Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3686

Appeal PA12-537-2

University of Ottawa

January 12, 2017

Summary: The appellant is a former employee of the university. His employment was terminated by the university. He submitted an access request for a report about him prepared by a psychiatrist, and other records "about" the report. The university claims that the responsive records are excluded from the application of the *Act* under section 65(6)3 (employment or labour relations). This order upholds that claim. The appellant claims that he should receive access to the records, arguing that section 65(6) is either unconstitutional, or constitutionally inapplicable, based on the right to freedom of expression under section 2(b) of the *Canadian Charter of Rights and Freedoms*. The appellant's *Charter* claim is not upheld. The appellant also claims that additional records should exist. This order determines that the additional records referred to by the appellant, if they existed, would not be responsive to the request, and/or would be excluded from the application of the *Act* under section 65(6)3. Accordingly, no additional searches are ordered. The appeal is dismissed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 24, 42(1)(m), 52(4), 52(8), 65(6)3; *Canadian Charter of Rights and Freedoms*, Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.), sections 2(b), 8 and 32; and *Constitution Act*, Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.), section 52(1).

Orders and Investigation Reports Considered: P-880, PO-2074-R, PO-2554, PO-3323, PO-3325.

Cases Considered: *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information & Privacy Commissioner)* (1998), 41 O.R. (3d) 484; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62; *Ontario (Ministry of Community*

and Social Services) v. Doe, 2014 ONSC 239; *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.); *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54; *Doré v. Barreau du Québec*, 2012 SCC 12; *R. v. Clarke*, 2014 SCC 28; *Taylor-Baptiste v. Ontario Public Service Employees Union*, 2015 ONCA 495; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23; *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47; *McKinney v. University of Guelph*, [1990] 3 SCR 229; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624; *Moghadam v. York University*, 2014 ONSC 2429; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53; *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25; *R. v. Jarvis*, 2002 SCC 73; *R. v. Court* (1997), 36 O.R. (3d) 263, 1997 CanLII 12180 (ON SC); *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4; *Solosky v. the Queen*, [1980] 1 SCR 821, 1979 CanLII 9; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.), [2006] S.C.J. No. 39; *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35; *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*, (June 3, 1997), Toronto Doc. 21670/87Q (Ont. Gen. Div.).

Other Authorities Considered: *Administrative Law Matters*, June 12, 2014; *International Covenant on Civil and Political Rights*, Articles 17 and 19.2.

OVERVIEW:

Background

[1] The appellant is a former employee of the University of Ottawa (the university). The appellant's employment was terminated by the university. The appellant's union brought several grievances on his behalf. The grievance pertaining to the termination of the appellant's employment was dismissed by the arbitrator. The arbitrator's decision is the subject of an ongoing application for judicial review.

[2] The records at issue in this appeal were generated during the processes followed by the university that led to the termination of the appellant's employment. The records were provided to the union by the university during the grievance arbitration process and the appellant has copies of all of them. However, the records were not entered into evidence at the grievance arbitration, and remain subject to an implied confidentiality undertaking.

[3] The appellant seeks access to the records under the *Act*. One effect of the university's decision to deny access to the records under the *Act* is that, in the appellant's hands, they remain subject to the implied confidentiality undertaking.

The access request and this appeal

[4] The appellant made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a report prepared by a psychiatrist, relating to

himself (the report), and any other records "about the report."

[5] The university located responsive records and denied access to them on the basis that the request was "frivolous or vexatious" under section 10(1)(b) of the *Act*. The appellant appealed this decision to this office (also referred to in this order as the IPC), and Appeal PA12-537 was opened. Adjudicator Catherine Corban addressed that appeal in Order PO-3325. She did not uphold the university's decision, and ordered it to provide the appellant with an access decision.

[6] The university responded to Order PO-3325 by issuing a decision denying access to the responsive records, including the report. The university relied on the exclusion in section 65(6) of the *Act* (employment or labour relations). The appellant appealed that decision to this office, arguing that the university is not entitled to rely on the exclusion in section 65(6) and that this provision is unconstitutional. He also asserts that additional responsive records ought to exist, thereby challenging the adequacy of the university's search. To address the new appeal, the IPC opened Appeal PA12-537-2, which is the subject of this order.

[7] During the intake stage of this appeal, the university advised the IPC that, in particular, the university relies on section 65(6)3. Also during the intake stage, the appellant served the IPC, the university, the Attorney General of Canada and the Attorney General of Ontario with a Notice of Constitutional Question (NCQ). The NCQ asserts that section 65(6) of the *Act* is unconstitutional as it violates the appellant's right to freedom of expression under section 2(b) of the *Canadian Charter of Rights and Freedoms* (the *Charter*).

[8] In the NCQ, the appellant states that the records are a necessary precondition for making meaningful expression about the university's practices affecting its employees and students, and the public at large.

[9] After receipt of the NCQ, this appeal moved directly to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*.

[10] The IPC began the inquiry by sending a Notice of Inquiry to the university, inviting it to provide representations, which it did. The IPC then sent a Notice of Inquiry to the appellant, inviting him to provide representations, along with a complete copy of the university's representations. The appellant responded with representations. The IPC then provided a complete copy of the appellant's representations to the university, inviting it to provide reply representations, which it did.

[11] This appeal was then transferred to me to complete the inquiry. I sent a complete copy of the university's reply representations to the appellant, inviting him to provide sur-reply representations, which he did.

