Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER PO-3555-I

Appeal PA13-375

York University

November 27, 2015

Summary: The appellant sought access to records relating to matters involving him and the university. In response, the university granted full or partial access to certain records for a fee, and denied access to the remaining records or portions of records on the basis of the exemptions in sections 49(a) (discretion to refuse requester's own information) in conjunction with sections 14(1)(e) and (l) (law enforcement), 19 (solicitor-client privilege) and 20 (danger to health and safety) as well as 49(b) (personal privacy). One of the categories of responsive records were identified by the university as being located in the Office of the Counsel. This interim order upholds the fee, the reasonableness of the university's search for responsive records and determines that records or portions of certain responsive records qualify for exemption under sections 49(a) and/or (b) of the *Act*. The consideration of whether the records in the Office of the Counsel qualify for exemption was not addressed in this interim order.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 2(1) (definition of personal information), 19(a), 20, 21(2)(e), 21(2)(f), 21(3)(b), 24, 49(a), 49(b), 57(1) and 57(4); Regulation 460, s. 6.1.

Orders Considered: PO-1940, PO-2642, PO-2967 and PO-3297.

Cases Considered: *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.); *Ontario (Community and Social Services) v. John Doe*, 2015 ONCA 107; *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31.

BACKGROUND:

[1] York University (the university) received a request for access to information under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) arising from matters involving the requester and the university.

[2] After receiving clarification of the request from the requester, the university sent the requester its initial decision letter. In the letter, the university set out that it understood the request to be for the following:

> 1. All communications made (sent/received) with Seneca College, York University and Toronto Police. Includes letters, emails, telephone, meeting minutes from [specified date] to [specified date] pertaining to you in which the words [specified names and address], "discrimination" and or "mental health" appear.
>
> 2. Security footage from the following:
>
> - [specified address and date], 10 - 11 p.m.
>
> - [specified address and date], 10 a.m. - 4 p.m.
>
> - York Lanes near Doctor's office, [specified date], 12 noon - 4 p.m.
>
> - Outside [specified address], [specified date], 10 a.m. - 6 p.m.
>
> - Outside [specified address], [specified date], 10 a.m. - 6 p.m.
>
> 3. All security reports relating to you from [specified date] to [specified date] including those for [specified dates]
>
> Note: We disclosed the [specified date] report in part in your previous *FIPPA* request, [specified number], and thus we will not be including it in this request, unless it has been modified (the modification date on the document we disclosed is [specified date]).
>
> 4. All communications relating to you concerning incidents on [three specified dates]. This includes: emails, security logs, telephone records, meeting minutes.
>
> 5. All forms filled out by [the requester] or in relation to [the requester] relating to complaints with York's Housing and Conflict Resolution offices from [specified date] to [specified date].
>
> Note: You indicated that you had made complaints in [specified month] and [specified month], [specified year]; these complaints were

> captured in the records of your previous *FIPPA* request, [specified number] in which we searched for complaints up to and including [specified date].
>
> 6. All information corrected as originally requested.

[3] The university advised that it was granting partial access to the records described in an index that accompanied its decision letter. The index indicated whether access to a record was being granted or denied in full, or in part, and if information was to be withheld, the exemption that the university relied upon to deny access to that information, or whether the university determined it to be non-responsive to the request[1]. The university also advised the requester that:

- the index listed the records that the university had identified as being responsive to items 1, 3, 4 and 5 of the clarified request.
- it had located responsive records "in the Office of the Counsel pertaining to legal matters for which we are claiming the exemptions at sections 19(a) and (c) of the Act (solicitor-client privilege)."[2]
- there was no security footage in existence that was responsive to item 2 of the request.
- with respect to item 6 of the request, the university stated that:

> … we believe you are referring to the anonymized entry in the Weekly Security Incident Log (WSIL) report pertaining to the incident involving you on [specified date] which you had asked us to remove from the website some months ago. Note that the WSIL reports for 2011 are no longer posted on the York University website.

[4] The letter also stated:

> We have made an effort to respond to your request in a responsible and efficient manner and in a way that minimizes the cost for you. Thus, we have excluded from the scope of this request, documents filed in court or with a tribunal that would be public documents or that you would already have in your possession. Similarly, we have not included correspondence to or from you, unless it forms part of a string that is otherwise

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[1] As set out in the index, the university claimed that all or parts of Records 1, 5, 9 and 54 were non-responsive to the request.

