**Information and Privacy Commissioner,
Ontario, Canada**

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

ORDER PO-3591

Appeal PA14-133

University of Ottawa

March 24, 2016

Summary: The university received a request for all records relating to the requester within a specified time period. The university granted partial access to the responsive records. It claimed the records that contained labour relations and employment related information were excluded from the scope of the *Act* pursuant to section 65(6) of the *Act*. It also claimed that records or portions of the records were exempt pursuant to the mandatory personal privacy exemption at section 21(1) and the discretionary personal privacy exemptions at sections 49(a) (discretion to refuse a requester's own information), read in conjunction with section 19 (solicitor-client privilege), and 49(b). Finally, the university claimed that some records or portions of records were not responsive to the request. The adjudicator upholds the university's decision and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. Section 2(1) (definition of "personal information"), 19, 21(1)(f), 21(2)(f) and (h), 21(3)(a), (d) and (g), 65(6)3.

Cases Considered: *Ontario (Attorney General) v. Toronto Star,* 2010 ONSC 991 (Div. Ct.).

OVERVIEW:

[1] The University of Ottawa (the university) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all documents, emails, notes and other records relating to the requester, held by 27 named individuals and "Le service de protection" for the period between September 1, 2012 to the date of the request.

[2] The university granted partial access to the responsive records. It claimed that some of the records were excluded from the scope of the *Act* pursuant to the exclusion for labour relations and employment related information at section 65(6). It also claimed that some of the records, or portions of the records, were either not responsive to the request or were exempt from disclosure as a result of the application of the mandatory personal privacy exemption at section 21(1) and the discretionary exemptions at sections 49(a) (discretion to refuse a requester's own information), read in conjunction with section 19 (solicitor-client privilege) and 49(b) (personal privacy) of the *Act.* The university provided the appellant with an index of records detailing the exclusions or exemptions that were relied upon for each one.

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

[4] During mediation, the appellant advised that she continues to pursue access to some of the withheld records. She provided this office with a list of records identifying those of interest to her. With the appellant's consent, this list was provided and reviewed by the university. The university advised that it stood by its position with respect to the non-disclosure of those records.

[5] As a mediated resolution could not be reached, the file was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry. I began my inquiry into this appeal by sending a Notice of Inquiry, setting out the facts and issues, to the university, initially. The university provided representations, the non-confidential portions of which were shared with the appellant in accordance with this office's *Practice Direction 7*. The appellant did not submit representations.

[6] In this order, I uphold the university's decision not to disclose the records and portions of records at issue to the appellant and dismiss the appeal. Specifically, I make the following findings:

- some of the records are excluded from the scope of the *Act* as a result of the application of the exclusion for records containing labour relations or employment-related information set out in section 65(6)3;
- the records contain the personal information of the appellant and some also contain the personal information of other identifiable individuals;
- the discretionary exemption at section 49(a), read in conjunction with section 19 applies to the information for which it has been claimed;
- either the mandatory personal privacy exemption at section 21(1) or the discretionary personal privacy exemption at section 49(b) apply to the information for which it has been claimed;
- the university's exercise of discretion was reasonable; and,
- some of the records or portions of records at issue were not responsive to

the appellant's request.

RECORDS:

[7] The following records remain at issue in this appeal:

- Section 65(6):

  438-439, 446-448, 456, 459, 470, 477, 480, 482, 499, 505-507, 516, 518-571, 573-577, 582-615 and 621-622.

- Section 21(1):

  27, 29, 376, 391, 392, 427, 430 and 431.

- Section 49(a), read with section 19:

  207, 209-218, 354, 356-361, 367-369, 378, 417, 421, 432, 435-437, 440-445, 449-455, 458, 460-463, 465-469, 471, 472, 474, 480-491, 493-498, 500-503, 510, 512-514, 517, 566, 571-583, 586-589, 591-597, 600-601 and 606-613.

- Section 49(b):

  378, 423-425, 437, 439, 446-448, 456-460, 469-481, 492, 499, 510, 512-514, 517, 530-532, 544 and 578-580.

- Responsiveness:

- 141, 279, 280, 345 and 634.

ISSUES:

A. Does section 65(6) exclude any of the records from the scope of the *Act*?

B. Do any of 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), read in conjunction with section 19, apply to any of the records at issue?

