

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3302

Appeal PA13-98-2

University of Ottawa

January 31, 2014

Summary: The appellant made an access request to the University of Ottawa under the *Freedom of Information and Protection of Privacy Act* for records about himself. The university indicated that the exemptions in sections 13(1) (advice or recommendations), 21 and 49(b) (personal privacy) of the *Act* apply to certain records. The university also claimed that some records were excluded from the application of the *Act*, pursuant to section 65(6) (employment or labour relations). The adjudicator does not uphold the application of the exclusion in 65(6)1 to Record 109 and orders the university to make an access decision on this record. She also finds that Record 90 is not responsive to the appellant's request. She partially upholds the university's decision under the discretionary advice or recommendations exemption in section 13(1), read with section 49(a), and the discretionary personal privacy exemption in section 49(b).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 65(6)1, 2(1) (definition of personal information, 49(a), 8(1)(d), 8(1)(g), 49(b), 21(3)(d), 21(3)(g), 21(2)(h) and 21(2)(i).

OVERVIEW:

[1] The University of Ottawa (the university) received seven requests under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*), from the same requester. In this specific request, the requester sought access to the following information:

...

I hereby request from the University of Ottawa all documents and/or records related to [requester's name] University of Ottawa [specified student number], and, included to but not limited to, sent to/by and/or received to/by and/or in possession physically and/or electronically of:

1. [named school at named faculty], [named individual], full professor.

...

[2] In response, the university issued a time extension decision which was subsequently appealed by the requester (now the appellant). As a result of mediation, Appeal PA13-98 was resolved when the university agreed to issue an access decision.

[3] The university then issued a decision granting partial access to the responsive records. In its index of records, the university indicated that the exemptions in sections 13(1) (advice or recommendations), 21 and 49(b) (personal privacy) of the *Act* apply to certain records. The university also claimed that some records were excluded from the application of the *Act*, pursuant to section 65(6) (employment or labour relations).

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

[5] During mediation, the appellant narrowed the records at issue to include only Records 8, 31, 32, 43, 67, 90, 109 and 117, which he claimed contained his personal information and should be disclosed. The appellant also pointed out that in many of the disclosed records, the dates and the names of the persons sending and receiving the emails are missing. The mediator relayed the issues to the university which explained that some emails had been received without the dates, or names of the sender and receiver.

[6] No further mediation was possible and the file was transferred to the adjudication stage of the appeals process where an adjudicator conducts an inquiry. I sought representations from the university and eight other individuals (the affected persons), initially. I received representations from the university and one affected person.

[7] I then sent a copy of the university's representations to the appellant seeking his representations. Portions of the university's representations were withheld due to confidentiality concerns. I also advised the appellant that the one affected person that provided representations objected to the disclosure of his personal information in Record 90. The appellant did not provide representations in response.

[8] In this order, I do not uphold the application of the exclusion in 65(6)1 to Record 109 and order the university to make an access decision on this record. I also find that Record 90 is not responsive to the appellant's request. I find that all of the records

remaining at issue contain the personal information of the appellant and that sections 49(a) and (b) apply to exempt some of the responsive information. In addition, I partially uphold the university's decision to apply the advice or recommendations exemption in section 13(1), read with section 49(a), and the personal privacy exemption in section 49(b) to the records.

RECORDS:

[9] Portions of Records 8, 31, 32, 43, 67, 90, and 109 and all of Record 117 remain at issue. These records consist of chains of emails. In addition Record 117 has an attachment.

ISSUES:

- A. Does the labour relations and employment records exclusion in section 65(6)1 exclude Record 109 from the *Act*?
- B. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- C. Does the discretionary exemption at section 49(a), in conjunction with the discretionary section 13(1) advice or recommendations exemption, apply to Records 31 and 32?
- D. Does the discretionary personal privacy exemption at section 49(b) apply to the information at issue in Records 8, 31, 32, 43, 67 and 90?
- E. Did the institution exercise its discretion under sections 49(a) and 49(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Does the labour relations and employment records exclusion in section 65(6)1 exclude Record 109 from the *Act*?

[10] Section 65(6) states in part:

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.

[11] 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*.

[12] 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.¹

[13] 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.²

[14] 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.³

[15] 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.⁴

[16] 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*.⁵

[17] 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 institution may be held vicariously liable for torts caused by its employees.⁶

[18] 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

¹ Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

² *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.). See also Order PO-2157.

³ Order PO-2157.

⁴ *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.

⁵ Orders P-1560 and PO-2106.