[2] The university did not describe or list those records in the index that accompanied the decision letter. I will not be addressing those records in this interim order and will leave any determination on those records for any final order that I may make in this appeal.

> responsive, based on your previous *FIPPA* request ([specified number]), where you asked us to review our original decision and exclude such records. Accordingly, there are additional records held by York University that relate to you and if you consider that our approach has been inappropriately narrowed, we are prepared to extend the scope of this request if you specifically asked us to do so.

[5] In addition, the university indicated that there was a photocopying fee for processing the request in the sum of $52.00, representing the cost of photocopying the severed records that the university had decided to disclose to the requester. The university further advised the requester that, "[i]f you wish only a portion of the records, please indicate which ones you want and we will reduce the fee accordingly."

[6] As discussed in more detail below, the university states in its representations that the requester did not initially object to the fee, instead instructing the university to withdraw the funds from his university meal plan or any rental owed to him.

[7] The university subsequently issued a supplementary decision letter. In the letter, the university advised the requester that it was withdrawing the application of the section 49(b) (personal privacy) exemption to record 25.[3] The university further advised that, in addition to the exemptions already claimed for records 51, 52 and 53, they also qualified for exemption under section 49(a) (discretion to refuse requester's own information), in conjunction with sections 19(a) and (c) as well as section 49(b) of the *Act*.

[8] The requester (now the appellant) appealed the university's access decision.

[9] During mediation, the university confirmed that the records in the Office of the Counsel had not been provided to the IPC,[4] and that the photocopying fee of $52.00 had not yet been paid. The appellant advised the mediator that he should not be required to pay the $52.00 fee. The appellant, however, did not formally request a fee waiver.

[10] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act*. I commenced my inquiry by sending a Notice of Inquiry setting out the facts and issues in the appeal to the university. The university provided representations in response. I then sent a Notice of Inquiry to the appellant along with a copy of the university's non-confidential representations. The appellant provided a responding email maintaining his position that he should be provided immediate access to "video footage".

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[3] The university's revised index of records indicated that the university was still claiming that section 49(a), in conjunction with section 20, applied to this record.

[4] Although the university did not provide this office with copies of these records at this stage it provided a general description of their contents.

RECORDS REMAINING AT ISSUE:

[11] At the close of mediation, remaining at issue in the appeal were the records identified in the university's revised index of records as being records numbered 1, 10, 13, 14, 37 to 44, 65 to 66 (denied in full) and 4, 5, 9, 15, 16 to 27, 51 to 54, 62 to 64, 67 and 68 (denied in part). Also remaining at issue are the records in the Office of the Counsel. However, I will not be addressing those records in this interim order and will leave any determination on those records for any final order that I may make in this appeal.

ISSUES:

A. Should the fee be upheld?

B. What is the scope of the request? Are all of records 1, 5, 9 and 54 responsive to the request?

C. Did the university conduct a reasonable search for records responsive to item 2 of the request?

D. Do the records contain "personal information" as defined in section 2(1)?

E. Does the discretionary exemption at section 49(a), in conjunction with sections 19(a) and/or (c), apply to records 1, 13, 14, 37 to 41, 43, 44, 51 to 53, 65 and 66?

F. Does the discretionary exemption at section 49(a), in conjunction with section 20, apply to records 10, 15 to 27, 42, 51 to 53, 62, 64, 67 and 68?

G. Does the discretionary exemption at section 49(b) apply to the remaining withheld information at issue in the records?

DISCUSSION:

Issue A: Should the fee be upheld?

[12] Where the fee exceeds $25, an institution must provide the requester with a fee estimate.[5] The purpose of a fee estimate is to give the requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access.[6]

[13] The fee estimate also assists requesters to decide whether to narrow the scope

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[5] Section 57(3).
[6] Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.

of a request in order to reduce the fees.[7]

[14] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.[8]

[15] Section 57(1) requires an institution to charge fees for requests under the *Act*. More specific provisions regarding fees are found in sections 6, 6.1, 7 and 9 of Regulation 460. Section 6.1 reads:

> 6.1 The following are the fees that shall be charged for the purposes of subsection 57(1) of the Act for access to personal information about the individual making the request for access:
>
> 1. For photocopies and computer printouts, 20 cents per page.
>
> 2. For records provided on CD-ROMs, $10 for each CD-ROM.
>
> 3. For developing a computer program or other method of producing a record from machine readable record, $15 for each 15 minutes spent by any person.
>
> 4. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

[16] The *Act* also contains fee waiver provisions. Section 57(4) of the *Act* reads:

> A head shall waive the payment of all or any part of an amount required to be paid under subsection (1) if, in the head's opinion, it is fair and equitable to do so after considering,
>
> (a) the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);
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> (b) whether the payment will cause a financial hardship for the person requesting the record;
>
> (c) whether dissemination of the record will benefit public health or safety; and
>
> (d) any other matter prescribed by the regulations.