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

E. Did the university exercise its discretion under section 49(a) or (b)? If so, should this office uphold its exercise of discretion?

F. Are some of the records not responsive to the request?

DISCUSSION:

A. Does section 65(6) exclude any of the records from the scope of the *Act*?

[8] Section 65(6) of the *Act* removes any records containing information about labour relations and employment related matters from the scope of the *Act*. The university claims that section 65(6) applies to exclude records 438-439, 446-448, 456, 459, 470, 477, 478, 480, 481, 499, 505-507, 516, 518-571, 573-577, 582-615 and 621-622, in their entirety.

[9] In its representations, the university refers only to the possible application of section 65(6)3. That section reads as follows:

> 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:
>
> > meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[10] If section 65(6)3 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*.

[11] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 3 of this section, it must be reasonable to conclude that there is "some connection" between them.[1]

[12] IPC orders had previously found that the term "in relation to" in section 65(6) means "for the purpose of, as a result of, or substantially connected to."[2] However, in the 2010 decision, *Ontario (Attorney General) v. Toronto Star,*[3] the Divisional Court addressed the meaning of the term "relating to" in section 65(5.2) of the *Act* and found that it requires "some connection" between the records and the subject matter of that section. It rejected the imputation of a "substantial connection" requirement into the meaning of "relating to."

[13] The IPC has concluded that the Division Court's findings in *Toronto Star* also apply to the words, "in relation to" in section 65(6).[4] Consequently, for section 65(6) to apply, an institution must show that there is "some connection" (not a "substantial

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[1] Order MO-2589; see also *Ontario (Attorney General) v. Toronto Star,* 2010 ONSC 991 (Div. Ct.).
[2] For example, see Order P-1223.
[3] Cited above, note 1.
[4] Order MO-2589.

connection”) between the records and the subjects mentioned in paragraph 1, 2, or 3 of this section.

[14] The types 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.[5]

Representations, analysis and findings

[15] The university submits that the records for which section 65(6) has been claimed fall into two categories:

(1) records relating to a professor’s efforts to obtain assistance from the university in addressing harassment by the appellant, and

(2) records relating to the hiring process for a position with the university for which the appellant applied, but was ultimately not hired.

[16] For section 65(6)3 to apply, the university must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

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

[17] My analysis on how all three parts of the requisite test for section 65(6)3 apply to the records for which it has been claimed follows.

Part 1: collected, prepared, maintained or used

[18] The university submits that records that fall in the first category of responsive records described above were “collected, prepared, maintained and used” by the university in relation to “allegations of harassment between two employees of the university.”

[19] With respect to records in the second category, the university also submits that they were “collected, prepared, maintained and used” in relation to the hiring process for a position for which the appellant applied but was not hired.

[20] Having reviewed the records for which section 65(6)3 has been claimed, I accept

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[5] *Ontario (Ministry of Correctional Services) v. Goodis*, (2008), 89 OR (3d) 457 (Div. Ct.).

that they were all collected, prepared, maintained and used by the university, for either the purpose of an investigation into allegations of harassment between two of its employees, or for the purpose of undertaking a hiring process for a position within the university. Accordingly, I accept that they meet the first requirement of the section 65(6)3 test.

Part 2: meetings, consultations, discussions or communications

[21] With respect to the second part of the test for the application of section 65(6)3, the university explains that the records were collected, prepared, maintained and used, "in relation to meetings, consultations, discussions or communications" about the circumstances outlined above, to which the records related. Specifically, for the first category of records, meetings, consultations, discussions or communications regarding the investigation into allegations or harassment between two of its employees, or, for the second category of records, meetings, consultations, discussions or communications regarding the hiring process for a position with the university, and the appellant's application for that position.

[22] As noted above, the Divisional Court in *Toronto Star*,[6] instructs that for the collection, preparation, maintenance or use of a record to be considered to be "in relation to" any of the circumstances identified in section 65(6), including the meetings, consultations, discussions or communications referred to in paragraph 3, that it must be reasonable to conclude that there is "some connection" between them.