[12] The Attorneys General of Ontario and Canada did not provide the IPC with representations or any other response to the NCQ.

[13] As noted previously, the appellant takes the position that the university did not conduct a reasonable search for records. Although this was not expressly addressed in the Notice of Inquiry, the appellant raised it in his representations. The university responded to the appellant's representations on this subject in its reply representations, and the appellant addressed these submissions at sur-reply. Accordingly, I will address the issue in this order under Issue C, below.

[14] In his representations, the appellant sometimes mentions the university's failure to contest some of the points or evidence he raises, as though that means they are established and cannot be questioned. This is not the case. It is my responsibility to weigh the evidence and arguments that have been presented. I am not compelled to accept evidence that is not credible, or arguments that are lacking in cogency or inconsistent with case law, simply because they have not been the subject of comment by the other party.[1]

[15] In conducting this inquiry, I have reviewed the voluminous material provided by the parties, and weighed all of the evidence and argument they have submitted. In the interest of keeping this order to a reasonable length, and focused on the issues before me, I will refer only to evidence and argument that are relevant to those issues.[2] I have also limited my references to the representations of the parties, in some instances, for reasons of confidentiality.

[16] In this order, I uphold the university's decision to apply section 65(6)3 to the responsive records. In addition, I find that the appellant's right to free expression under section 2(b) of the *Charter* has not been infringed as a result of the university's denial of access to the records. On the reasonable search issue, I conclude that the additional records that the appellant claims should exist would not be responsive to his request, and/or would be excluded from the application of the *Act* under section 65(6)3, and there is therefore no basis to order the university to conduct further searches.

[17] The appeal is therefore dismissed.

RECORDS:

[18] The records at issue in the appeal consist of the report, two emails, a fax cover page, and an invoice for the preparation of the report.

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[1] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information & Privacy Commissioner)* (1998), 41 O.R. (3d) 484.
[2] See *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

ISSUES:

A. Are the records excluded from the operation of the *Act* as a result of the application of section 65(6)3 of the *Act*?

B. Is section 65(6) unconstitutional or constitutionally inapplicable under section 2(b) of the *Canadian Charter of Rights and Freedoms*?

C. Did the university conduct a reasonable search for records?

DISCUSSION:

Issue A: Are the records excluded from the operation of the *Act* as a result of the application of section 65(6)3 of the *Act*?

[19] Section 65(6)3 states:

> 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.

[20] If section 65(6) applies to the records, and none of the exceptions found in section 65(7) applies, the records are excluded from the scope of the *Act*.

[21] 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.[3]

[22] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.[4]

[23] If section 65(6) applied at the time the record was collected, prepared,

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[3] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).
[4] Order PO-2157.

maintained or used, it does not cease to apply at a later date.[5]

[24] The exclusion in section 65(6) does not exclude all records concerning the actions or inactions of an employee simply because this conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees.[6]

[25] The type of records excluded from the *Act* by section 65(6) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.[7]

[26] 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.[8]

[27] The records collected, prepared maintained or used by the institution are excluded only if [the] meetings, consultations, discussions or communications are about labour relations or "employment-related" matters in which the institution has an interest. Employment-related matters are separate and distinct from matters related to employees' actions.[9]

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

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

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

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

Representations

University's initial representations

[29] The university submits that the records at issue were prepared by the psychiatrist who drafted the report on its behalf, and that they were subsequently

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[5] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.
[6] *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).
[7] *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.
[8] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner),* cited above.
[9] *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

maintained and used by the university. The university also submits that the records were prepared, maintained and used in relation to meetings, consultations, discussions and communications, including consultations with the author of the report, as well as internal meetings, discussions and communications at the university. The university submits further that these meetings, discussions and communications were about matters regarding the appellant's employment and his conduct in the workplace.

[30] The university cites *Ontario (Ministry of Community and Social Services) v. Doe*,[10] which found that to qualify for exclusion under section 65(6)3, ". . . the record must be about labour relations or employment-related matters." As the university notes, that case also refers to *Ontario (Ministry of Correctional Services) v. Goodis*,[11] where the Court characterized the types of records excluded under section 65(6) as "documents related to matters in which the institution is acting as an employer, and the terms and conditions of employment or human resources questions are at issue."

[31] The university submits that the records meet the tests set out in these two decisions.

[32] The university submits further that: "[t]he appellant later put the report in issue in a labour arbitration proceeding regarding the termination of his employment with the university."

[33] With its representations, the university provided a copy of a sworn but undated affidavit by one of its lawyers. This affidavit states, among other things, that three ongoing grievances are currently before the arbitrator. This affidavit was originally provided to the IPC during the inquiry into Appeal PA12-537 which, as already noted, dealt with the university's initial claim, dismissed in Order PO-3325, that the appellant's request is frivolous or vexatious. As stated previously, the grievance arbitration is now complete, and the matter is before the Divisional Court in the form of a judicial review.

Appellant's initial representations

[34] The appellant objects to the university's contention that he "put the report in issue in a labour arbitration proceeding." He states that no evidence has been produced to this effect, and that this claim is utterly false.

[35] The representations I have received on this point demonstrate that the report was produced to the appellant's union during the grievance process, and that it was not entered into evidence by anyone. If the university itself had relied upon the report during the grievance process, this might have provided support for the application of section 65(6)1, which refers to proceedings that would include a grievance arbitration hearing. But the university does not rely on this provision.

