Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3447

Appeal PA09-249

University of Ottawa

January 12, 2015

Summary: The appellant made a request to the University of Ottawa (the university) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all records about him that were sent by, or received by, or held by the university's President. The university located responsive records and issued a decision letter, granting partial access to them. The university also denied access to other records, in whole or in part, claiming the application of the discretionary exemptions in section 49(b) in conjunction with section 21(1) (personal privacy), and section 49(a) in conjunction with section 19 (solicitor-client privilege). The university also claimed the application of the exclusion in section 65(6) of the *Act* to some of the records, and advised the requester that portions of records were non-responsive to the request. The appellant also took the position that additional responsive records should exist.

In this order, the adjudicator upholds the university's access decision, its exercise of discretion and its search as being reasonable. The appeal is dismissed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (definition of personal information), 19, 21(1), 24, 49(a), 49(b) and 65(6).

Orders Considered: Order PO-2867.

Cases Considered: *Ministry of the Attorney General and Toronto Star and Privacy Commissioner of Ontario*, 2010 ONSC 991 (CanLII).

OVERVIEW:

[1] The requester made a request to the University of Ottawa (the university) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all records about him that were sent by, or received by, or held by the university's President. The university located responsive records and issued a decision letter, granting partial access to them. It also denied access to other records, in whole or in part, claiming the application of the discretionary exemptions in section 49(b) in conjunction with section 21(1) (personal privacy), and section 49(a) in conjunction with section 19 (solicitor-client privilege). The university also claimed the application of the exclusion in section 65(6) of the *Act* to some of the records, and advised the requester that portions of other records were non-responsive to the request.

[2] The requester, now the appellant, appealed the university's decision to this office.

[3] During the mediation of the appeal, the appellant advised the mediator that he was pursuing access to all of the withheld records and was also of the view that additional responsive records should exist. In particular, the appellant claimed that additional records should exist that explain or accompany a specific record and that four specific e-mails to the President of the university should also exist. The appellant also questioned whether the Office of the President of the University was searched, as none of the email communications involving the President were printed from that office.

[4] The university advised the mediator that an electronic version of the records was provided to the Office of the Vice-President, Governance for printing as at the time of the request, that office was responsible for processing access to information requests. The university also advised that the record referred to by the appellant was not accompanied by any other documents when it was provided to the Access to Information and Privacy Office. The Office of the President conducted an additional search for the four specific e-mails to which the appellant sought access, and that none of these records was located during this search, according to the university. The appellant was not satisfied with this explanation and, consequently, the reasonableness of the university's search was added as an issue in this appeal.

[5] The appeal then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. I sought and received representations and reply representations from the university and the appellant, which were shared in accordance with this office's *Practice Direction 7*. In his representations, the appellant denies application of the exclusion and exemptions claimed by the university, and submits that its exercise of discretion should not be upheld. The appellant provided more detailed representations regarding the issues of responsiveness and search, which are set out, below.

[6] For the reasons that follow, I uphold the university's access decision, its exercise of discretion and its search as being reasonable. The appeal is dismissed.

RECORDS:

[7] The records consist of e-mails and reports, which are listed in the university's index of records that was provided to the appellant.

ISSUES:

A: What records are responsive to the request?

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 section 19 exemption apply to the information at issue?

D: Does the mandatory exemption at section 21(1) or the discretionary exemption at section 49(b) apply to the information at issue?

E: Does section 65(6) exclude the records from the *Act*?

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

G: Did the institution conduct a reasonable search for records?

DISCUSSION:

Issue A: What records are responsive to the request?

[8] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

. . .

> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[9] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[1] To be considered responsive to the request, records must "reasonably relate" to the request.[2]

[10] The university submits that portions of records 7, 8, 26, 48, 52, 54, 77, 84, 85, 93, 94, 96, 98, 99, 109, 112, 113, 119, 120, 122, 123, 132, 139, 160, 164, 165, 169, 170, 171, 200, 201, 203, 204, 208-213 and 219 are not responsive to the appellant's access to information request as the request is for his own information.[3] The university then sets out a general description of the withheld portions of the records listed above:

- record 7 contains information that relates to a conversation between the President and his former chief of staff about making arrangements to speak directly with one another;

- records 8 and 165 relate to email exchanges among the university's senior administration and some members of the university's Board of Governors about circumstances involving other institutions that are not concerned with the appellant;