⁶ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.⁷

[19] For section 65(6)1 to apply, the institution must establish that:

1. the record was collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; and
3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.

[20] The university provided both confidential and non-confidential representations on this issue. In its non-confidential representations, it states that Record 109 needs to be put in context as it follows the e-mail chain contained in Record 108. It states that the university collected and maintained this communication exchange as it had been received by a specific dean and vice-dean. It further states that the anticipation of proceedings is more than a vague or theoretical possibility.

Analysis/Findings

Part 1: collected, prepared, maintained or used

[21] A copy of Record 109 was received by a specific dean and vice-dean. Therefore, I find that part 1 of the test has been met by the university, and that the information in Record 90 was collected and maintained by it.

Part 2: proceedings before a court or tribunal

[22] The word "proceedings" means a dispute or complaint resolution process conducted by a court, tribunal or other entity which has the power, by law, binding agreement or mutual consent, to decide the matters at issue.⁸

[23] For proceedings to be "anticipated", they must be more than a vague or theoretical possibility. There must be a reasonable prospect of such proceedings at the time the record was collected, prepared, maintained or used.⁹

[24] The word "court" means a judicial body presided over by a judge.¹⁰

⁷ *Ministry of Correctional Services*, cited above.

⁸ Orders P-1223 and PO-2105-F.

⁹ Orders P-1223 and PO-2105-F.

[25] A “tribunal” is a body that has a statutory mandate to adjudicate and resolve conflicts between parties and render a decision that affects the parties’ legal rights or obligations.¹¹

[26] “Other entity” means a body or person that presides over proceedings distinct from, but in the same class as, those before a court or tribunal. To qualify as an “other entity”, the body or person must have the authority to conduct proceedings and the power, by law, binding agreement or mutual consent, to decide the matters at issue.¹²

[27] Based on my review of the information in Record 109 and the university’s representations, I find that it was collected and maintained in relation to anticipated proceedings before a court. Therefore, part 2 of the test has been met.

Part 3: labour relations or employment

[28] The proceedings to which the paragraph appears to refer to are proceedings related to employment or labour relations per se - that is, to litigation relating to terms and conditions of employment, such as disciplinary action against an employee or grievance proceedings. In other words, it operates to exclude records relating to matters in which the institution has an interest as an employer. It does not exclude records where the institution is sued by a third party in relation to actions taken by government employees.¹³

[29] Although a copy of Record 109 was received by a specific dean and vice-dean, I find that this fact alone does not ensure that this record comes within the section 65(6)1 exclusion.

[30] As stated above, 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.

[31] Based on my review of the information in Record 109 and the related record, Record 108, and the university’s representations, I find that Record 109 does not relate to labour relations or the employment of a person by the university.

[32] As stated above, 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. Based on my review of the information in the record and the university’s

¹⁰ Order M-815.

¹¹ Order M-815.

¹² Order M-815.

¹³ *Ministry of Correctional Services*, cited above.

representations, I find that it does not relate to the employment of a person by the institution.

[33] Even if Record 109 could be said to relate to the employment of a person with the university, I would find that the record relates to the actions or inactions of an employee that may give rise to a civil action. As stated above, section 65(6)1 does not exclude records where the institution is sued by a third party in relation to actions taken by government employees.¹⁴

[34] Even if the university may be held vicariously liable for torts caused by one of its employees, I find that Record 109 is not excluded under section 65(6)1.¹⁵

[35] Accordingly, Record 109 is not excluded and is subject to the *Act*. I will order the university to provide the appellant with an access decision concerning Record 109.

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

[36] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains “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,

¹⁴ *Ministry of Correctional Services*, cited above.

¹⁵ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

- (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.

[37] 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.¹⁶

[38] 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.

[39] 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.¹⁷

[40] 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.¹⁸

¹⁶ Order 11.

¹⁷ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

¹⁸ Orders P-1409, R-980015, PO-2225 and MO-2344.

[41] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.¹⁹

[42] Remaining at issue in this appeal are Records 8, 31, 32, 43, 67, 90, 109 and 117. I have decided above that Record 109 is not excluded from the application of the *Act* by reason of section 65(6)1 and I am ordering the university to issue an access decision with respect to it. The university provided confidential representations on the whether the remaining records, other than Record 117, contain personal information. The affected person who responded to the Notice of Inquiry also provided confidential representations on Record 90.