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[10] (2014), 120 O.R. (3d) 451 at para. 29.
[11] (cited above), at para. 35.

[36] Perhaps the appellant's intention in disputing the claim that he "put the report in issue" during the grievance process was to suggest that the university's representations are not factual in a more general sense, but he does not say so. As already noted, it is my duty to weigh the evidence and arguments that are put to me, and I have done so in reaching my decisions in this appeal. I accept that the appellant did not "put the report in issue" during the grievance proceedings. However, this is not conclusive as regards the potential application of section 65(6)3, which does not require that a record was collected, prepared, used or maintained in relation to proceedings.

[37] The appellant also argues that the "university's undated and outdated affidavit has a potential to cause misdirection." Referring to the affidavit he provided with his representations, the appellant states that the university's lawyer's affidavit was used in an earlier submission by the university prior to the issuance of Order PO-3325. He also states that the university's lawyer's affidavit is "incorrect at the present time" in that it refers to three active grievances. As the appellant notes, those grievances were addressed in the arbitrator's decision which is now the subject of an application for judicial review.

[38] The concern advanced here by the appellant, that the grievances are no longer ongoing before the arbitrator, whose decision is now the subject of an application for judicial review, is irrelevant to any issue before me. Moreover, similar to my analysis of the appellant's argument that he did not put the report in issue in the grievance, the presence of an active grievance arbitration, or, for that matter, a judicial review relating to employment or labour relations matters, is not required in order for section 65(6)3 to apply. Also, section 65(6) is not time-limited in its application. As noted previously, if section 65(6) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.[12]

[39] The appellant submits that "[t]he stated or inferred purpose of the Report and the evidence of use of the Report are determinative." While I agree that any statement of purpose in the report may be relevant, I note that section 65(6) requires that records were "*collected, prepared, maintained* or used by or on behalf of an institution . . ." [emphasis added] in relation to the matters listed in the rest of section 65(6). Accordingly, I do not agree that evidence relating to "use" is determinative to the exclusion of evidence relating to collection, preparation or maintenance of the records.

[40] In any event, part 1 of the test requires that "the records were collected, prepared, maintained or used by an institution or on its behalf," and the appellant "admits that the record was prepared on behalf of the university," based on the first sentence of the report, and that part 1 of the test is therefore satisfied.

[41] Under part 2, the appellant submits that "collection, preparation, maintenance or

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[12] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

usage" of the records would not be "in relation to" meetings, consultations, discussions or communications" if, for example, the records themselves constitute communications about labour relations or employment-related matters in which the university has an interest. He asserts that the test under section 65(6) ". . . would be an absurdity if it meant that the two objects that are 'in relation' or that have 'some connection' are the same object." In other words, according to the appellant, the record that is collected, prepared, maintained or used in relation to meetings, consultations, discussions or communications must be some separate document that is not, in and of itself, the communication, consultation, etc.

[42] As already noted, 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. In other words, there must be "some connection" between the collection, preparation, maintenance or usage of the records and "meetings, consultations, discussions or communications" about the subjects referred to in section 65(6)3. I fail to see how a record that is, itself, a communication that was prepared on behalf of the university, is not a record whose preparation was "in relation to" communications.[13] The appellant suggests that making this finding would be absurd. In my view, the opposite is the case. It would be absurd, artificial and unreasonable to adopt the approach advocated by the appellant and find that such a record was not prepared "in relation to" communications.

[43] Attempting to build on this argument, the appellant submits that there is no evidence of "distinct" meetings, consultations, discussions or communications having some connection to the report. For the reasons just given, this is not necessary to meet part 2 of the test.

[44] The appellant also makes arguments based on the chronology of events relating to his dismissal and the provision of the report to the university, arguing that this proves that the report could not have been "used in relation to" meetings, consultations, discussions or communications. This argument depends on the appellant's earlier attempt to impose a requirement that a record cannot itself be prepared or used as, and therefore "in relation to," a communication. I have already rejected that argument.

[45] The appellant argues that the report is not related in any functional way to his work. He argues that the report predicts events that may potentially occur after he was dismissed, and also refers to the fact that he had already been dismissed by the time the university received the report. Both these arguments are intended to demonstrate that the report is not employment-related. He also seeks to apply the dicta from *Ontario*

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[13] For an example of a decision where a communication was found to have been used in relation to communications under section 65(6)3, see Order PO-3323, cited by the university in its reply representations. See also Order PO-2074-R.

(Ministry of Correctional Services) v. Goodis,[14] to the effect that "[e]mployment-related matters are separate and distinct from matters related to employees' actions."

[46] It is clear from the evidence that the university ordered the report before it dismissed the appellant, although it did not receive the report until after it had informed the appellant that he was being dismissed[15]. It is also clear that the report relates to the appellant's possible dismissal. In my view, this is an employment-related matter. This result is not contradicted by the Divisional Court's decision in *Ontario (Ministry of Correctional Services) v. Goodis*.[16]

[47] *Goodis* addressed the question of whether records relating to a lawsuit against the institution for vicarious liability relating to employee misconduct are excluded under section 65(6)1 or 3. It is in that sense that matters relating to "employees' actions" do not attract the application of section 65(6). Records prepared in relation to human resources issues such as possible dismissal are not comparable to those at issue in *Goodis*, and are, almost by definition, employment-related. As well, they appear to fit neatly within the description, given by the Divisional Court in that case, of the type of records that *would* be excluded under section 65(6): "documents related to matters in which the institution is acting as an employer, and . . . human resources questions are at issue."[17] Accordingly, the outcome in *Goodis* is distinguishable, and I do not accept this submission.