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7 Order MO-1520-I.
8 Orders P-81 and MO-1614.

The representations

[17] As set out above, the university's decision letter indicated that there was a fee in the sum of $52.00 for the cost of photocopying the severed records that the university had decided to disclose to the requester. The university also wrote that, if the appellant could indicate if he only wanted a portion of the records, the fee would be reduced accordingly. The university submits that "the appellant was aware that he could pick and choose records from the list and be charged only for those he wanted". The university also indicated that it made an effort to respond to the appellant's request in a way that minimized cost. The university states that the fee charged was based on the work actually done and included only the cost for photocopies.

[18] The university further submits that the appellant did not initially object to the fee, instead instructing the university to withdraw the funds from his university meal plan or any rental owed to him. The university submits that the appellant never asked for a fee waiver.

[19] The appellant did not make any specific representations regarding the fee. However, as set out in the Revised Mediator's Report:

> Also during mediation, it was confirmed that the appellant had not paid the $52 fee which related to the 260 pages of severed records. The mediator advised the appellant that he could request to receive the records on CD (rather than photocopies) and that under section 6 of Regulation 460, the cost for a CD is $10. The mediator also advised the appellant that under section 57(4), he could request a fee waiver from York University and that if York University did not grant the fee waiver, he could appeal the fee waiver denial. The appellant advised the mediator that he should not be required to pay the $52 fee, contending that he should not pay for information that exonerates him.

Analysis and finding

[20] The appellant has not formally requested a fee waiver. A requester must first ask an institution for a fee waiver, and provide sufficient information to support the request before this office will consider whether a fee waiver should be granted. In the absence of such a request, I will address it no further in this appeal.

[21] There is no evidence before me that the appellant requested that the records be delivered to him by way of a CD. Nor has the appellant provided any basis to challenge the amount of the fee.

[22] In my view, the university has provided a fee estimate that complies with the provisions of the *Act*. It properly considered the request to be for personal information and only claimed the cost of photocopying. In my view, it has sufficiently explained in its decision letter and its representations, the basis for its fee decision.

Accordingly, in all the circumstances, the university's photocopying fee of $52.00 is allowed.

Issue B: What is the scope of the request? Are all of records 1, 5, 9 and 54 responsive to the request?

[23] 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).

[24] 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.[9]

[25] To be considered responsive to the request, records must "reasonably relate" to the request.[10]

[26] The university submits that the appellant sought access to records pertaining to several incidents on the university campus. The university states it took steps to ensure that the appellant was requesting his own personal information and to contact the university "if he thought the scope of the request as interpreted by the university was not correct".

[27] The university submits that four of the records contain a mixture of responsive and non-responsive information and provides a detailed explanation of how certain withheld portions of records 1, 5, 9 and 54 are not responsive to the request. I have reviewed the records and the university's representations on the issue and agree that the portions of these records that the university identified as non-responsive are indeed

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[9] Orders P-134 and P-880.
[10] Orders P-880 and PO-2661.

not responsive to the appellant's request.

Issue C: Did the university conduct a reasonable search for records responsive to item 2 of the request?

[28] 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.[11] 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.

[29] 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.[12] To be responsive, a record must be "reasonably related" to the request.[13]

[30] 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.[14]

[31] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[15]

[32] 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.[16]

[33] The university states that there is no security footage in existence that is responsive to item 2 of the appellant's request. The university submits that according to its Common Records Schedule, security footage is retained for a short period of time and then it is overwritten.

[34] The university provided an affidavit of its Senior Security Official, Investigations, Campus Services and Operations detailing the efforts to locate responsive records. This individual deposed that:

> … I conducted a search of York University Security Services' CCTV computer software for the above-requested records of CCTV footage. No

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[11] Orders P-85, P-221 and PO-1954-I.
[12] Orders P-624 and PO-2559.
[13] Order PO-2554.
[14] Orders M-909, PO-2469 and PO-2592.
[15] Order MO-2185.
[16] Order MO-2246.