[23] In my view, it is evident on the face of the records for which section 65(6)3 has been claimed that they were collected, prepared, maintained and used "in relation to meetings, consultations, discussions or communications" within the university. Some of those records clearly relate to meetings, consultations and discussions between university staff, others can more accurately be characterized as communications prepared by the university. I accept that given the subject matter of both categories of records, the university would engage in meetings, consultations, discussions and communications about those matters. I also accept that there is "some connection" between their collection, preparation, maintenance or use and the meetings, consultations, discussions or communications held by the university. Accordingly, I find that the second requirement of the section 65(6)3 test has been met.

Part 3: labour relations or employment-related matters in which the institution has an interest

[24] I will first assess whether the records have some connection to meetings, consultations, discussions or communications about "labour relations or employment-related matters."

[25] The records collected, prepared, maintained or used by the institution are excluded only if the meetings, consultations, discussions or communications are about

[6] Cited above, note 1.

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.[7]

[26] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.[8]

[27] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.[9] Examples of contexts in which the phrase "labour relations or employment-related matters" has been found to apply include a job competition,[10] an employee's dismissal,[11] and disciplinary proceedings under the *Police Services Act*.[12]

[28] The phrase "in which the institution has an interest" means more than a "mere curiosity or concern," and refers to matters involving the institution's own workforce.[13]

[29] The university submits that harassment by or against one of its employees is an employment-related matter in which it has an interest. It submits that it has a statutory duty to protect its employees from hazards in the workplace, including harassment. Although it acknowledges that in some cases, this office has found that records relating to harassment *of* an employee[14] rather than harassment *by* an employee[15] are not excluded, it submits that those cases can be distinguished from the present case as the appellant was both a student and an employee at the university. It submits that the harassment occurred in the workplace, the harassment was ongoing and it occurred while the appellant was applying for a permanent position with the university. It submits that the harassment directly impacted the terms and conditions of employment of both the appellant and the other employee. It submits that the records relating to the harassment allegations were used in relation to consultations, discussions or communications relating to employment-related matters in which the university had an interest, thereby meeting the third requirement for the records to be excluded from the scope of the *Act* under section 65(6)3.

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[7] *Ontario (Ministry of Correctional Services) v. Goodis,* cited above, note 5.
[8] *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.
[9] Order PO-2157.
[10] Orders M-830 and PO-2123.
[11] Order MO-1654-I.
[12] Order MO-1433-F.
[13] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner),* (2001) 55 O.R. (ed) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.
[14] Order PO-3272.
[15] Order PO-2625-I.

[30] With respect to the records relating to the appellant's application for a position of employment with the university, the university submits that the hiring process in which the appellant was involved can clearly be characterized as an "employment-related matter." It submits that it has an interest in matters relating to the hiring of its own employees and therefore, records in the second category fall squarely within the exclusion in section 65(6)3 and are therefore not subject to the *Act*.

[31] Having reviewed the records that the university submits fall outside of the scope of the *Act* due to the application of the exclusion at section 65(6)3, I accept that all of them relate to matters which can clearly be described as "employment-related matters." The first category of records relates to the alleged harassment of a university employee by another employee and, as such, clearly relate to the impact of such allegations on the employment of both individuals. The second category of records relate to the appellant's application for a permanent position with the university, and that information is intermingled with information regarding her present employment with the university. Accordingly, I am satisfied that the type of information at issue in both categories of records can be described as "employment-related" matters falling squarely within one of the two terms contemplated in the third part of the exclusion at section 65(6)3.

[32] The final component required for section 65(6)3 to be established is whether the university can be said to "have an interest" in the employment-related matters that are the subject of the records. As stated above, that phrase requires the university to have more than a "mere curiosity or concern" in the information, and has been held to apply to matters involving the university's own workforce.

[33] Given that the records relate to matters relating to the conduct of and between its employees, in my view, they clearly relate to the university's management of its own workforce. Therefore, I accept that it has more than a mere curiosity or concern with respect to these matters. I am satisfied that the university has an interest in these records that amounts to more than a curiosity or concern about its own workforce. Accordingly, the third requirement of the section 65(6)3 test has been met.

[34] Having closely reviewed the records for which the exclusion at section 65(6)3 has been claimed, I find that they were collected, prepared, maintained or used by the university in relation to meetings, consultations, discussions, and communications related to employment-related matters in which the university has an interest as contemplated by the exclusion at paragraph 3 of section 65(6).