[48] The appellant suggests that section 65(6)3 cannot apply on the basis of the appellant's allegation that the university's actions in commissioning the report were improper. In particular, he submits that ". . . there is sufficient evidence to conclude that the Report and the manner in which it was produced constitute professional malfeasance to a sufficient degree that the Report and its production cannot be related to any matters 'in which the institution has an interest'. . . ." This suggests that the IPC is to become an arbiter of the behaviour of institutions, and if it is found to be lacking in some manner, the institution would be punished by losing its ability to rely on section 65(6)3. I reject this argument. As outlined below, this was also the subject of further discussion in subsequent representations. At this point, I would observe that the jurisprudence establishes that I am required to determine, on the facts, whether the criteria in section 65(6)3 are met, and "has an interest" means "more than a mere curiosity or concern."[18]

[49] One factor cited by the appellant in relation to the university's alleged "malfeasance" is his allegation that detailed and intimate information about himself and

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[14] (cited above), at para. 23.
[15] The evidence shows that the author of the report conducted an interview relating to the preparation of the report several days before the university informed the appellant of his dismissal.
[16] Cited above.
[17] *Goodis*, at para. 24.
[18] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner),* cited above.

his family in the report was hearsay provided to the author of the report by another university employee during an interview, and that this information "could not possibly have been collected for the purpose of making the Report. . . ." This is, in essence, an allegation that this information was collected, used or disclosed in a manner that is not consistent with the privacy rules in Part III of the *Act*. This allegation is not under consideration in this appeal, which is not a privacy complaint investigation. Rather, this appeal addresses the issue of access to the records. I will discuss the appellant's options in relation to his privacy concerns in more detail at the end of this order.

University's reply representations

[50] In reply, the university's submissions concerning the employment-related matter in which it claims to have an interest under section 65(6)3 refer to the appellant's possible dismissal and the university's rationale for obtaining the report, which is directly related to him possibly being dismissed.

[51] The university also responds to the appellant's argument that the report is not related in any functional way to his employment. The university submits that this ". . . imposes a higher threshold for the application of section 65(6)3 than has been accepted by the IPC and the Courts." The university goes on to state:

> The Report need only be about a matter in which the University is acting as employer, and the terms and conditions of employment are in issue. It need not be related to the "full spectrum" of the employee's duties, nor be related in a "functional way" to those duties.

[52] The university's reference to the terms and conditions of employment derives from *Ontario (Ministry of Correctional Services) v. Goodis*. Although the outcome in *Goodis* is distinguishable, the discussion it sets out, pertaining to the way in which section 65(6) is to be applied, remains relevant. For a better understanding of the criteria as actually stated by the Court, I will repeat the actual passage in question (which I have already reproduced above):

> . . . the type of records excluded from the Act by s. 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.[19]

[53] I agree with the university that section 65(6)3 does not require that the records, or the employment-related matter, be related to the "full spectrum" of the employee's duties, or related in a "functional way" to those duties. Moreover, as the quote from *Goodis* makes clear, the terms and conditions of employment, *or human resources questions*, must be at issue. The records clearly relate to the human resources issue of

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[19] *Ontario (Ministry of Correctional Services) v. Goodis*, cited above, at para. 24.

the appellant's possible dismissal. As already stated, records prepared in relation to human resources issues such as possible dismissal are, almost by definition, employment-related.

[54] The university also denies the appellant's allegations of misconduct, and argues that section 65(6)3 does not inquire into such matters. The university submits that the appellant's interpretation ". . . reads substantial new restrictions into s. 65(6)3 which are not found in the language of the statute, nor in the jurisprudence."

[55] Above, I have already rejected any suggestion that the IPC is to become an arbiter of the behaviour of institutions which, if found to be lacking in some manner, would cause the institution to lose its ability to rely on section 65(6)3. I will refer to this subject again in my discussion of the appellant's sur-reply representations, where he made additional comments about it, and will also refer in more detail to the university's position.

The appellant's sur-reply representations

[56] In sur-reply, the appellant makes further arguments about the question of whether the report itself can be a communication and in that way, meet the requirement that its collection, preparation, maintenance or use must be "in relation to" meetings, consultations, discussions or communications. He says that the university:

> . . . *falsely states* "The Appellant suggests it would be 'an absurdity' if the meetings, consultations, discussions or communications could be embodied in the record in issue." [Emphasis added.]

[57] The appellant now essentially denies having made this argument, arguing that, instead, he:

> . . . did not say or suggest that a record in issue could not be about meetings, consultations, discussions or communications in which the institution has an interest. Rather, the Appellant argued that there is no connection between the Report and consultations, discussions or communications in which the institution has an interest.

[58] However, the appellant did, in fact, make this argument, as outlined in my earlier discussion of his initial representations. None of his submissions in sur-reply would lead me to alter my analysis, above, in which I rejected this argument. It is clear that the report was "prepared" in relation to "communications" because it is, itself, a communication.