> records of CCTV footage were found. A records check on York University's Security incident reporting software showed the existence of reports for [specified date] and [specified date]; however, there was no indication of any CCTV footage saved in relation to these reports.

[35] The email provided by the appellant in the course of adjudication indicates that he continues to seek access to records responsive to item 2 of the request.

[36] As set out above, the *Act* does not require the university to prove with absolute certainty that the records do not exist, but only to provide sufficient evidence to establish that it made a reasonable effort to locate any responsive records. 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. In my view, the individual who conducted the search for the security footage is such an experienced employee knowledgeable in the subject matter of the request. Based on the evidence before me, I am satisfied that the university conducted a reasonable search for any responsive record pertaining to item 2 of the appellant's request.

[37] Accordingly, I find that the university has provided me with sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate records responsive to item 2 of the request.

[38] Accordingly, I am satisfied that the university's search for records that are responsive to item 2 of the appellant's request is in compliance with its obligations under the *Act*.

Issue D: Do the records contain "personal information" as defined in section 2(1)?

[39] 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,
>
> (e) the personal opinions or views of the individual except where 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.

[40] 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.[17]

[41] 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.

[42] 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.[18]

[43] Even if information relates to an individual in a professional, official or business

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

capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[19]

[44] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[20]

[45] The university submits that all of the records remaining at issue contain the personal information of the appellant. On my review of all the records remaining at issue, I agree that they all contain the personal information of the appellant, as that term is defined in section 2(1) of the *Act*, because they contain his name and/or relate to incidents in which he is involved.

[46] I also find that records 4, 15, 18 to 20, 23, 26, 51, 52, 62, 63, 64 and 68 contain the personal information of identifiable individuals other than the appellant.

Issue E: Does the discretionary exemption at section 49(a), in conjunction with sections 19(a) and/or (c), apply to records 1, 13, 14, 37 to 41, 43, 44, 51 to 53, 65 and 66?

[47] 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.

[48] 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.

[49] 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.[21]

[50] In this case, the university relies on section 49(a) in conjunction with sections 19(a) and/or 19(c) to withhold all, or portions of, records 1, 13, 14, 37 to 41, 43, 44, 51 to 53, 65 and 66.

[51] Section 19 states:

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[19] Orders P-1409, R-980015, PO-2225 and MO-2344.
[20] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).
[21] Order M-352.

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.

[52] Section 19 contains two branches. Branch 1 (subject to solicitor-client privilege) is based on the common law. Branch 2 (prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital) is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

[53] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

Solicitor-client communication privilege

[54] 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.[22] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[23] The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.[24]

[55] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[25]

[56] 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.[26]

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[22] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[23] Orders MO-1925, MO-2166 and PO-2441.
[24] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)
[25] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[26] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

Litigation privilege

[57] Litigation privilege protects records created for the dominant purpose of litigation. It is based on the need to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial.[27] Litigation privilege protects a lawyer's work product and covers material going beyond solicitor-client communications.[28] It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[29] The litigation must be ongoing or reasonably contemplated.[30]

Branch 2: statutory privileges

[58] Branch 2 is a statutory privilege that applies where the records were prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital "for use in giving legal advice or in contemplation of or for use in litigation." The statutory exemption and common law privileges, although not identical, exist for similar reasons.

Statutory solicitor-client communication privilege

[59] Branch 2 applies to a record that was prepared by or for Crown counsel, or counsel for an educational institution, "for use in giving legal advice."

Statutory litigation privilege

[60] This privilege applies to records prepared by or for Crown counsel or counsel employed or retained by an educational institution "in contemplation of or for use in litigation." It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[31]

[61] In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 19.[32]

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[27] *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).
[28] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).
[29] *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).
[30] Order MO-1337-I and *General Accident Assurance Co. v. Chrusz,* cited above; see also *Blank v. Canada (Minister of Justice)*, cited above.
[31] See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, cited above.
[32] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).