[35] I do not find that any of the exceptions to the exclusion set out in section 65(7) apply. Accordingly, I find that section 65(6)3 applies to exclude the records for which it has been claimed, from the scope of the *Act*.

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

[36] Under the *Act*, different exemptions may apply depending on whether a record

at issue contains or does not contain the personal information of the requester. Where the records contain the requester's own personal information, access to the records is addressed under Part III of the *Act* and the discretionary exemptions at section 49 may apply. Where the records contain the personal information of individuals other than the requester but do not contain the personal information of the requester, access to the records is addressed under Part II of the *Act* and the mandatory exemption at section 21(1) may apply.

[37] Accordingly, 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) of the *Act*:

> "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 if 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;

[38] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as

personal information.[16]

[39] To qualify as personal information, it must be reasonable to expect that an individual maybe identified if the information is disclosed.[17]

Representations

[40] The university claims that portions of records 27, 29, 376, 391, 392, 427, 430 and 431 are exempt from disclosure pursuant to the mandatory exemption at section 21(1) of the *Act*. For section 21(1) of the *Act* to apply, those portions must contain the personal information of an identifiable individual.

[41] The university also claims that the discretionary exemption at section 49(a), read in conjunction with section 19, applies to a number of records. As I have found that some of them are excluded from the *Act* as a result of the application of the exclusion at section 65(6)3, they are no longer at issue in this appeal. The records for which the university has claimed section 49(a), read in conjunction with section 19 that remain at issue are as follows: records 207, 209-218, 354, 356-361, 367-369, 378, 417, 421, 432, 435-437, 440-445, 449-455, 458, 460-463, 465-469, 471, 472, 474, 481, 483-491, 493-498, 500-503, 510, 512-514, 517, 566, 571, 572, and 578-581. For section 49(a) to apply to these records, it must be established that they contain the personal information of the appellant.

[42] Finally, the university claims that the discretionary exemption at section 49(b) applies to some of the records. As I have found that some of them are excluded from the *Act* as a result of the application of the exclusion at section 65(6)3, they are no longer at issue in this appeal. Those that remain at issue are as follows: records 378, 423-425, 437, 457, 458, 460, 469, 471-476, 478, 481, 492, 510, 512-514, 517, and 578-580. For section 49(b) to apply, the records must contain the personal information of the appellant, as well as that of other identifiable individuals.

[43] The university does not, in its representations, identify the specific types of personal information that each of the records contain.

Analysis and findings

[44] I have reviewed the records for which the university claims section 21(1) and find that all of them contain the personal information of a number of identifiable individuals other than the appellant. This information includes information relating to their employment history (paragraph (b)), their personal opinions or views where they do not relate to another individual (paragraph (e)), as well as their name, where it appears with other personal information about them (paragraph (h)).

[45] I have also reviewed the records for which the university claims section 49(a),

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[16] Order 11.

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

read in conjunction with section 19, and find that all of them contain the personal information of the appellant. Specifically, this information relates to her education or medical or employment history (paragraph (b)), the views or opinions of another individual about her (paragraph (g)) and her name, where it appears with other personal information about her (paragraph (h)).

[46] Finally, I have reviewed the information for which the university has claimed section 49(b) and find that it contains both the personal information of the appellant, as well as that of other identifiable individuals. Specifically, this information includes the appellant's age and sex (paragraph (a)), her educational and employment history (paragraph (b)), her address and telephone number (paragraph (d)), the views or opinions of another individual about her (paragraph (g)), as well as her name, where it appears with other personal information about her (paragraph (h)). The information also includes information about other identifiable individuals including their age and sex (paragraph (a), their employment history (paragraph (b)), their address and telephone number (paragraph (d)), the views or opinions of another individual about that individual (paragraph (g), as well as the individual's name, where it appears with other personal information about them (paragraph (h)).

C. Does the discretionary exemption at section 49(a), read in conjunction with section 19, apply to any of the records at issue?

[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. Section 49(a) reads:

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

[48] Section 49(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.[18]

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

[50] In this case, the university relies on section 49(a), in conjunction with section 19 for a number of records as identified above in the records section. However, as I have found records 480, 482, 571, 573-577, 582, 583, 586-589, 591-597, 600, 601, 606-613 excluded from the scope of the *Act* pursuant to the application of section 65(6)3, with

[18] Order M-352.

respect to the application of section 49(a), read in conjunction with section 19, the following records remain at issue: 207, 209-218, 354, 356-361, 367-369, 378, 417, 421, 432, 435-437, 440-445, 449-455, 458, 460-463, 465-469, 471, 472, 474, 481, 483-491, 493-498, 500-503, 510, 512-514, 517, 566, 572, and 578-581.