Analysis/Findings

[43] Based on my review of the information at issue in the records, I find that, other than Record 117, the records at issue contain the personal information of the appellant and other identifiable individuals in their personal capacity. This personal information includes these individuals' employment and educational history,²⁰ correspondence sent to the university that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence²¹ and personal opinions or views.²²

[44] I find that Record 117 contains only the personal information of the appellant. Although other individuals' information is contained in this record, I find that this information is not personal information, but rather constitutes information associated with these individuals in a professional capacity. As no other exemptions beyond section 49(b) have been claimed for Record 117, I will order this record disclosed as its release will not result in an unjustified invasion of another individual's privacy.

[45] I will now consider whether the discretionary exemption at section 49(a), in conjunction with the discretionary section 13(1) advice or recommendations exemption, applies to Records 31 and 32 and the discretionary personal privacy exemption in section 49(b) applies to Records 8, 31, 32, 43, 67 and 90.

¹⁹ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

²⁰ Paragraph (b) of the definition of personal information in section 2(1) of the *Act*.

²¹ Paragraph (f) of the definition of personal information in section 2(1) of the *Act*.

²² Paragraphs (e) and (g) of the definition of personal information in section 2(1) of the *Act*.

C. Does the discretionary exemption at section 49(a), in conjunction with the discretionary section 13(1) advice or recommendations exemption, apply to the information at issue?

[46] 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.

[47] 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.

[48] 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 institutions the power to grant requesters access to their personal information.²³

[49] Where access is denied under section 49(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[50] In this case, the institution relies on section 49(a), in conjunction with section 13(1), which reads:

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

[51] The purpose of section 13 is to ensure that persons employed in public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure.²⁴

²³ Order M-352.

²⁴ Orders 24 and P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.).

[52] Previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information.²⁵

[53] "Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must reveal a course of action that will ultimately be accepted or rejected by its recipient.²⁶

[54] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.²⁷

[55] It is implicit in the various meanings of "advice" or "recommendations" considered in *Ministry of Transportation* and *Ministry of Northern Development and Mines*²⁸ that section 13(1) seeks to protect a decision-making process. If the document actually suggests the preferred course of action it may be accurately described as a recommendation. However, advice is also protected, and advice may be no more than material that permits the drawing of inferences with respect to a suggested course of action but does not recommend a specific course of action.²⁹

[56] There is no requirement under section 13(1) that an institution be able to demonstrate that the document went to the ultimate decision maker. What section 13(1) protects is the deliberative process.³⁰

[57] Examples of the types of information that have been found *not* to qualify as advice or recommendations include

- factual or background information
- analytical information

²⁵ See Order PO-2681.

²⁶ Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

²⁷ Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above); see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above).

²⁸ Cited above.

²⁹ *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, 2012 ONCA 125 (C.A.).

³⁰ *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, (cited above).

- evaluative information
- notifications or cautions
- views
- a supervisor's direction to staff on how to conduct an investigation³¹

[58] The university provided both confidential and non-confidential representations on this issue. In its non-confidential representations, it states that the specific advice and recommendation contained in Record 31, has been given by a vice-dean on the request of an employee of the university. It further states that Record 32, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations contained in Record 31. The university states:

The professors, administrative staff and the various academic units, within a faculty of an institution have to deal with many students, in various different situations. It is submitted that it is important to protect the free flow of advice or recommendations among the representatives of the faculty and of the academic unit as it is an important element in the decision making process for an educational institution. The disclosure of the advice or recommendation will reasonably expected to inhibit the free flow of advice or recommendation to the institution.

Analysis/Findings

[59] Records 31 and 32 are identical email chains, except Record 32 contains an additional email. Record 31 has two severances and Record 32 has three severances. Based on my review of the information at issue and the university's representations, I find that the first severance in Record 31 and the first two severances in Record 32 reveal advice or recommendations or the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations. As none of the exceptions to section 13(1) in section 13(2) apply, subject to my review of the university's exercise of discretion, these severances are exempt under section 49(a), read in conjunction with section 13(1).

³¹ Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above); Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above).

[60] The second severance on Record 31 and the third severance on Record 32 are identical. I find that section 13(1) does not apply to this information as it does not reveal advice or recommendation within the meaning of section 13(1). This information is factual or background information. However, I will consider below the university's application of the discretionary personal privacy exemption at section 49(b) to this severance from Records 31 and 32.

D. Does the discretionary personal privacy exemption at section 49(b) apply to the information at issue in Records 8, 31, 32, 43, 67 and 90?

[61] The university provided confidential representations on the application of the personal privacy exemption to Records 8, 31, 32, 43, 67 and 90.

[62] Section 47(1) of the *Act* 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.

[63] Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. Since the section 49(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.

[64] Sections 21(1) to (4) provide guidance in determining whether disclosure of the information would be an unjustified invasion of personal privacy.