- records 48, 93, 94, 96, 98, 99, 119, 120, 160 and 164 are not responsive to the request as they consist of email exchanges between the university's President and its former Executive Director of the Communications Directorate that do not relate to the appellant;

- records 26, 54, 84, 122, 123, 132 and 139 consist of personal information of students or former students (for example, personal contact information) and their personal comments to the President on various matters that do not relate to the appellant;

- records 77, 85, 109, 112 and 113 are not responsive to the request as they consist of email discussions among members of the university's

[1] Orders P-134 and P-880.
[2] Orders P-880 and PO-2661.
[3] I note that the university's index also indicates that portions of records 180, 181, 182, 183, 184, 185, 186 and 214 are also non-responsive.

> senior administration relating to various matters and affairs of the university concerning it as a whole which do not relate to the appellant;
>
> - records 169, 170 and 171 consists of email exchanges between the President and a journalist discussing matters that do not relate to the appellant; and
>
> - records 184 through 186 consist in part of information provided by a third party and discuss issues that do not relate to the appellant.

[11] In response, the appellant submits:

> The University argues . . . that parts of responsive records are not responsive. The appellant submits that all parts of a responsive record should be taken to be responsive *a priori*, unless the University can establish (University's burden of proof) that the parts it wishes to exclude are correctly excluded pursuant to statutory exclusions foreseen in the *Act*. This is because, *a priori*, any part of a responsive record that does not relate to the request when read in isolation, does in fact relate to the request when read in the context of the whole record, or of many records. Since it is difficult to judge these relations, a liberal interpretation should be used, especially when the request is of the classic "about me" type, as is the case here. Furthermore, the appellant's dealings with the University are broad and varied, thereby multiplying the opportunities for any part of a respondent record to be reasonably related to the "about me" request.

[12] The appellant's request was for access to all records about him that were sent by, or received by, or held by the university's President. As previously stated, to be considered responsive to the request, records must "reasonably relate" to the request.[4] In my view, the appellant was clear that he was seeking information about himself. I agree with the university that the information it has identified as being non-responsive to the request is non-responsive with some exceptions, as set out below.

[13] I have reviewed the records and I find that portions of the records contain information that are either exclusively about individuals other than the appellant or pertain to issues that are unrelated to the appellant. As the appellant's request was for records that contain information about him, I find that it was reasonable for the university to sever the portions of records that are not about the appellant.

[14] Conversely, I find that the portions of records the university identified as non-responsive in records 52, 139, 204, 208-213 and 219 are, in fact, responsive to the request, as they "reasonably relate" to information about the appellant. I note that the

[4] Orders P-880 and PO-2661.

university has also claimed either exemptions or the exclusion in section 65(6) with respect to these records, which I will consider below.

[15] Consequently, I find that, with the exception of the records set out above, all of the information the university claims to be non-responsive to the request is not reasonably related to the appellant's request, and need not be disclosed to the appellant.

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

[16] 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.

[17] 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.[5]

[18] 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.[6]

[19] The university submits that records 4-7, 9, 13-16, 18, 20-30, 32, 34-37, 39, 41, 44-47, 49-60, 62-63, 66-76, 78-83, 86, 88-91, 97, 103, 108, 114, 117-118, 120-124, 128-132, 134, 137-142, 144, 146-159, 162, 165-166, 173, 175-186, 191, 196, 202-205, 214, 218 and 219 contain personal information. In particular, the university argues that the personal information contained in these records fall into one or more of the following descriptions:

- Records containing the name, personal email addresses and personal contact information of individuals;
- Records containing the educational history of students, former students and members of the community;
- Records containing the personal opinions or views of individuals; or
- Records containing correspondence sent by students to the university's senior management that is implicitly of a confidential nature.

[20] I have reviewed the records and I find that many of them contain information that qualifies as the personal information of identifiable individuals other than the appellant, as defined in section 2(1) of the *Act*, including: paragraph (b) (educational or employment history); paragraph (d) (address and telephone number); and paragraph (e) (personal opinions of the individual).

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

[21] Similarly, I find that many of the records listed above also contain information about the appellant that qualifies as his personal information, as defined in section 2(1) of the *Act*, including the views of another individual about him (paragraph (f)) and the appellant's name where it appears with other personal information relating to him (paragraph (h)). In sum, I find that the records contain either the personal information of the appellant, that of other individuals, or both.

