed records index the following records were withheld in part: records 1-5, 7, 8, 20, 33, 38-39, 52, 55, 58, 60, 62, 75, 88-91, 100, 107, 112-113, 159-160, and 259.

- On the undisclosed records index the following records were withheld in full: records 1-109, 111-314, 316-320, 322-328, 330-376, 378-403, 405-412, 414-416, 418-526, 528, and 530-698.

- On the grievances index the following records were withheld in full: records G-13, G-14, G-15.

- On the supplementary index the following records were withheld in full and in part: records 1, 2, 3, 5, 6, 7, 8, 12, and 13.

## ISSUES:

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

B. Is some of the information in the records not responsive to the appellant's request?

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), or the mandatory exemption at section 21(1), apply to the records?

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

## DISCUSSION:

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

[11] 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.

[12] 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]

[13] 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]

[14] 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]

[15] 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.

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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.

***Representations***

[16] The university submits that the initial search for responsive records was of the Dean of the Faculty of Science's emails, as well as his paper record holdings. The university states that during a second search conducted during mediation it located a package of additional responsive records and issued a supplementary decision letter granting partial access to the additional records.

[17] The university submits that the searches were conducted by both of the Dean of the Faculty of Science's assistants who are both experienced employees of the university who are familiar with the operation of the filing systems within their respective offices. Further, the university submits that it expended reasonable efforts in conducting a search to identify records reasonably related to the request.

[18] The university also enclosed an affidavit sworn by the Dean of the Faculty of Science attesting to the fact that it is his practice to keep emails that he has sent and received relating to his duties as Dean and university activities. He also states that he has not intentionally deleted any such email records and to the best of his knowledge, no such emails have been destroyed or deleted.

[19] The university submits that it cannot determine if records responsive to the request existed but no longer exist. It states that retention of paper records at the university is governed by the policy "Archives of the University 20-4" and email retention is governed by the practice set out in the document entitled "Email Practices at the University of Ottawa."

[20] The appellant maintains that the university did not conduct a reasonable search for records responsive to his request. He submits that in its representations, "the university does not provide any information about how the search was done, such as which keywords would have been used." He also submits that having office staff that "are not part of management" conduct the search is "a way of blocking access to the more sensitive records" because only the Dean "was familiar enough with his disciplinary concerns with the appellant … to perform an adequate search."

[21] The appellant alleges:

> Clearly, any record that management intentionally or instinctively or inadvertently seeks to protect by avoiding obvious key words and obvious identifiers will probably not be found by office staff whereas the Dean would personally know about such records.

[22] He submits that several "high-level exchanges appear to have purposely avoided any identifiers" and points to an email that he received in response to a different

request in which he is referred to as "une certaine personne" and "no other identifiers are present in the respondent record."

[23] The appellant further submits:

> Since the dean did not perform the search, the affidavits should come from those who did perform the search and should explain how the search was performed…
>
> In the appellant's view, the only reasonable solution in the circumstances is to have the university officer (the Dean) whose records are being searched to search the records himself, using context-specific experience and memory that only he possesses. I am certain that [the Dean] remembers many aspects of his dealings concerning the appellant that his office staff could not possible know.

[24] As evidence in support of his claim that the searches have been incomplete, the appellant points to the "patchy (non-systemically and systematically incomplete) overlap of indexed respondent records compared with indexes from overlapping but more specific requests where the dean (when specified) performed the searches himself." The appellant identified the appeal numbers of the appeals dealing with those related requests.

### *Analysis and finding*

[25] I have carefully reviewed and considered all of the evidence presented to me in the parties' representations on the reasonable search issue. While I acknowledge that the appellant takes issue with some of the techniques and approaches used in the university's searches, 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.

[26] 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.

[27] 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.

[28] 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]

[29] In this case, based on the evidence presented, I accept that two knowledgeable and experienced employees of the Dean of the Faculty of Science's office, specifically, his Executive Assistant and his Administrative Assistant, conducted searches of the Dean's records holdings, in both paper and electronic formats. I acknowledge that the appellant believes that it would have been preferable for the individuals who conducted the search to have sworn affidavits regarding the search, however, I do not accept that it is necessary, particularly because those individuals are no longer employed by the university. I acknowledge that, due to their absence, it is difficult to ascertain some of the particulars of the searches that were conducted, such as the keywords used in the electronic searches. However, based on the evidence provided by the university, including the Dean of Faculty and Science's sworn affidavit, I accept that the individuals who conducted the searches were experienced employees with sufficient knowledge and experience of the records management processes of the Office of the Dean of the Faculty Science that they were in a position to conduct a reasonable search for the records responsive to the request.