[59] The appellant also refers to the "fact" that the university ". . . did not bring the Report in evidence in making its [initial] Submissions, nor did it reveal that it had disclosed the Report to the IPC." In that regard, I note that the university had provided all the records at issue, including the report, to this office prior to submitting its initial

representations in this appeal.

[60] As for the appellant's comment that the university failed to reveal that it had provided the report to the IPC, I am left to surmise that the appellant finds this problematic from a privacy perspective. It is not. Section 52(4) of the *Act* gives the Commissioner the power to compel production of ". . . any record that is in the custody or under the control of an institution. . . ." This includes records that are claimed to be exempt and records that are claimed to be excluded from the application of the *Act* under section 65. In most appeals, including this one, institutions provide the records at issue in response to a request for documentation from the IPC, which is sent out in virtually every appeal at the intake stage. In such instances, the IPC is not required to order production, even though it could. The IPC is clearly empowered to review the records at issue in order to deal with appeals that come before it. Disclosure of personal information to the IPC is also authorized under section 42(1)(m) of the *Act* and is not a violation of personal privacy.

[61] In addition, the appellant submits that:

- the report only became available to the university after it had dismissed him; and
- there is no evidence or allegation that the report was ever "used."

[62] These submissions do not assist the appellant. The first bullet point does not mean that the report is not employment-related; as I have already observed, the evidence makes it clear that the university commissioned the report prior to dismissing the appellant. With respect to the argument that the report was not "used," section 65(6)3 applies to records that were "*collected, prepared, maintained* or used" [emphasis added] by an institution in relation to "meetings, consultations, discussions or communications about an employment-related matter in which the institution has an interest." Use is not required if the record was collected, prepared or maintained in relation to the matters referred to in the section. I have already noted that the report was prepared on behalf of the university and, because it is, itself, a communication, it was prepared "in relation to" communications.

[63] The appellant then returns to his argument based on *Ontario (Ministry of Correctional Services) v. Goodis*[20] and argues that the subject matter of the report is further removed from employment-related matters than allegations of misconduct against government employees in the course of employment. I reiterate that, in my view, the outcome in *Goodis* is distinguishable because it dealt with records pertaining to litigation against an institution for vicarious liability in relation to employee misconduct, which is very different than the circumstances here, where the records relate to the possible dismissal of the appellant, a human resources issue. As I observed earlier, human resources issues are, almost by definition, employment-related matters.

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[20] Cited above.

[64] Referring to the university's argument that the records need only "be about a matter in which the University is acting as an employer, and the terms and conditions of employment are at issue," the appellant also states that "the terms and conditions of employment" are not at issue in the report. As I explained above, in setting out the university's version of this argument, this is a reference to *Ontario (Ministry of Correctional Services) v. Goodis*, where the Court (in a passage I have already reproduced) observed that the type of records excluded from the Act by section 65(6) are documents "related to matters in which the institution is acting as an employer, and terms and conditions of employment *or human resources questions* are at issue."[21] [Emphasis added.]

[65] The dismissal or contemplated dismissal of the appellant is clearly a human resources issue in which the university acts as employer. When stated in full, the *Goodis* criteria do not assist the appellant here.

[66] The appellant also reiterates his earlier arguments that the university does not "have an interest" in the report as ". . . it cannot be in the interest of the institution to perform acts that are manifestly improper." I have already addressed this argument, above. Simply put, the question is not whether the commissioning of the report was in the university's interest; rather, the question is a different one: is the report about an employment-related matter in which the university has an interest (defined as "more than a mere curiosity or concern")? In my opinion, as further discussed below, the answer to that question is "yes."

[67] At the conclusion of his reply representations, the appellant amplifies this point further by stating:

> Therefore, misconduct – from misdirection in mandate to ethical breaches in criminal behaviour – is a factor that must be considered when pleaded on appeal, as is the case here. Otherwise, to turn a blind eye to the question of the Appellant's evidence-based pleading of misconduct and to thereby allow the exclusion would have the effect of shielding the institution from public accountability, an effect that is contrary to the purpose of the *Act*. Public accountability is not restricted to a tunnel vision of the institution's statutory mandate but includes misconduct in all institutional activities, whether the said activities are justified or not.

[68] As I have already stated, above, this argument ". . . suggests that the IPC is to become an arbiter of the behaviour of institutions, and if it is found to be lacking in some manner, the institution would lose its ability to rely on section 65(6)3. I reject this argument." I also noted that ". . . I am required to determine, on the facts, whether the criteria in section 65(6)3 are met, and 'has an interest' means 'more than a mere

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[21] *Ontario (Ministry of Correctional Services) v. Goodis*, cited above, at para. 24.

curiosity or concern.'" As the university stated in its reply representations:[22]

> Needless to say, the University denies the Appellant's allegations of misconduct in this respect. In any event, the Appellant's submissions are without merit. The well-established test for the application of s. 65(6)3 does not inquire into whether the circumstances of the creation of a record, or the contents of a record were "materially inconsistent with the institution's statutory and legal obligations." The Court of Appeal has confirmed that the test does not even inquire into the nature of an institution's interest in a record, and that a "legal interest" is not required.[23] The test only asks whether an institution has "more than a mere curiosity or concern" in the employment-related matter to which the record relates. The test posed by the appellant reads substantial new restrictions into s. 65(6)3 which are not found in the language of the statute, nor in the jurisprudence.
>
> The appellant's proposed restriction would also assign to the IPC the task of assessing each record brought before it to determine whether the record could, in some way, be said to be inconsistent with an obligation on the part of the institution in question. This task would take the IPC far beyond its jurisdiction, requiring it to make findings of fact about the legitimacy of the actions of an institution through a "moral, ethical or civil-law" lens, in matters with no bearing on the institution's obligations under [the *Act*]. The Appellant's proposed restriction is impossible to interpret and apply in practice.