Issue C: Does the discretionary exemption at section 49(a) in conjunction with the section 19 exemption apply to the information at issue?

[22] The university claims the application of section 49(a), in conjunction with section 19, to records 5, 9, 127, 160, 180, 185-186, 194, 196-201, 205, 208-213, 215-216 and 218-219. 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 to this right and states:

> 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. [emphasis added].

[23] 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.[7] 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.

[24] Section 19 of the *Act* states:

> 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 or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

[7] Order M-352.

[25] Section 19 contains two branches as described below. Branch 1 arises from the common law and section 19(a). Branch 2 is a statutory privilege and arises from section 19(b), or in the case of an educational institution or hospital, from section 19(c). The institution must establish that at least one branch applies.

[26] Branch 1 of the section 19 exemption 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.[8]

[27] 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.[9] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[10]

[28] 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.[11]

[29] 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.[12]

[30] Under branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege. Waiver of privilege is ordinarily established where it is shown that the holder of the privilege knows of the existence of the privilege, and voluntarily evinces an intention to waive the privilege.[13] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[14]

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[8] Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).
[9] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[10] Orders PO-2441, MO-2166 and MO-1925.
[11] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[12] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).
[13] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).
[14] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; see also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.).

[31] Branch 2 is a statutory exemption that is available in the context of Crown counsel giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons. Branch 2 applies to a record that was prepared by or for Crown counsel, or counsel for an educational institution or hospital, "for use in giving legal advice."

[32] The university claims the application of section 49(a), in conjunction with section 19, to records 5, 9, 127, 180, 185-186, 194, 196, 198-201, 205, 208-213, 215-216 and 218-219 in their entirety. The university states that these records fall into two general categories, namely: emails and other communications between university staff and its legal counsel for the purpose of seeking and/or giving legal advice; and emails or other communications that form part of the "continuum of communications" that were exchanged for the purpose of keeping the university's legal counsel and staff informed so that advice may be sought or given, as required.

[33] The university goes on to argue that all of these communications were made with the understanding they would remain confidential, and that it has not taken any action, either implicitly or explicitly, that would constitute waiver of its common-law and statutory solicitor-client privilege. The university states that the records have not been disclosed to outsiders by counsel or staff and that it has not voluntarily evinced an intention to waive the privilege.

[34] I have reviewed the records for which the university has claimed the application of the solicitor-client privilege exemption in section 19, and I find that they qualify for exemption under branch 1 of the section 19 exemption. The records contain ongoing communications between university staff and its legal counsel,[15] regarding its ongoing dispute with the appellant in regard to his position at the university. In particular, disclosure of the records would reveal that:

- The President of the University and other staff sought legal advice from legal counsel on particular subjects;
- Instructions were given by the President to legal counsel;
- Legal advice and opinions were given by legal counsel to the President and staff; and
- Legal counsel reviewed draft materials.

[35] It is clear from my review of the records that there was a solicitor-client relationship between the university and the legal counsel with whom the

[15] The content of several of the records for which this exemption was claimed is duplicated in other records. This duplication does not affect my finding. I raise it as an observation only.

communications took place. I am also satisfied that these records constitute direct communications of a confidential nature between university staff and its legal counsel for the purpose of seeking and giving professional legal advice, as well as providing instructions to legal counsel on the issues arising as a result of the ongoing dispute with the appellant. The records were either prepared by legal counsel or by university staff for legal counsel and form part of the "continuum of communications" between a solicitor and client. In addition, based on my review of the university's representations, it has not waived its solicitor-client privilege.

[36] Under section 10(2) of the *Act*, an institution must disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt. Some of the records for which this exemption was claimed were severed by the university and disclosed to the appellant, in part. Other records were withheld, in full. I find that these records represent communications containing legal advice and related information, and do not contain communications for other purposes which are unrelated to legal advice. Consequently, I find that the withheld information is subject to solicitor-client privilege and that they qualify for exemption under branch 1 of section 19. As a result, I conclude that they are exempt under section 49(a) subject to my review of the university's exercise of discretion.

Issue D: Does the mandatory exemption at section 21(1) or the discretionary exemption at section 49(b) apply to the information at issue?