Representations and findings

[62] The university states:

> The discretionary exemptions at section 19(a) and (c) … was claimed for Records 1, 13, 14, 37-41, 43, 44, 51-53, 65 and 66, … because all of these records contain communications between York University employees and an external lawyer retained to represent [the university] before the Ontario Landlord and Tenant Board in a claim brought against the university by the appellant, and/or with the university's internal counsel pertaining to the Landlord and Tenant Board case, a human rights claim brought by the appellant against York University to the Ontario Human Rights Tribunal, or other internal legal matters pertaining to the appellant.
>
> The communications are thus protected from disclosure pursuant to section 19(a) as part of the continuum of privileged, and section 19(c) as records prepared by or for counsel employed or retained by an educational institution for use in giving legal advice or in contemplation of or for use in litigation.

[63] The appellant does not address this issue.

[64] Records 1, 13, 14, 37, 38, 39, 40, 41, 43, 44, 51, 52, 53, 65 and 66 all consist of emails (with or without attachments) and email strings (with or without attachments) between employees of the university and/or its internal or external counsel. I note that the portion of records 51, 52 and 53 that the university claims is subject to the section 19(a) or 19(c) exemption is the same information repeated in each of the emails.

[65] Record 1 is a meeting invitation, the responsive portion of which contains information about the purpose of the meeting which relates to a proceeding between the university and the appellant. I am satisfied that disclosing this information would reveal the confidential privileged communication between the client and its external counsel aimed at keeping both informed so that advice can be sought and given. Accordingly, I find that the responsive withheld portion of record 1 qualifies for exemption under Branch 1 of section 19(a).

[66] Records 13 and 14 are emails between internal university counsel and a university employee requesting information, and containing answers to the request, relating to a proceeding between the university and the appellant. I find that these emails are confidential communications with internal legal counsel for the purpose of obtaining or providing legal advice, and qualify for exemption under Branch 1 of section 19(a).

[67] Records 37, 38, 39, 40 and 41 are emails (with attachments) exchanged between internal university counsel and a university employee or employees relating to a proceeding between the university and the appellant. I am satisfied that these records

either contain legal advice or form part of the continuum of communications aimed at keeping both internal legal counsel and the client informed so that advice may be sought and given as required. In my view, disclosing the records would reveal the confidential privileged communications. Accordingly, I find that records 37, 38, 39, 40 and 41 qualify for exemption under Branch 1 of section 19(a).

[68] Record 43 is an email from a university employee to other university employees and internal university counsel pertaining to a court proceeding involving the appellant. I am satisfied that this record forms part of the continuum of communications aimed at keeping both internal legal counsel and the client informed so that advice may be sought and given as required. In my view, disclosing the record would reveal the confidential privileged communication. Accordingly, I find that record 43 qualifies for exemption under Branch 1 of section 19(a).

[69] Record 44 is an email from internal university counsel to a university employee and copied to other university employees, pertaining to a court proceeding involving the appellant. I am satisfied that this record either contains legal advice or forms part of the continuum of communications aimed at keeping both internal legal counsel and the client informed so that advice may be sought and given as required. In my view, disclosing the record would reveal the confidential privileged communications. Accordingly, I find that record 44 qualifies for exemption under Branch 1 of section 19(a).

[70] Records 51, 52 and 53 are email strings between university employees, and the portion that the university claims is subject to the solicitor-client privilege relates to a contemplated legal proceeding between the university and the appellant. This is the portion that is repeated in each of the emails. The university is prepared to disclose most of these email strings to the appellant. The portion of the emails that the university claims is exempt under section 19 pertains to the course of action suggested by external counsel who is named. I am satisfied that disclosing this information would reveal the substance of the confidential legal advice provided by external counsel. Accordingly, I find that the portions at issue in records 51, 52 and 53 qualify for exemption under Branch 1 of section 19(a).

[71] Record 65 is an email between internal university counsel and a university employee and copied to other university employees. Record 66 is an email between a university employee and internal university counsel and copied to other university employees. Both are emails requesting information, and containing answers to the requests, relating to a proceeding between the university and the appellant. I am satisfied that these records either contain legal advice or form part of the continuum of communications aimed at keeping both internal legal counsel and the client informed so that advice may be sought and given as required. In my view, disclosing the records would reveal the confidential privileged communications. Accordingly, I find that records 65 and 66 qualify for exemption under Branch 1 of section 19(a).

[72] Furthermore, considering all the circumstances of this matter, I am satisfied that the university properly exercised its discretion under section 49(a) not to disclose to the appellant the information that I have found to qualify for exemption under section 19(a) of the *Act*. As I have found that section 49(a) in conjunction with section 19(a) applies, it is not necessary for me to consider whether these records, or portions thereof, also qualify for exemption under section 49(a), in conjunction with 19(c) of the *Act*.