Solicitor-client privilege

[51] Section 19 of the *Act* reads:

> 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. In the circumstances of this appeal, the university submits that the common law solicitor-client communication privilege, considered in section 19(a), applies.

Branch 1: common law privilege

[53] At common law, solicitor-client privilege encompasses two types of privilege: (1) 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.[19] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[20] 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.[21]

[55] The privilege may also apply to the legal advisor's working papers directly related

[19] *Descoteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[20] Orders PO-2441, MO-2166 and MO-1925.
[21] *Balabel v. Air India,* [1998] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

to the seeking, formulating or giving legal advice.[22]

[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.[23] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[24]

Loss of privilege

Waiver

[57] Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege knows of the existence of the privilege, and voluntarily demonstrates an intention to waive the privilege.[25]

[58] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.[26]

[59] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[27] However, waiver may not apply where the records is disclosed to another party that has a common interest with the disclosing party.[28]

Representations

[60] The university submits that in Order PO-3248, Adjudicator Colin Bhattacharjee upheld its decision to withhold a number of records on the basis of solicitor-client privilege in the context of a request for access to the requester's own personal information. It submits that the records included numerous communications seeking and giving legal advice, as well as communications comprising part of the "continuum of communications" between counsel and officers and employees of the university, exchanged for the purpose of seeking or providing legal advice.

[61] The university submits that the records at issue in the current appeal are of the same nature as those that were at issue in Order PO-3248. It submits that the records amount to communications between one of its employees and university legal counsel that have been exchanged for the purpose of seeking or providing legal advice with regard to the alleged harassment by the appellant. It further submits that although in some records legal advice is not specifically sought or received, those records contain information that form part of the continuum of communications between the employee

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[22] *Susan Hosiery Ltd. v. Minister of National Revenue,* [1969] 2 Ex. C.R. 27.
[23] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[24] *Kichener (City) v. Ontario (Information and Privacy Commissioner),* 2012 ONSC 3496 (Div. Ct.).
[25] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R 218 (S.C.).
[26] *R. v. Youvaragjah,* 2011 ONCA 654 (CanLII) and Order MO-2945-I.
[27] J. Sopinka et al., *The Law of Evidence in Canada* at p.669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe,* [1997] O.J. No. 4495 (Div. Ct.).
[28] *General Accident Assurance Co. v. Chrusz,* cited above; Orders MO-1678 and PO-3167.

and legal counsel upon which legal advice was given.

[62] Additionally, the university submits that these communications were supplied under implied assurances of confidentiality because counsel owes a professional obligation to maintain the university's confidence, which is fundamental to her ability to provide legal advice to officers and employees of the university on an ongoing basis. The university also submits that privilege was not waived in the circumstances of this case and the communications and advice were maintained in confidence at all times.

[63] Accordingly, the university submits that the records for which it has claimed section 49(a), read in conjunction with section 19, are properly subject to solicitor-client privilege and therefore exempt from disclosure pursuant to section 49(a).

Analysis and findings

[64] I have reviewed the records for which section 49(a), read in conjunction with section 19 has been claimed. They are all email exchanges which can be characterized as direct communications between counsel and a university employee. In many of the emails it is clear that advice is either being given or sought by counsel about matters relating to the alleged harassment of the employee by the appellant. In the remaining emails it is clear that the information contained within them falls within the "continuum of communications" between a solicitor and client with respect to matters about which the solicitor is providing advice.

[65] Accordingly, I find that all of the records remaining at issue for which section 49(a) has been claimed are subject to solicitor-client privilege as contemplated by section 19(a) as all of them were prepared either for the purpose of providing or seeking legal advice or form part of the "continuum of communications" between a lawyer and her client. There is no evidence before me to suggest that the privilege attached to these records has been waived. Consequently, subject to my review of the university's exercise of discretion, I find that records 207, 209-218, 354, 356-361, 367-369, 378, 417, 421, 432, 435-437, 440-445, 449-455, 458, 460-463, 465-469, 471, 472, 474, 481, 483-491, 493-498, 500-503, 510, 512-514, 517, 566, 572, and 578-581 qualify for exemption under section 49(a), read in conjunction with section 19(a).