[69] I agree with the university. While inappropriate behaviour by institutions may attract the application of the "public interest override" found at section 23 of the *Act*, that override does not apply to exclusions such as section 65(6). Moreover, section 23 provides clear criteria for its application, such that there must be a compelling public interest in disclosure that clearly outweighs the purpose of an exemption. By contrast, as the university notes, the appellant's proposed approach is impossible to interpret and apply in practice. In any event, as I noted above, this office is required to determine, on the facts, whether the criteria in section 65(6)3 are met.

[70] As previously stated, "has an interest" means "more than a mere curiosity or concern."[24] That is the test I will apply here.

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[22] (set out here, rather than in my discussion of the university's reply representations, above, for ease of reference)
[23] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner*), cited above.
[24] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner),* cited above.

Analysis and Conclusions

Part 1: collected, prepared, maintained or used by an institution or on its behalf

[71] It is clear on the evidence, including the records themselves, that the report and the other records at issue were prepared by or on behalf of the university, meeting part 1 of the test. Some of the records were prepared by the psychiatrist, and others by university staff.

Part 2: "in relation to" meetings, consultations, discussions or communications

[72] All of the records are communications. For the reasons outlined above, I find that as the records themselves are communications, their preparation had "some connection" to communications, and part 2 of the test is met. In addition, I find that all of the records other than the report had "some connection" to the report, itself a communication, since they are ancillary documents that reference or deal with the report. Accordingly, I find that all of the records were prepared "in relation to" communications.

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

[73] Referring to the criteria in *Goodis*, it is clear that the records are related to a matter in which the institution is acting as an employer, and human resources questions (namely, the contemplated dismissal of the appellant) are at issue, as discussed above. Having reviewed the records, I find that the report is a communication about the employment-related matter of the appellant's dismissal. Clearly, this was a matter about which the university had "more than a mere curiosity or concern." For these reasons, I find that this is a matter in which the university "has an interest" within the meaning of section 65(3)3. As regards the other records, I have just found that they were prepared "in relation to" the report, which is a communication about an employment-related matter in which the university has an interest.

[74] I therefore find that all of the records meet the third part of the test.

[75] As all three parts of the test are met, I find that the records are excluded from the scope of the *Act* under section 65(6)3.

Issue B: Is section 65(6) unconstitutional or constitutionally inapplicable under section 2(b) of the *Canadian Charter of Rights and Freedoms*?

[76] The appellant contends that he should receive access to the records on the basis of the right to freedom of expression in section 2(b) of *Canadian Charter of Rights and Freedoms* (the *Charter*).

[77] As already noted, the appellant's NCQ claims that the records are a necessary

precondition for making meaningful expression about the university's practices affecting its employees and students, and the public at large. In his initial representations, he states that the *Act* is unconstitutional because, among other things, it does not allow him to communicate to anyone about the report. As regards freedom of expression, the appellant's concerns therefore relate to his ability to discuss the report publicly, and also to express himself about the university's relationship with its employees in a more general sense.

[78] He concludes both his initial representations and his sur-reply representations by requesting, among other items, the following relief:

- an order that access to the records must be granted forthwith because the application of section 65(6) to exclude the records is unconstitutional;

- a declaration that section 65(6) is unconstitutional.

[79] As the university relies on section 65(6)3, that section is the focus of the constitutional issues under consideration here. The first bullet point is, in effect, a request for a finding that section 65(6)3 is constitutionally inapplicable in the circumstances of this appeal. The second bullet point requests a declaration that the section is, *per se*, unconstitutional.

[80] The availability of these two forms of relief has been confirmed by the Supreme Court of Canada in *Eldridge v. British Columbia (Attorney General)*:[25]

> There is no question, of course, that the *Charter* applies to provincial legislation; see *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573. There are two ways, however, in which it can do so. First, legislation may be found to be unconstitutional on its face because it violates a *Charter* right and is not saved by s. 1. In such cases, the legislation will be invalid and the Court compelled to declare it of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982*. Secondly, the *Charter* may be infringed, not by the legislation itself, but by the actions of a delegated decision-maker in applying it. In such cases, the legislation remains valid, but a remedy for the unconstitutional action may be sought pursuant to s. 24(1) of the *Charter*.

[81] If a breach of section 2(b) is found, traditional *Charter* analysis would then require consideration of section 1 of the *Charter*.

[82] Sections 1 and 2(b) of the *Charter* state:

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[25] [1997] 3 SCR 624, at para. 20.

> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> 2. Everyone has the following fundamental freedoms:
>
> > (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

Approach to Charter adjudication at the tribunal level

[83] It is clear that the IPC has the authority to decide constitutional issues, including those arising under the *Charter*.[26] A more complex question arises as to what form of analysis should be employed in deciding this issue.