[73] Accordingly, as I have found that section 19(a) applies to the information for which it is claimed, I uphold the university's decision to withhold these records, or portions of these records, pursuant to section 49(a) of the *Act*.[33]

Issue F: Does the discretionary exemption at section 49(a), in conjunction with section 20, apply to records numbered 10, 15 to 27, 42, 51 to 53, 62, 64, 67 and 68?

[74] As noted above, section 47(1) gives individuals a general right of access to their own personal information held by an institution. As set out above, section 49 provides a number of exemptions from this right.

[75] The university takes the position that the records remaining at issue qualify for exemption under section 20, in conjunction with section 49(a). Section 20 reads:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

[76] For this exemption to apply, the institution must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[34]

[77] An individual's subjective fear, while relevant, may not be enough to justify the exemption.[35]

[78] The term "individual" is not necessarily confined to a particular identified

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[33] As I have found that record 43 qualifies for exemption under section 19(a) in conjunction with section 49(a), it is not necessary for me to also consider whether it qualifies for exemption under sections 14(1)(i) and/or 20 in conjunction with 49(a). Similarly, as I found that record 13 qualifies for exemption under section 19(a) in conjunction with section 49(a), it is not necessary for me to also consider whether it qualifies for exemption under section 49(b).

[34] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

[35] Order PO-2003.

individual, and may include any member of an identifiable group or organization.[36]

[79] The university claims that section 20 applies to all or parts of records 10, 15 to 27, 42, 51 to 53, 62, 64, 67 and 68. The records are:

- Records 10, 42, 51 to 53 and 67: communications, including emails, regarding incidents or proceedings involving the appellant
- Records 15 to 27, 62, 64 and 68: Reports from Security Services relating to incidents involving the appellant

[80] The university submits that:

> The appellant's request is the second one he has made of [the university]. In his first access to information request (resolved in adjudication under IPC Order PO-3297), he made inflammatory and abusive remarks regarding [university] staff, and indicated that he would publish information about the Security Staff. Further consultations with Security Services and with staff in other offices who had dealt with the appellant revealed a pattern of threatening and harassing behavior that people found worrisome. These offices have examples of the kinds of postings the appellant has made online and they have reason to believe that he would carry through with his threat to publish the names and personal details, use the information to damage the reputations of the employees, and potentially cause physical harm. The university's priority is to protect the health, safety and well-being of its employees, and the wider university community.

[81] The university then provides representations on the application of section 20 to the specific information withheld from records 10, 15 to 27, 62, 64, 67 and 68. It states:

> Normally, [the university] does not sever names of employees from records when processing [requests under the *Act*]; names in the context of employment responsibilities are considered to be business information. However, section 20 was claimed for Records 10, 15-27, 62, 64, 67 and 68 because all contain the names of [university] security officers or other employees who have been verbally threatened and thus we determined that there was a reasonable threat to the safety or health of our employees. Safety concerns have been expressed on the part of some employees and accordingly, we decided to err on the side of protecting our employees. Record 10, in particular, recounts the incident on [a specified date] where an employee felt under threat. That incident

[36] Order PO-1817-R.

> resulted in the arrest of the appellant; he was charged with criminal harassment and also taken into custody under the *Mental Health Act* to be examined by a physician at an appropriate facility due to concerns that his actions could result in bodily harm to another individual.

[82] The university also provides representations on why the information at issue in records 42, 51, 52 and 53 also fall within section 20, but those cannot be set out in this order due to confidentiality concerns.

Analysis and findings

[83] In Order PO-1940, Adjudicator Laurel Cropley considered the wording of section 20, and found that it applied to deny records to an appellant who was deemed to be "angry and potentially dangerous" after having engaged in a pattern of abusive and intimidating correspondence with the institution. In that order she stated:

> … [I]t is noteworthy to add (in response to the appellant's assertions that he would not physically attack anyone) that a threat to safety as contemplated by section 20 is not restricted to an "actual" physical attack. Where an individual's behaviour is such that the recipient reasonably perceives it as a "threat" to his or her safety, the requirements of this section have been satisfied. As the Court of Appeal found in *Ontario (Ministry of Labour)*:
>
> > It is difficult, if not impossible, to establish as a matter of probabilities that a person's life or safety will be endangered by the release of a potentially inflammatory record. Where there is a reasonable basis for believing that a person's safety will be endangered by disclosing a record, the holder of that record properly invokes [sections] 14(1)(e) or 20 to refuse disclosure.[37]