C. Does the mandatory exemption at section 21(1) or the discretionary exemption at section 49(b) apply to any of the information at issue?

[66] 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.

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

requester.[29]

[68] The university claims that section 49(b) applies to exempt portions of records 378, 423-425, 437, 439, 446-448, 456-460, 469-481, 492, 499, 510, 512-514, 517, 530-532, 544, 578-580 from disclosure. As I have already found that some of those records are excluded from the scope of the *Act* pursuant to the application of section 65(6)3 and others are exempt from disclosure pursuant to section 49(a), read in conjunction with section 19, those that remain at issue are the following: records 423-425, 457, 473, 475, 476, 478, 479 and 492. These records contain the personal information of both the appellant and other identifiable individuals.

[69] In contrast, under section 21(1), where a record contains personal information only of an individual other than the requester but *not* that of the requester, the institution must refuse to disclose that information unless disclosure would not constitute an "unjustified invasion of personal privacy" (section 21(1)(f)).

[70] The university claims that section 21(1) applies to exempt records 27, 29, 376, 391, 392, 427, 430 and 431 from disclosure. These records contain the personal information of identifiable individuals other than the appellant and not the personal information of the appellant.

[71] Sections 21(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold under either section 21(1)(f) or 49(b) is met:

- If the information falls within any of paragraphs (a) to (e) of section 21(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 21(1) or section 49(b);

- Section 21(2) lists "relevant circumstances" or factors that must be considered;

- Section 21(3) lists circumstances in which the disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy; and

- Section 21(4) lists circumstances in which the disclosure of personal information does not constitute an unjustified invasion of personal privacy, despite section 21(3).

[72] For records claimed to be exempt under section 21(1) (i.e., 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.[30] In the circumstances of this appeal neither the exceptions listed in section 21(4), nor the public interest override at

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[29] See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 49(b).

[30] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

section 23 is applicable.

[73] 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.[31]

[74] For records claimed to be exempt under section 49(b) (i.e., 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.[32]

Finding and analysis

[75] The university has not explicitly explained in its representations how either section 21(1) or section 49(b) apply to the information contained in the records for which those exemptions have been claimed, however, on my review I accept that both of them apply to the records remaining at issue for which they have been claimed.

[76] I will first address the records containing only the personal information of individuals other than the appellant and to which the mandatory exemption at section 21(1) might apply. These records have been severed in part. Records 27 and 29 are duplicates of communications between university employees regarding the potential application of a candidate for position at the university. From my review, the information that has been withheld from these records can be described as personal information that relates to the employment or educational history of an identifiable individual, disclosure of which is presumed to constitute an unjustified invasion of personal privacy under section 21(3)(d). The information also includes personal recommendations or evaluations, character references or personnel evaluations of individuals other than the appellant and therefore, are presumed to constitute an unjustified invasion of personal privacy under section 21(3)(g). Record 376 is an email chain that contains information regarding two other identifiable individuals that can be described as relating to their medical condition, disclosure of which is presumed to amount to an unjustified invasion of personal privacy under the presumption against disclosure at section 21(3)(a). Record 391 also contains information about an identifiable individual's medical condition as contemplated by the presumption at section 21(3)(a). As 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, and in the circumstances, none of the exceptions in section 21(4) apply and section 23 is not applicable, I find that the severed information in records 27, 29, 376 and 391 is exempt from disclosure as a result of the application of the mandatory exemption at section 21(1).

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[31] Order P-239.

[32] Order MO-2954.

[77] The severed portions of records 392, 427, 430 and 431 do not contain personal information that falls within any of the presumptions listed in section 21(3), however, they do contain information that has been supplied by the individual to whom it relates in confidence as contemplated by the factor weighing against disclosure at section 21(2)(h). As there is no evidence before me to suggest that any other factors apply, specifically, any factors weighing in favour of disclosure of this information, I find that disclosure of the severed information in these records would also amount to an unjustified invasion of personal privacy of the individuals to whom this information relates and the mandatory exemption at section 21(1) applies.