[84] In *Doré v. Barreau du Québec*,[27] the Supreme Court of Canada reviewed the decision of the Tribunal des professions in an appeal from a disciplinary decision taken by the Disciplinary Council of the Barreau du Québec. The issue was whether a reprimand issued to a member of the Barreau for critical remarks about a judge constituted a violation of the member's right to freedom of expression as guaranteed under section 2(b) of the *Charter*.

[85] *Doré* focuses on the appropriate methodology for a court to apply when reviewing an administrative tribunal's decision applying the *Charter*. The Court's reasons compare the assessment of whether a law violates the *Charter* with the similar but distinct issue of whether a decision of an administrative tribunal does so.

[86] The Court decided that, in the latter case, an "administrative law" approach should be adopted rather than the *Oakes*[28] test, which is the usual method of

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[26] See *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54 at para. 3, which states, in part: "Administrative tribunals which have jurisdiction — whether explicit or implied — to decide questions of law arising under a legislative provision are presumed to have concomitant jurisdiction to decide the constitutional validity of that provision. This presumption may only be rebutted by showing that the legislature clearly intended to exclude Charter issues from the tribunal's authority over questions of law." The Commissioner's powers at sections 50 through 54 of the *Act* clearly include the power to decide questions of law including, for example, the interpretation and application of the exemptions at sections 12-22 and section 49, and the interpretation and application of exclusions such as section 65(6)3. There is no evidence that the Legislature intended to exclude *Charter* considerations from the Commissioner's mandate.

[27] 2012 SCC 12

[28] This is a reference to *R. v. Oakes*, [1986] 1 S.C.R. 103, which established the test for whether an established *Charter* breach would survive a constitutional challenge because of section 1 of the *Charter*. This could occur if the objective is pressing and substantial, and if it passes the following "proportionality" test: "First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally

determining whether, in the event of an established *Charter* breach, an impugned statutory provision should survive under section 1 of the *Charter* because it represents a "reasonable limit" that is "prescribed by law as can be demonstrably justified in a free and democratic society."

[87] The "administrative law" approach involves consideration of the statutory objectives and balancing those against the extent to which they interfere with a *Charter* right.

[88] In deciding to apply the "administrative law" approach on judicial review where *Charter* issues arise, the Court stated[29]:

> . . . Normally, if a discretionary administrative decision is made by an adjudicator within his or her mandate, that decision is judicially reviewed for its reasonableness. The question is whether the presence of a *Charter* issue calls for the replacement of this administrative law framework with the *Oakes* test, the test traditionally used to determine whether the state has justified a law's violation of the *Charter* as a "reasonable limit" under s. 1.
>
> It seems to me to be possible to reconcile the two regimes in a way that protects the integrity of each. The way to do that is to recognize that an adjudicated administrative decision is not like a law which can, theoretically, be objectively justified by the state, making the traditional s. 1 analysis an awkward fit. On whom does the onus lie, for example, to formulate and assert the pressing and substantial objective of an adjudicated decision, let alone justify it as rationally connected to, minimally impairing of, and proportional to that objective? On the other hand, the protection of *Charter* guarantees is a fundamental and pervasive obligation, no matter which adjudicative forum is applying it. How then do we ensure this rigorous *Charter* protection while at the same time recognizing that the assessment must necessarily be adjusted to fit the contours of what is being assessed and by whom?
>
> We do it by recognizing that while a formulaic application of the *Oakes* test may not be workable in the context of an adjudicated decision, distilling its essence works the same justificatory muscles: balance and proportionality. I see nothing in the administrative law approach which is inherently inconsistent with the strong *Charter* protection — meaning its

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connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question. [Citation omitted.] Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance'."

[29] *Doré*, at paras. 3-7.

> guarantees and values — we expect from an *Oakes* analysis. The notion of deference in administrative law should no more be a barrier to effective *Charter* protection than the margin of appreciation is when we apply a full s. 1 analysis.
>
> In assessing whether a law violates the *Charter*, we are balancing the government's pressing and substantial objectives against the extent to which they interfere with the *Charter* right at issue. If the law interferes with the right no more than is reasonably necessary to achieve the objectives, it will be found to be proportionate, and, therefore, a reasonable limit under s. 1. In assessing whether an adjudicated decision violates the *Charter*, however, we are engaged in balancing somewhat different but related considerations, namely, has the decision-maker disproportionately, and therefore unreasonably, limited a *Charter* right. *In both cases, we are looking for whether there is an appropriate balance between rights and objectives, and the purpose of both exercises is to ensure that the rights at issue are not unreasonably limited.*
>
> . . . In the *Charter* context, the reasonableness analysis is one that centres on proportionality, that is, on ensuring that the decision interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives. If the decision is disproportionately impairing of the guarantee, it is unreasonable. If, on the other hand, it reflects a proper balance of the mandate with *Charter* protection, it is a reasonable one.
>
> [Emphases added.]

[89] The Court also observed that:[30]

> It goes without saying that administrative decision-makers must act consistently with the values underlying the grant of discretion, including *Charter* values. . . . [Citations omitted.] The question then is what framework should be used to scrutinize how those values were applied?

[90] This analysis is primarily directed at the approach to be taken by a reviewing court, rather than an administrative law decision-maker such as myself. However, it is evident from these comments by the Court that, in adjudicating *Charter* issues, an administrative law decision-maker must achieve an appropriate balance between rights and objectives.