[30] In my view, it is not necessary that the Dean of the Faculty of Science to personally search for responsive records. He has attested to the fact that it is his practice to keep emails that he has sent and received and the familiarity of his staff with his records to enable them to perform searches for records responsive to the appellant's request for information related to him and all records related to his initiatives. Additionally, given that the searches yielded a significant number of records, I conclude that the university expended a reasonable effort to identify and locate all of the records that were produced, sent by, or received by the Dean as requested by the appellant's request.

[31] 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. Despite the appellant's general claim that additional records responsive to

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[6] Order MO-2143-F.

his request, must exist, I find that he has not provided me with sufficient evidence to establish a reasonable basis for concluding that they do.

[32] 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.

[33] I find that the university has provided a sufficiently detailed explanation of the reasonable efforts made by experienced employees to identify and locate any responsive records, in both electronic and paper format, responsive to the appellant's request. Therefore, I am satisfied that the university's searches were reasonable.

## B. Is some of the information in the records not responsive to the appellant's request?

[34] The university submits that records 54, 59, 121-123, 375, 507 and 509-513 on the index of undisclosed records, as well as record 5 on the supplemental index are not responsive to the appellant's request either in whole or in part.

[35] Later in this order, I find that records 54, 59, 375, 507, and 509-513 on the undisclosed index records and well as record 5 on the supplemental index are excluded, in their entirety, from the scope of the *Act* based on the application of the exclusion at section 65(6). Additionally, I find that records 121-123 are exempt in their entirety, due to the discretionary exemption at section 49(a), read in conjunction with section 19. Accordingly, it is not necessary for me to determine whether or not these records contain information that is not responsive to the appellant's request.

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

[36] The university takes the position that the *Act* does not apply to the following records because they fall within one or both of the exclusions listed at sections 65(6)1 or 3:

- On the undisclosed records index: records 1, 3, 5-18, 20, 22-31, 33-39, 42, 44, 46-51, 53-55, 58-73, 77-89, 94-109, 111-116, 118-120, 124-240, 242-280, 282-295, 299-302, 309-310, 312-314, 316-320, 322-328, 330-331, 334-344, 346-376, 378-403, 405-412, 414-416, 418-526, 528, 530-544, 546-553, 555-608, 615-629, and 631-698.

- On the grievances index: records G-13, G-14, G-15.

- On the supplementary index: records 1, 2, 3, 5, and 12.

[37] Sections 65(6)1 and 3 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.

[38] 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).

[39] 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*

[40] 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*.

[41] 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]

[42] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining

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

legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.[8]

[43] 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]

[44] 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]

[45] 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.[11]

[46] 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.[12]

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

[47] 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.

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

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

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

[49] 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?*

[50] 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.

[51] 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 consist primarily of 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?*

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

- a job competition[13]
- an employee's dismissal[14]
- a grievance under a collective agreement[15]

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

- an organizational or operational review[16]
- litigation in which the institution may be found vicariously liable for the actions of its employee[17]

[54] 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.[18]

[55] 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.[19]

[56] 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.

[57] 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

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[13] Orders M-830, PO-2123.
[14] Order MO-1654-I.
[15] Orders M-832, PO-1769.
[16] Orders M-941, P-1369.
[17] Orders PO-1722, PO-1905.
[18] *Solicitor General, supra,* note 9.
[19] *Ministry of Correctional Services, supra,* note 11.

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."

[58] Previous orders of this office, including the decision in *Solicitor General*[20] 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.

[59] 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)[21] 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,
>
> > 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.

[60] 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."

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

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

[62] Having reviewed the substance 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 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.

[63] 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.

[64] 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, the following records remain at issue:

- On the disclosed records index: records 1-5, 7, 8, 20, 33, 38-39, 52, 55, 58, 60, 62, 75, 88-91, 100, 107, 112-113, 159-160, and 259.

- On the undisclosed records index records: 2, 4, 19, 21, 32, 40, 41, 43, 45, 52, 56, 57, 74-76, 90-93, 117, 121-123, 241, 281, 296-298, 303-308, 311, 332, 333, 345, 545, 554, 609-614, and 630.

- On the supplementary index: records 6, 7, 8, and 13.

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

[65] 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,
>
> (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;

[66] 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.[22]

[67] 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

[22] Order 11.

> dwelling and the contact information for the individual relates to that dwelling.

[68] 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.[23]

[69] 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.[24]

[70] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[25]

[71] The university submits that the records contain the appellant's "personal information" as defined in the definition of that term in section 2(1) of the *Act*. It states that the records "contain the personal opinions and views of other individuals about the appellant." The university submits that the records also contain the personal information of identifiable individuals other than the appellant, including their personal views or opinions, their email addresses and their names where its disclosure would reveal other personal information about the individuals. In its representations, the university lists a number of specific records and identifies, more precisely, the types of personal information contained in those records.