[37] The university is claiming the application of the discretionary personal privacy exemption in section 49(b), in conjunction with section 21(1) to portions of records 4, 118, 128, 202 and 214, as well as the mandatory personal privacy exemption in section 21(1) to portions of records 6, 7, 13, 15, 16, 18, 20-30, 32, 34-37, 39, 41, 44-47, 49-60, 62-63, 66-76, 78-83, 86, 88-91, 97, 103, 108, 114, 117, 120-124, 129-132, 134, 137-142, 144, 146-159, 162, 165-166, 173, 175-179, 183 and 191.

[38] 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.

[39] 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.

[40] In contrast, under section 21(1), where a record contains personal information of another individual but *not* the requester, the institution is prohibited from disclosing

that information unless one of the exceptions in sections 21(1)(a) to (e) applies, or unless disclosure would not be an unjustified invasion of personal privacy.

[41] In applying either of the section 49(b) or 21(1) exemptions, sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Also, section 21(4) lists situations that would not be an unjustified invasion of personal privacy.

[42] 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.

[43] For records claimed to be exempt under section 21(1) (ie., records that do not contain the requester's personal information), a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if a section 21(4) exception or the "public interest override" at section 23 applies.[16]

[44] If the records are not covered by a presumption in section 21(3), section 21(2) lists various factors that may be relevant in determining whether disclosure of the personal information would be an unjustified invasion of personal privacy and the information will be exempt unless the circumstances favour disclosure.[17] For records claimed to be exempt under section 49(b) (ie., records that contain the requester's personal information), this office will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.[18]

[45] This factor 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.[19]

[46] The university submits that the mandatory exemption in section 21(1) applies to some of the personal information at issue. Further, the university argues that the records containing the personal information of both the appellant and other individuals are exempt under section 21(1), as the disclosure of this information would constitute an unjustified invasion of the individuals' privacy, given that the information was supplied in confidence to the university.[20]

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[16] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.
[17] Order P-239.
[18] Order MO-2954.
[19] Order PO-1670.
[20] See the factor in section 21(2)(h) of the *Act*.

[47] The majority of the records for which section 21(1) was claimed were disclosed to the appellant, in part. These records consist of email communications sent by individuals to the university's president, in which they provide opinions about the appellant and the university's actions. The information that was withheld consists of the individuals' names and contact information, their educational or employment history, as well as various information which I have found above to be not responsive to the request. The opinions of these individuals about the appellant and the university's actions were disclosed to him, with the exception of records 202 and 214, which were withheld from the appellant in their entirety.

[48] With respect to the personal information setting out only the educational or employment history of individuals other than the appellant, I find that the presumption in section 21(3)(d) applies to that information and it is, consequently, exempt from disclosure under section 21(1). The remaining information at issue consists of the names and contact information of the individuals who sent the emails. I find that the disclosure of this information, if combined with the opinions that were already disclosed to the appellant would constitute an unjustified invasion of these individuals' privacy under section 49(b) or 21(1).

[49] I do not accept the university's argument that section 21(2)(h) applies, as there is no objective evidence that the emails were supplied to the President "in confidence." However, I also find that none of the factors that weigh in favour of disclosure set out in section 21(2) apply in this instance. In addition, I find that while records 202 and 214, which were withheld in full, contain the appellant's personal information, that information is so intertwined with the personal information of others that it would not be possible to sever these records.

[50] Consequently, I find that all of the withheld information at issue is exempt from disclosure under sections 21(1) or 49(b), subject to my review of the university's exercise of discretion.

Issue E: Does section 65(6) exclude the records from the *Act*?

[51] The university claims the application of the exclusion in sections 65(6)(1) and 65(6)(3) to records 14, 42, 105, 106, 181, 182, 184, 192, 193, 195, 203, 204, 206, 207 and 217. 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.

[52] 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*.

[53] 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.[21]

[54] 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.[22] 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.[23]

[55] 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.[24]

[56] 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;

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

[22] *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.

[23] Order PO-2157.

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

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.

[57] 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.[25] 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.[26]

[58] The word "court" means a judicial body presided over by a judge.[27] 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.[28]

[59] "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.[29]

[60] The proceedings to which the paragraph appears to refer 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 excludes records relating to matters in which the institution has an interest as an employer.

[61] 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

[25] Orders P-1223 and PO-2105-F.
[26] *Ibid*.
[27] Order M-815.
[28] *Ibid*.
[29] *Ibid*.