[84] Adjudicator Catherine Corban applied this approach when she upheld the application of the same section in Order PO-2642, in the context of an appeal involving Queen's University. She stated:

> … based on the representations … as well as on a review of the records themselves, I accept that the appellant has engaged in persistent and harassing behaviour towards the affected parties. As noted above, although there is no evidence before me that the appellant has been physically violent towards the affected parties or any other individuals, from their confidential representations, it is clear that the affected parties perceive that disclosure of this information could reasonably be expected to seriously threaten their health or safety. …

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[37] (1999), 46 O.R. (3d) 395 (C.A.).

[85] As Adjudicator Frank DeVries did in Order PO-3297, which addressed an appeal involving the same appellant and the university, I adopt the approach taken by Adjudicators Cropley and Corban, with the appropriate modifications as reflected in the Supreme Court of Canada's decision in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*[38] and the Court of Appeal decision in *Ontario (Community and Social Services) v. John Doe.*[39]

[86] In that regard, I note that these are very different circumstances than those which were before me in the decision that was ultimately upheld by the Court of Appeal in *Ontario (Community and Social Services) v. John Doe*. In that matter, access was sought to the names of Family Responsibility Office (FRO) employees that were found in the records at issue in that appeal. The factual underpinnings in that appeal and the one before me are very different. In that appeal:

> …. It was accepted that the Requester himself posed no threat to FRO employees. As to the risk arising if the Requester disseminated the names of FRO employees disclosed in the records, as the Commissioner and Divisional Court both noted, there was no evidence that the FRO employees whose names were going to be disclosed had ever been the subject of threats by the Requester or anyone else. Further, the Requester had the names of at least seven employees and had not disseminated that information. And, as the Divisional Court noted, there was nothing inflammatory in the records that suggested the behaviour of the Requester would change after reviewing the records sought.[40]

[87] I also accept the evidence of the university that the appellant has threatened to publish the names and personal details of university employees. According to the Court of Appeal, this was a relevant factor to be assessed under a section 20 analysis. In that regard, paragraph 30 of *Ontario (Community and Social Services) v. John Doe* provides that:

> … the risk that a requester will share the information provided to him or her is a relevant factor, to be assessed with all of the other relevant factors, in determining whether or not the evidentiary threshold established by the Supreme Court in *Ontario (Community Safety and Correctional Services)* has been met. …

[88] Based on the representations of the university, as well as on my review of the records themselves and the circumstances of this appeal, I am satisfied that there exists a reasonable basis for believing that the disclosure of the information at issue could reasonably be expected to seriously threaten the health or safety of the

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[38] 2014 SCC 31 (CanLII) at paras. 52-4.
[39] 2015 ONCA 107.
[40] See paragraph 27 of the Court of Appeal decision.

individuals named in the records. In addition to other evidence about other restrictions and concerns about the appellant's actions, the evidence is clear that a Trespass Notice was placed against the appellant, the appellant was subject to a peace bond, the appellant has been restricted from attending certain areas of the university and interacting with a named staff member, and proceedings were taken to remove the appellant from university housing. In addition, throughout the records there are references to university staff expressing safety concerns based on the appellant's actions.

[89] I accept that I have not been provided with evidence that the appellant has been physically violent towards any individuals; however, it is clear from the evidence before me that there exists a perception that disclosure of the information could reasonably be expected to seriously threaten the health or safety of the individuals whose information is contained in the withheld records. I find that there exists sufficient evidence to satisfy me that disclosure could reasonably be expected to seriously threaten the health or safety of the individuals. Further, I find that this evidence demonstrates a risk of harm that is well beyond the merely possible or speculative in accordance with the guidance provided by the Supreme Court of Canada in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*.

[90] As a result, I find that the requirements of section 20 have been met for the information that the university claimed was subject to exemption under section 49(a) read in conjunction with section 20 of the *Act*.[41]

[91] Accordingly, I am satisfied that the information at issue qualifies for exemption under section 49(a), read in conjunction with section 20. Furthermore, considering all the circumstances of this matter, I am satisfied that the university properly exercised its discretion under section 49(a) not to disclose this information to the appellant.[42]

Issue G: Does the discretionary exemption at section 49(b) apply to the remaining withheld information at issue in the records.