[72] The appellant does not make any specific submissions addressing whether the information at issue contains personal information that belongs to him or to others. However, he submits that if the records contain personal opinions of others, about himself, this is the type of information that he should have a right of access to.

### *Analysis and findings*

[73] As mentioned above, with the application of the exclusion at section 65(6), only the following records remain at issue in this appeal:

- On the disclosed records index: records 1-5, 7, 8, 20, 33, 38-39, 52, 55, 58, 60, 62, 75, 88-91, 100, 107, 112-113, 159-160, and 259.

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[23] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[24] Orders P-1409, R-980015, PO-2225 and MO-2344.
[25] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

- On the undisclosed records index records: 2, 4, 19, 21, 32, 40, 41, 43, 45, 52, 56, 57, 74-76, 90-93, 117, 121-123, 241, 281, 296-298, 303-308, 311, 332, 333, 345, 545, 554, 609-614, and 630.

- On the supplementary index: records 6, 7, 8, and 13.

[74] In the request at issue, the appellant sought access to all records about himself, produced by, sent by, or received by the Dean of the Faculty of Science. Accordingly, I find that all of the responsive records remaining at issue, by definition, 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 in which he is involved, the information reveals something of a personal nature about him.[26]

[75] I also find that some of the records remaining at issue contain the personal information of identifiable individuals other than the appellant. Specifically, all of the records remaining at issue on the disclosed records index, records 241, 281, 296-298, 332, 609-614, and 630, on the undisclosed records index, and record 13 on the supplementary index.

## 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?

[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.[27]

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

[79] In this appeal, the university relies on section 49(a), read in conjunction with section 19, to deny access to the following records that remain at issue:

- On the undisclosed records index records: 2, 4, 19, 21, 32, 40, 41, 43, 45, 52, 56, 57, 74-76, 90-93, 117, 121-123, 303-308, 311, 333, 345, 545, and 554.

- On the supplementary index: records 6, 7, and 8.

[80] As previously determined, those records contain the personal information of the appellant.

### ***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.[28]

[28] 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.[29]

[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.[30]

[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.[31]

[87] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[32]

[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.[33]

*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 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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[29] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[30] Orders PO-2441, MO-2166 and MO-1925.
[31] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[32] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[33] *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 his representations, 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:

> …University staff lawyer solicitor-client privilege cannot be extended to a volunteer or hired undergraduate student ([named individual], not a law student) who was shown respondent records that the university has a burden of proof responsibility to show hiring contracts in this regard, and that such involvement of the student or volunteer constitutes a waiver of the university's common law and statutory solicitor-client privilege.

### *Analysis and findings*

[95] I have carefully reviewed the records for which the exemption at section 49(a), read in conjunction with section 19, might apply. 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 or they form part of the continuum of communications between lawyer and client. I accept that they 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,*[34] and
- the lack of a "zone of privacy" in connection with records prepared for use in or in contemplation of litigation.[35]

[97] The appellant takes the position that the university has waived its solicitor-client privilege by disclosing records to a named individual. 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 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 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] 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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[34] *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.).
[35] *Ibid.*

by section 19(1)(c). Subject to my review of the exercise of discretion below, I find that records 2, 4, 19, 21, 32, 40, 41, 45, 52, 56, 57, 74-76, 90-93, 117, 121-123, 303-308, 311, 333, 345, 545, and 554, on the undisclosed records index and records 6, 7, and 8 on the supplementary index qualify for exemption under section 49(a), read in conjunction with section 19.

## F. Does the discretionary exemption at section 49(b), or the mandatory exemption at section 21(1), apply to the records?

[100] The university submits that the severed portions of the remaining records contain the personal information of individuals other than the appellant and should not be disclosed pursuant to the mandatory exemption at section 21(1). Specifically, these records include:

- On the disclosed records index: records 1-5, 7, 8, 20, 33, 38-39, 52, 55, 58, 60, 62, 75, 88-91, 100, 107, 112-113, 159-160, and 259.
- On the undisclosed records index records: 241, 281, 296-298, 332, 609-614, and 630.
- On the supplementary index: record 13.

[101] As I have found that these records also contain the personal information of the appellant, the more appropriate exemption is the discretionary personal privacy exemption at section 49(b), which is informed by section 21(1).

[102] 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*.

[103] 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.

[104] 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.

[105] 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.

[106] 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*

[107] The university claims that the information identified above is subject to the discretionary personal privacy exemption at section 49(b) because it amounts to the personal information of other individuals and its disclosure would constitute an unjustified invasion of those other individuals' personal privacy.