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

[62] The phrase "labour relations or employment-related matters" has been found to apply in the context of, for example, an employee's dismissal[30] and a grievance under a collective agreement.[31] The records collected, prepared maintained or used by the 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.[32]

[63] The university submits that the records for which the exclusion is claimed were prepared by its employees on its behalf and contain discussions, consultations, and advice among the university's senior management and, in some instances, counsel for the university. It indicates that these discussions took place in connection with matters relating to the appellant's employment and other labour relations considerations. The university argues that it was at all times acting as an employer, and that terms and conditions of the appellant's employment were at issue.

[64] The university advises that its relationship with its full-time professors is governed by the collective agreement between it the Association of Professors of the University of Ottawa (APUO). Accordingly, all labour relations matters between the university and the APUO members are dealt with in accordance with the collective agreement.

[65] The university goes on to state that at the time of the appellant's access request for information and the issuance of the decision letter, the appellant was an APUO member and was involved with several labour relations grievances with the university. An arbitrator subsequently issued an award resulting from the appellant's grievances relating to letters of reprimand and the appellant's dismissal from the university. The university advises that the APUO had recently notified it that it decided to make an application for judicial review of the arbitrator's award. Consequently, as of the date the representations were made, the university argues, the appellant's labour relations and employment matters were still ongoing.

[66] The university submits that subsections 65(6)(1) and 65(6)(3) apply to all records where section 65(6) was claimed given that the appellant's involvement in numerous labour relations and employment matters at the time the records were created. Furthermore, it argues that the records generally relate to consultations, discussions and communications about labour relations and employment related

[30] Order MO-1654-I.
[31] Orders M-832 and PO-1769.
[32] *Ministry of Correctional Services*, cited at note 6.

matters involving the appellant.

[67] In particular, the university states that the records fall into one of more of the following general descriptions:

- records relating to the appellant's numerous grievances filed under the collective agreement;
- records relating to the appellant's workload duties, behaviour in the workplace and his performance as a professor within his department; and
- records relating to the appellant's dismissal from the university.

[68] The university further submits that it has an interest in matters involving its own workforce. It states that for any employer, workload duties, workplace conduct, employee performance, disciplinary actions, dismissals and grievances filed under the collective agreement are serious matters which must be addressed by the university as the appellant's employer. The university goes on to argue that grievances and employee performance, as well as any form of unresolved workplace matters, will affect the working environment of the institution as a whole, and that the three-part test in section 65(6)3 has been met. Lastly, the university submits that none of the records fall within any of the exceptions in section 65(7) of the *Act*.

[69] In *Ministry of the Attorney General and Toronto Star and Privacy Commissioner of Ontario*,[33] the Divisional Court defined "relating to" in section 65(5.2) of the *Act* as requiring "some connection" between the records and the subject matter of the section. This definition has been adopted for the words "in relation to" in the municipal equivalent of the exclusion in section 65(6). In particular, there must be some connections between "a record" and either "proceedings or anticipated proceedings" or "meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest."

[70] I am satisfied that the records at issue, the majority of which are email communications, were collected, prepared, maintained and used by the university staff, including the President. Accordingly, I find that the university has established the first of three requirements for the application of sections 65(6)1 and 3.

[71] With respect to the remaining requirements in section 65(6)1, I am satisfied that the preparation, maintenance and use of records 105, 106,[34] 192, 193 and 195 was directly in relation to proceedings or anticipated proceedings before a tribunal or other entity and that these proceedings relate to the appellant's employment and dismissal

[33] 2010 ONSC 991 (CanLII).
[34] The withheld information in records 105 and 106 is identical.

from the university. In particular, the information contained in these records were used by the university to prepare for the anticipated grievance proceedings arising from the appellant's grievance of his dismissal. On this basis, I conclude that the university has met the second and third requirements for the application of section 65(6)1 with respect to records 105, 106, 192, 193 and 195, and that these records are excluded from the *Act*.

[72] Turning to the remaining records at issue,[35] all of which are email communications, I am also satisfied that these records meet the second and third requirements for the application of section 65(6)3, as they were collected, prepared, maintained and used in relation to consultations, discussions and communications about the appellant's labour relations, and the resulting labour relations and workforce considerations and issues in which the university has an interest.