General principles

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

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[41] The university claimed that record 42 was also subject to exemption under sections 14(1)(e) and 14(1)(i). As I have found that the record is subject to exemption under section 20 it is not necessary for me to also consider whether it falls with section 14(1)(e) or 14(1)(i) of the *Act*.

[42] As I have found that record 10 qualifies for exemption under section 20 in conjunction with section 49(a), it is not necessary for me to also consider whether it qualifies for exemption under section 49(b).

privacy.

[93] 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.[43]

[94] Section 49(b) reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where the disclosure would constitute an unjustified invasion of another individual's personal privacy

[95] Sections 21(2) and 21(3) read:

> (2) 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,
>
> > (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
> >
> > (b) access to the personal information may promote public health and safety;
> >
> > (c) access to the personal information will promote informed choice in the purchase of goods and services;
> >
> > (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
> >
> > (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
> >
> > (f) the personal information is highly sensitive;
> >
> > (g) the personal information is unlikely to be accurate or reliable;
> >
> > (h) the personal information has been supplied by the individual to whom the information relates in confidence; and

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[43] Order MO-2954.

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

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

(a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

(b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

(c) relates to eligibility for social service or welfare benefits or to the determination of benefit levels;

(d) relates to employment or educational history;

(e) was obtained on a tax return or gathered for the purpose of collecting a tax;

(f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

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

(h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

[96] The university makes the following submissions with respect to records 4, 15, 18 to 20, 23, 26, 62, 64 and 68:

> These records are communications or security incident reports that include the names and/or personal details of students. These students lived and/or worked in the same residence as the appellant and encountered some difficulties with him and/or witnessed his disturbing and verbally abusive behavior. These records disclose the individuals' names, and in some cases their birthdates, their home telephone numbers, student numbers, physical appearance, and other details of a personal nature.

[97] The university also provides more particular representations as to why the remaining withheld information in records 9, 23, 26, 51 and 52 qualifies for exemption under section 49(b) of the *Act*.

[98] The university submits that none of sections 21(2)(a) to (i) apply. It submits that it did consider whether section 21(2)(d) was relevant, "but determined that it was not as we have disclosed numerous other records to the appellant (although he has chosen not to obtain them)". The university further submits that sections 21(2)(f), 21(2)(h) and 21(2)(i) apply in the circumstances of this appeal.

[99] In addition, the university submits that section 21(2)(e) is a relevant factor:

> … The appellant allegedly uttered a death threat to one student; he allegedly targeted another student with a threatening note that was posted publicly in the residence. He also threatened to publish personal information of Security staff.

[100] The appellant provided no representations to refute the university's position.

[101] I have reviewed the records remaining at issue and in light of all the circumstances find that the considerations at sections 21(2)(e) and 21(2)(f) apply to the remaining withheld personal information of identifiable individuals other than the appellant found in records 4, 15, 18, 19, 20, 23, 26, 51, 52, 62, 63, 64 and 68.[44] In all the circumstances, and in the absence of submissions from the appellant on this issue, I find that there are no considerations in favour of disclosure.[45]

[102] I have considered and weighed the factors in sections 21(2) that I have found to be applicable, and balancing the interests of the parties, find that disclosing the remaining withheld personal information of identifiable individuals other than the appellant in the records, would be an unjustified invasion of their personal privacy under section 49(b).

[103] Accordingly, I find that this information qualifies for exemption under section 49(b) of the *Act*. Furthermore, considering all the circumstances of this matter, I am satisfied that the university properly exercised its discretion under section 49(b) not to disclose this information to the appellant.

ORDER:

1. I uphold the university's fee.

2. I uphold the reasonableness of the university's search for responsive records.

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[44] See in this regard Order PO-2967.

[45] As I have found that the considerations at sections 21(2)(e) and 21(2)(f) apply, and there are no considerations favouring disclosure, it is not necessary for me to consider whether any section 21(3) presumptions or any other considerations in favouring of non-disclosure might also apply.

3. I uphold the university's determination that portions of records 1, 5, 9 and 54 are not responsive to the request.

4. I uphold the university's decision to withhold the other records, in part or in full.

5. I remain seized of this appeal in order to address any issues regarding access to the records in the Office of the Counsel.

Original Signed by: November 27, 2015

Steven Faughnan
Adjudicator