[108] The university submits:

> [The] records consist of personal evaluations and character references as well as personal opinions which are highly sensitive and were supplied by these individuals in confidence and fall within a presumed unjustified invasion of personal privacy which cannot be rebutted by one or more factors under section 21. The disclosure of the information would unfairly affect these individuals

[109] The appellant states that he has a compelling need to receive his own personal information for a number of reasons. He states 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.

[110] 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*

[111] Having reviewed the parties' representations I accept that that the university has properly severed the personal information of individuals other than the appellant as it is subject to the discretionary exemption at section 49(b).

[112] The records remaining at issue on the disclosed records index consist primarily of emails sent to the university from students or former students commenting on courses taught by the appellant. With respect to the partially disclosed records, in most cases only the name and other personal information relating to the individuals has been

severed, but the substance of the email has already been disclosed to the appellant. As such, the only information that has been withheld from the appellant is that which would enable him to identify the individual.

[113] The university submits that the records remaining at issue on the undisclosed records index contain information relating to individuals in their personal capacity and it is reasonable to expect that were the information disclosed it would render those individuals identifiable. Many of these records are emails from university students and former students and relate to university matters, not specifically related to the appellant himself.

[114] Record 13 on the supplementary index is a press release that has been disclosed in its entirety to the appellant, with the exception of a handwritten note on the page that contains an individual's name and home telephone number.

[115] In some circumstances, for example records 1, 20, 52, 62, 91, 113, on the disclosed records index, the records reveal information that relates to the individual's educational history disclosure of which is presumed to amount to an unjustified invasion of personal privacy pursuant to section 21(3)(d). Accordingly, I find that disclosure of this information is presumed to be an unjustified invasion of personal privacy of the individuals to whom it relates and should not be disclosed. None of the remaining information is subject to a presumption listed in section 21(3) and section 21(4) is also not applicable to this information.

[116] 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 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 the factor in section 21(2)(h) which favours non-disclosure applies. Specifically, I find that the personal information has been supplied in confidence [section 21(2)(h)] and that in the context of these records, the individuals to whom this information relates would not expect the university to disclose their names, personal emails, and other personal information about themselves to the appellant for his own private purposes.

[117] Accordingly, I find that disclosure of the personal information belonging to individuals other than the appellant that is found in the following records would amount to an unjustified invasion of their personal privacy and find that the discretionary exemption at section 49(b) applies:

- On the disclosed records index: records 1-5, 7, 8, 20, 33, 38-39, 52, 55, 58, 60, 62, 75, 88-91, 100, 107, 112-113, 159-160, and 259.

- On the undisclosed records index records: 241, 281, 296-298, 332, 609-614, and 630.

- On the supplementary index: record 13.

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

[118] 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.

[119] In this order, I have found that records 2, 4, 19, 21, 32, 40, 41, 45, 52, 56, 57, 74-76, 90-93, 117, 121-123, 303-308, 311, 333, 345, 545, and 554, on the undisclosed records index and records 6, 7, and 8 on the supplementary index qualify for exemption under section 49(a), read in conjunction with section 19(c), and the records remaining at issue on the disclosed records index, as well as records 241, 281, 296 to 298, 332, 609-614, and 630, on the undisclosed records index, and record 13 on the supplementary index qualify for exemption under section the discretionary exemption at section 49(b). Consequently, I will assess whether the university exercised its discretion properly in applying this exemption to the portions of records that have been withheld.

[120] 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.

[121] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[36] This office may not, however, substitute its own discretion for that of the institution. [37]

[122] 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

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

  - 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.[38]

***Representations***

[123] 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 section 49(b).

[124] 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:

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

- 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.

[125] 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.

[126] 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*

[127] I have considered the university's representations on the manner in which it exercised its discretion with respect to the following records:

- On the disclosed records index: records 1-5, 7, 8, 20, 33, 38-39, 52, 55, 58, 60, 62, 75, 88-91, 100, 107, 112-113, 159-160, and 259.
- On the undisclosed records index records: 2, 4, 19, 21, 32, 40, 41, 43, 45, 52, 56, 57, 74-76, 90-93, 117, 121-123, 241, 281, 296-298, 303-308, 311, 332, 333, 345, 545, 554, 609-614, and 630.
- On the supplementary index: records 6, 7, 8, and 13.

[128] Based on that information, I accept that the university's exercise of discretion not to disclose those records (or the severed portions of those records) pursuant to section 49(a), read in conjunction with section 19(c), or 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 (b) of the *Act*.

## ORDER:

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

Original Signed by: November 27, 2012
Catherine Corban
Adjudicator