[65] If the information fits within any of paragraphs (a) to (e) of section 21(1) or if any of paragraphs (a) to (d) of section 21(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b). In this appeal, the information does not fit within paragraphs (a) to (e) of section 21(1) or paragraphs (a) to (d) of section 21(4).

[66] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 49(b), this office will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties.³²

[67] If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 49(b). The one affected person that provided representations relies on section 21(3)(d) for Record 90.

³² Order MO-2954.

[68] The university states that the presumption in section 21(3)(d) applies to Record 43, and the presumption in section 21(3)(g) applies to Records 8, 67 and 90. It also submits that the information in Record 90 could be considered non-responsive to the appellant's request, even if it is contained in a chain of mail regarding his own thesis defense.

[69] Sections 21(3)(d) and (g) read:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

(d) relates to employment or educational history;

(g) consists of personal recommendations or evaluations, character references or personnel evaluations.

[70] Information which reveals the dates on which former employees are eligible for early retirement, the start and end dates of employment, the number of years of service, the last day worked, the dates upon which the period of notice commenced and terminated, the date of earliest retirement, entitlement to and the number of sick leave and annual leave days used and restrictive covenants in which individuals agree not to engage in certain work for a specified duration has been found to fall within the section 21(3)(d) presumption.³³

[71] The thrust of section 21(3)(g) is to raise a presumption concerning recommendations, evaluations or references about the identified individual in question rather than evaluations, etc., by that individual.³⁴ The terms "personal evaluations" or "personnel evaluations" in section 21(3)(g) refer to assessments made according to measurable standards.³⁵ This exemption has been found to apply, for example, to interview or test scores in job competitions.³⁶

[72] The information at issue in Record 8 is not a personal or personnel evaluation made according to measurable standards. Nor can this information be said to be a character reference or personal recommendation. The information at issue in Record 8 consists merely of a comment about the sender of the email and the contents of the email.

[73] Based on my review of the information at issue in Record 8, I do not agree with the university that the information at issue in this record reveals personal

³³ Orders M-173, P-1348, MO-1332, PO-1885 and PO-2050. See also Orders PO-2598, MO-2174 and MO-2344.

³⁴ Order P-171.

³⁵ Orders PO-1756 and PO-2176.

³⁶ See Orders P-447, PO-1756, PO-2176, PO-3133 and PO-3150.

recommendations or evaluations or character references within the meaning of section 21(3)(g).

[74] Based on my review of the information at issue in Record 43, I agree with the university that it reveals information about an affected person's employment history and is subject to the presumption in section 21(3)(d).

[75] Based on my review of Record 67, I find that the personal information does not consist of personal recommendations or evaluations, character references or personnel evaluations within the meaning of section 21(3)(g). The information in that record is a brief comment. The affected person who made the comment did not provide representations in this appeal. It is not clear from my review of this comment what exactly the affected person is commenting on. As such, I do not have sufficient evidence to determine that the presumption in section 21(3)(g) applies to this comment.

[76] Based on my review of the information at issue in Record 90, I agree with the university that the information at issue in this record is not responsive to the appellant's request as it does not relate to the appellant. The appellant only sought information about himself in his request. I also agree with the affected person that provided representations that that it reveals information about this affected person's employment history and is subject to section 21(3)(d). As the information at issue in Record 90 is not responsive to the appellant's request, I will not consider it any further in this order.

[77] Although the information at issue in Records 8, 67 and 90 contains references made by certain individuals about other individuals, these references are merely observations made by these individuals and do not contain any formality that would be required for "assessments made according to measurable standards." Accordingly, I find that the presumption at section 21(3)(g) does not apply to the personal information at issue in these records.³⁷

[78] I will consider whether any of the factors in section 21(2) apply to the information at issue in this record.

[79] Section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.³⁸

[80] The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2) [Order P-99]. The university relies on two factors that favour privacy protection

³⁷ Order PO-3133.

³⁸ Order P-239.

for Records 8, 31 and 32. It did not provide any representations on the applicability of the factors in section 21(2) to Record 67.

[81] The university states that the factor in section 21(2)(i) applies to the information at issue in Record 8 and the factor in section 21(2)(h) applies to the information at issue in Records 31 and 32. These sections read:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(h) the personal information has been supplied by the individual to whom the information relates in confidence;

(i) the disclosure may unfairly damage the reputation of any person referred to in the record.