[73] Neither the university nor the appellant argued that any of the exceptions in section 65(7) apply, and I find that this section has no application in the circumstances of this appeal. Accordingly, I find that section 65(6)1 applies to records 105, 106, 192, 193 and 195 and that section 65(6)3 applies to records 14, 42, 181, 182, 184, 203, 204, 206, 207 and 217. Consequently, I find that these records are excluded from the operation of the *Act*.

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

[74] 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.

[75] 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; or it fails to take into account relevant considerations. In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[36]. This office may not, however, substitute its own discretion for that of the institution.[37]

[76] Relevant considerations may include those listed below:

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[35] I note that information in records 181, 182 and 184 is partially duplicated, as is the case with records 206 and 207.
[36] Order MO-1573.
[37] Section 54(2) of the *Act*.

- the purposes of the *Act*, including the principles that: information should be available to the public; individuals should have a right of access to their own personal information; exemptions from the right of access should be limited and specific; and 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;

- the age of the information; and

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

[77] The university submits that it did not exercise its discretion in bad faith or for improper purposes, but that it took the following factors into consideration in exercising its discretion:

- the purpose of the *Act*;

- whether the appellant was seeking his own personal information;

- whether the appellant had a sympathetic or compelling need to receive the information; and

- whether disclosure of the records would increase public confidence in the operation of the university.

[78] The university also argues that the records for which it claimed the solicitor-client privilege exemption comprise exchanges of confidential communication between its legal counsel and staff for the purposes of seeking and giving legal advice. The university states that it has never disclosed privileged solicitor-client communications, thereby increasing public confidence in its operation.

[79] Further, the university argues that some the records include the personal information of other individuals as well as that of the appellant. It argues that this information was provided on a confidential basis by the individuals other than the appellant. The university goes on to state:

> It is important that personal information of other individuals, for which disclosure will constitute an unjustified invasion of personal privacy in accordance with *FIPPA*, remain undisclosed. This is not a case where personal information should be made available to the public. The 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.
>
> Furthermore, 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 personal and of the advice 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 with Counsel for the University in the furtherance of such advice at present and in the future.
>
> [emphasis added]

[80] I have carefully considered the representations of the university. I find that the university took into account relevant factors in weighing both for and against the disclosure of the information at issue and did not take into account irrelevant considerations. In my view, the university's representations reveal that they considered the appellant's position and circumstances and balanced them against the importance of the protection of its own solicitor-client privilege, and the personal privacy of other individuals in exercising its discretion not to disclose the information at issue. I am also mindful that the university has disclosed most of the responsive records to the appellant, either in whole or in part, including the majority of the appellant's own personal information.

[81] Under all the circumstances, therefore, I am satisfied that the university has appropriately exercised its discretion and I uphold the ministry's exercise of discretion to apply the exemptions in sections 49(a) and (b), in conjunction with sections 19 and 21(1), to the withheld information.

Issue G: Did the institution conduct a reasonable search for records?

[82] 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.[38] 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.

[83] 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.[39] To be responsive, a record must be "reasonably related" to the request.[40]

[84] 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.[41] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[42]

[85] The university provided its evidence on the issue of search in its representations and by way of an affidavit sworn by the Administrative Assistant of the Office of the President, who, amongst other staff, manages, files and organizes the paper and electronic files in the Office of the President. The university submits that it conducted a reasonable search for records, and that in the present case, it had no need to contact the requester for additional clarification because the scope of the request was clear. The university advises that the university's Freedom of Information Coordinator advised the Office of the President that the access to information request had been made to the university. Subsequently, the Administrative Assistant of the Officer of the President conducted a search of her computer and paper records for information responsive to the request. The university also advises that a search of the President's emails was conducted by the former Information Systems Security Officer from Computing and Communications Services for the university.

[86] In addition, the university states that as part of the Information and Privacy Commissioner's mediation process, the Office of the President conducted a second search for four specific emails. No records were located as a result of the additional search.

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[38] Orders P-85, P-221 and PO-1954-I.
[39] Orders P-624 and PO-2559.
[40] Order PO-2554.
[41] Orders M-909, PO-2469 and PO-2592.
[42] Order MO-2246.

[87] The university submits that given the nature and scope of the request, it has provided sufficient evidence to show that it has made reasonable effort to locate records responsive to the request.