[78] Considering now the possible application of the discretionary personal privacy exemption at section 49(b) to the records that contain the personal information of both the appellant and other identifiable individuals, I find that it applies to the records for which it has been claimed.

[79] Records 423-425, 457, 473, 475, 476, 478, 479 and 492 have been withheld in their entirety. They are emails that contain the personal information of the appellant as well as that of an identifiable individual in a manner that is inextricably intertwined. In my view, although these records do not contain information that amounts to a presumed unjustified invasion of privacy as contemplated by section 21(3), they do contain information that I consider to be highly sensitive (section 21(2)(f)) in that its disclosure could cause the individual to whom it relates significant distress, and is also information that has been supplied by that individual in confidence (section 21(2)(h)). As there is no evidence before me to suggest that any other factors apply, specifically, any factors weighing in favour of disclosure of this information, I find that disclosure of the severed information in these records would also amount to an unjustified invasion of personal privacy of the individuals to whom this information relates and the exemption at section 49(b) applies to records 423-425, 457, 473, 475, 476, 478, 479 and 492, subject to my discussion of the university's exercise of discretion below.

E. Did the university exercise its discretion under section 49(a) or (b)? If so, should this office uphold its exercise of discretion?

[80] The exemptions at sections 49(a) and (b) are discretionary. They 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.

[81] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it exercises its discretion in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[82] In either case this office may send the matter back to the institution for an exercise of discretion based on proper consideration.[33] This office may not, however, substitute its own discretion for that of the institution.[34]

Representations

[83] The university submits that it exercised its discretion in not disclosing the portions of the records that it severed pursuant to the discretionary exemptions in good faith and having taken into consideration all relevant factors, including, but not limited to, the purposes of the *Act*.

[84] The university submits that in exercising its discretion in withholding records on the basis of section 49(a), read in conjunction with the solicitor-client privilege exemption it considered all relevant circumstances, including the importance of protecting the ability of the university to communicate in confidence with in house legal counsel for the purpose of obtaining legal advice. It submits that it determined that the importance of these factors and the prejudice that would result from the disclosure of such information outweighed any benefit to transparency which would be obtained by disclosure.

[85] With respect to its exercise of discretion in applying section 49(b) to deny access to records or portions of records containing the personal information of other individuals as well as that of the appellant, the university submits that it carefully balanced the appellant's interest in obtaining access to the information against the invasion of privacy which would result from its disclosure and determined that the balance weighed in favour of withholding the information at issue.

Analysis and finding

[86] Considering the circumstances before me and the specific information contained in the records at issue, I am satisfied that the university exercised their discretion in good faith and for a proper purpose taking into account all relevant factors. The university disclosed to the appellant some of the responsive records in their entirety and others in part. The information that the university has withheld pursuant its discretion to do so is restricted to information that is clearly solicitor-client privileged or is solely related to or inextricably intertwined with the personal information of identifiable individuals other than the appellant. I accept that the university did not err in exercising its discretion to deny the appellant access to the information that I have found subject to the discretionary personal privacy exemptions in section 49.

F. Are some of the records located not responsive to the request?

[87] The university identified pages 141, 279, 280, 345, 351 and 634 as being not responsive to the request.

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[33] Order MO-1573.

[34] See section 54(2) of the *Act*.

[88] To be considered responsive to the request, records must "reasonably relate" to the request.[35] It has previously been established that 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.[36]

[89] In its index of records attached to its representations, the university submits that the subject of the communications in the pages that it has identified as not responsive to the request do not relate to the appellant as specified in the request, but relate to other individuals. In its representations it further explains that the portions that have been withheld as non-responsive do not result from a particular interpretation of the appellant's request but are "simply on their face not reasonably related to the appellant's request, and so [it] elected to withhold them." The university submits that the severed portions are properly withheld as non-responsive to the request.

[90] I have reviewed the records and have considered the severed portions that the university claims are not responsive to the appellant's request. I am satisfied that these portions of the records are not responsive to the request. This information relates to other university matters that do not relate to the appellant or the matters identified in her request. Consequently, I find that the information severed as non-responsive by the university is, in fact, not responsive to the request and I uphold the university's decision to withhold it.

ORDER:

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

Original Signed By: March 24, 2016

Catherine Corban
Adjudicator

[35] Orders P-880 and PO-2661.
[36] Orders P-134 and P-880.