[82] The factor in section 21(2)(h) applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 21(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.³⁹

[83] The applicability of section 21(2)(i) is not dependent on whether the damage or harm envisioned by the clauses is present or foreseeable, but whether this damage or harm would be "unfair" to the individual involved.⁴⁰

[84] The university provided confidential representations on Record 8. I agree with the university that disclosure may unfairly damage the reputation of a person referred to in the record and that the information in this record is subject to the factor in section 21(2)(i).

[85] Concerning Records 31 and 32, the university states that:

... the information contained in that portion of these records is a resume of conversations implicitly of a confidential nature. The fact that this information was sent to four people in a goal of determining the potential options should not be considered as consent to disclosure from those who gave that information to the sender. They would probably have expected that the information shared would serve to enlighten the administration on their own situation but they would also implicitly have expected that

³⁹ Order PO-1670.

⁴⁰ Order P-256.

the administration would preserve the confidentiality of the information shared.

[86] The information at issue in Records 31 and 32 is the same information. I find that the personal information at issue in these records has been supplied by the individual to whom it relates in confidence and that the factor favouring privacy protection in section 21(2)(h) applies.

Conclusion

[87] I found above that the information at issue in Record 90 is not responsive to the request and that this record is no longer at issue in this appeal.

[88] Concerning the information at issue in Records 8, 31, 32, 43 and 67, I have considered and weighed the factors and presumptions in sections 21(2) and (3) noted above, and balanced the interests of the parties.

[89] Based on my review of the information at issue in these records, and in the absence of representations from the appellant, I find that no factors weigh in favour of disclosure of the information at issue in Records 8, 31, 32 and 43. I find that either a presumption in section 21(3) or a factor favouring privacy protection in section 21(2) apply to all of the information at issue in these records, except for the information at issue in Record 67.

[90] As no presumptions or factors favouring privacy protection apply to the information in Record 67, I will order this record disclosed.

[91] Concerning Records 8, 31, 32 and 43, I find, subject to my review of the university's exercise of discretion, that disclosure of the personal information at issue in these records would be an unjustified invasion of personal privacy and they are, accordingly, exempt under section 49(b).

E. Did the institution exercise its discretion under sections 49(a) and 49(b)? If so, should this office uphold the exercise of discretion?

[92] The sections 49(a) and 49(b) exemptions 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, the Commissioner may determine whether the institution failed to do so.

[93] In addition, the Commissioner 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
- it fails to take into account relevant considerations.

[94] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.⁴¹ This office may not, however, substitute its own discretion for that of the institution.⁴²

[95] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:⁴³

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or 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

⁴¹ Order MO-1573.

⁴² Section 54(2).

⁴³ Orders P-344, MO-1573.

- the age of the information
- the historic practice of the institution with respect to similar information.

[96] The university states that when exercising its discretion, it took into consideration the purpose of the *Act*, whether the appellant was seeking his own personal information, whether he had a sympathetic or compelling need to receive the information, the nature of the information and the extent to which it was significant and/or sensitive to the appellant or any affected person, and the need to protect the free flow of advice or recommendations.

[97] The university states:

The appellant is seeking his own personal information and might have a general sympathetic or compelling need to receive the information requested. Under this consideration, almost all records had been released or partially released to the appellant. On the other hand, the professors of an institution have to deal with many students and various different situations. It is submitted that it is important to protect the free flow of advice or recommendation as they must feel free to consult on different matters to be reassured on the way to respect the practices of the institution. The disclosure of the advice or recommendation will reasonably be expected to inhibit the free flow of advice or recommendation to the institution. Also in the application of section 49(b), the personal information of others contained in the records would have constituted an invasion of privacy. Therefore, the coordinator exercised his discretion to preserve the confidentiality of personal information.

Analysis/Findings

[98] Based on my review of the information at issue in the records and the university's representations, and in the absence of representations from the appellant, I find that the university exercised its discretion in a proper manner under sections 49(b) and 13(1). I find that the university took into account relevant considerations and did not take into account irrelevant considerations in the exercise of its discretion and I will uphold the university's exercise of discretion. I find that the information at issue in Records 31 and 32 is exempt by reason of section 49(a) read in conjunction with section 13(1) or section 49(b) and the information at issue in Records 8 and 43 is exempt under section 49(b).

ORDER:

1. I order the university to disclose to the appellant the information at issue in Records 67 and 117 by **March 10, 2014** but not before **March 4, 2014**.
2. I order the university to provide the appellant with an access decision concerning Record 109, using the date of this order as the date of the request.
3. I uphold the university's decision to deny access to the remaining information at issue in the records.

Original Signed By:
Diane Smith
Adjudicator

January 31, 2014