[88] The appellant submits that the university has failed to provide evidence that it conducted a reasonable search for records. In particular, the appellant argues that:

- the university has not provided adequate evidence that the affiant is sufficiently knowledgeable in the subject matter, other than stating that she manages, files and organizes the paper and electronic files of the President;
- he has seen hundreds of records about him from the university and has observed that various communications often do not use his full family name. As such, a simple key-word search was not sufficient;
- the only two key words suggested by the university that were used were the appellant's initials and surname;
- the affiant only searched her own computer and did not detail her search methods;
- the university did not indicate whether the Information Systems Security Officer actually conducted a search of the President's computer and, if so, did not provide the results of that search;
- the Information Systems Security Officer did not provide an affidavit;
- the affiant did not indicate that she contacted or made inquiries to other persons who could be knowledgeable in the subject matter of the request;
- the university provided no evidence that its Chief of Staff's computer was searched;
- the Information Systems Security Officer cannot be considered to be an employee who is knowledgeable in the subject matter of the request because the request is not about information systems or information storage protocols, but is about a broad array of sensitive topics which directly involve the President; and
- in previous access requests made to the university subsequent searches have yielded more records.

[89] The appellant further submits that when a sensitive request involves a high-ranking officer of the university, the search should be conducted by an executive assistant, a chief of staff, an informed legal counsel or, in this case, the President himself.

[90] In reply, the university submits that the Information Systems Security Officer (the former Security Officer), who has since retired, conducted a reasonable search of the email accounts of the President and the Chief of Staff. The university goes on to state that the former Security Officer had extensive knowledge of the university's email system and often assisted the Access to Information and Privacy Office in answering questions relating to search issues. As well, the university states that at the time of the request, it was the practice that the former Security Officer would conduct the emails searches of the Office of the President, save any responsive records on a USB stick and then provide the USB stick to the Access to Information and Privacy Office.

[91] The university relies on Order PO-2867, in which Adjudicator Catherine Corban recognized that the former Security Officer was an experienced and knowledgeable employee to conduct a search of the electronic files of the President and of staff in his office.

[92] In sur-reply, the appellant argues that Order PO-2867 is distinguishable from this case in that the order is silent on the issue of whether an information systems security officer is suitably knowledgeable in the subject matter of the request, although he concedes that the officer may have conducted some of the searches of retired employees. In addition, the appellant submits that in PO-2867, the President's office was searched by the Executive Assistant[43] of the President and Chancellor, not by an information systems employee, and that twenty individuals provided affidavit evidence with respect to the searches conducted.

[93] As previously stated, the appellant's request was for copies of all records about him that were sent by, or received by, or held by the university's President. I have carefully reviewed the representations of both parties and I am satisfied that the university has conducted reasonable searches for responsive records, taking into account all of the circumstances of this appeal. A reasonable search is one in which an experienced employee expends a reasonable amount of effort to locate records which are reasonably related to the request.[44]

[94] The university provided evidence by way of affidavit and in its representations, explaining the nature and extent of the searches conducted in response to the request, and also the additional search conducted during the mediation of this appeal. These searches were conducted in the Office of the President, which is the location where these records would most likely be located. Although the second search did not

[43] The title of the position is now the Chief of Staff.
[44] Order M-909.

uncover additional information, I am satisfied that the nature and extent of these searches were reasonable in the circumstances. In addition, the appellant has not provided sufficient evidence of a reasonable basis for concluding that further records exist. The appellant argues that the two individuals who conducted the searches did not possess sufficient knowledge of the subject matter of the request to conduct an adequate search. I disagree. Part of one individual's job was to manage the President's records and I find that the Information Systems Security Officer would have the knowledge and experience to conduct adequate searches for electronic records. In addition, contrary to the appellant's assertions, I do not accept the fact that the Information Systems Security Officer did not provide an affidavit suggests that the university did not conduct a reasonable search.

[95] With respect to Order PO-2867, this order can be distinguished from the current appeal, as the request in that appeal was for all records relating to a presentation by an international human rights organization. This broad request entailed searches in five different departments at the university. Conversely, the request in this appeal was focused in terms of who the records relate to (the appellant), and where the records originated from and/or are held (the Office of the President). Consequently, I am satisfied the two individuals who conducted the searches did so in a reasonable fashion, and I uphold the university's search for responsive records.

ORDER:

I uphold the university's access decision, exercise of discretion and search, and dismiss the appeal.

Original Signed By: January 12, 2015
Cathy Hamilton
Adjudicator