[91] The Court provided further guidance on this point later in its reasons.[31] It stated:

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[30] at para. 24.
[31] at paras. 55 and 56.

> How then does an administrative decision-maker apply *Charter* values in the exercise of statutory discretion? He or she balances the *Charter* values with the statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives. . . .
>
> Then the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives. . . .

[92] In *R. v. Clarke*,[32] in a passage that appears to be *obiter*, the Supreme Court amplified its discussion of the proportionality exercise:

> . . . Only in the administrative law context is ambiguity not the divining rod that attracts *Charter* values. Instead, administrative law decision-makers "must act consistently with the values underlying the grant of discretion, including Charter values" (*Doré*, at para. 24). The issue in the administrative context therefore, is not whether the statutory language is so ambiguous as to engage *Charter* values, it is whether the exercise of discretion by the administrative decision-maker unreasonably limits the *Charter* protections in light of the legislative objective of the statutory scheme.

[93] This restatement of the principle in *Doré* helps to explain its meaning, and also provides a strong indication that the requirement for ambiguity in a legislative text before *Charter* values can be considered[33] does not apply in the administrative law context.

[94] In *Doré*, the alleged infringement of the Barreau member's freedom of expression arose from the application of section 2.03 of the *Code of ethics of advocates*, which stated: "The conduct of an advocate must bear the stamp of objectivity, moderation and dignity." The constitutionality of this provision was not, itself, under attack. Rather, the question was whether the decision of the Tribunal des professions, upholding the earlier ruling of the Disciplinary Council of the Barreau du Québec, violated the member's right to freedom of expression.

[95] In the wake of *Doré*, a significant question is: how does an administrative tribunal assess *Charter* issues in order to "balance the severity of the interference of the

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[32] 2014 SCC 28, at para. 16. These comments appear to be *obiter* because this decision relates to a change in the law of sentencing in the criminal law context. It does not involve an administrative law decision. See also *Taylor-Baptiste v. Ontario Public Service Employees Union*, 2015 ONCA 495 at paras. 54-55.

[33] See, for example, *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 62.

Charter protection with the statutory objectives"? What methodology should be followed?

[96] In the appeal under consideration in this order, the appellant argues that section 65(6) of the *Act* is constitutionally inapplicable because of section 2(b) of the *Charter*, and in the alternative, that section 65(6), *per se*, is unconstitutional. The representations I have received that relate to section 2(b) focus on whether there has been a breach of section 2(b). In that way, they appear to be aimed at a traditional *Charter* analysis rather than the "*Charter* values" approach.

[97] I do not read *Doré* as precluding a traditional *Charter* analysis, in which the first step is to determine whether a *Charter* right has been breached, and if so, the second step would be to consider section 1 of the *Charter*. In fact, this approach has been followed in a subsequent case involving the judicial review of an administrative decision.[34]

[98] I also note the following comment by Paul Daly in "Charter Application by Administrative Tribunals: Statutory Interpretation," in a discussion of *Doré* :[35]

> Caveat: the individual retains the option of asking for a Charter remedy, in which case I presume a formal Charter analysis remains necessary.

[99] In the context of the *Act*, the framework for assessing whether there is a breach of the *Charter* is provided by the Supreme Court of Canada's decision in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*[36] (*CLA*). Interestingly, although the approach taken in *CLA* resembles traditional *Charter* analysis, the Court in *Doré* characterizes it as an embodiment of the "administrative law" approach:

> Other cases, and particularly recently, have instead applied an administrative law/judicial review analysis in assessing whether the decision-maker took sufficient account of *Charter* values. This approach is seen in . . . *Criminal Lawyers' Association*. . . .[37]

[100] Accordingly, I will apply the criteria enunciated in *CLA*. After conducting that analysis, I will also review the statutory objectives and assess the balance between the severity of the interference with section 2(b) protection and the statutory objectives, as advocated in *Doré*.

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[34] See *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47.
[35] *Administrative Law Matters*, June 12, 2014.
[36] 2010 SCC 23.
[37] at para. 32 of *Doré*. "*Criminal Lawyers' Association*" is fully cited elsewhere in *Doré* as a reference to *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23.

The interpretation and application of section 2(b) of the Charter in relation to the Act

[101] As already noted, *CLA* provides the framework for assessing possible breaches of section 2(b) of the *Charter* in the context of the *Act*. In *CLA*, the Court considered whether the public interest override at section 23 of the *Act* was constitutionally underinclusive, based on section 2(b) of the *Charter*, because it omitted to provide for the possible override of the exemptions found in sections 14 (law enforcement) and 19 (solicitor-client privilege). In upholding an order of this office finding that section 23 is not constitutionally underinclusive on that basis, the Court articulated the following criteria for finding that section 2(b) of the *Charter* has been breached in relation to an access-to-information request:

> We conclude that the scope of the s. 2(b) protection includes a right to access documents only where access is necessary to permit meaningful discussion on a matter of public importance, subject to privileges and functional constraints.[38] . . .
>
> . . .
>
> To demonstrate that there is expressive content in accessing such documents, the claimant must establish that the denial of access effectively precludes meaningful commentary. If the claimant can show this, there is a prima facie case for the production of the documents in question. But even if this prima facie case is established, the claim may be defeated by factors that remove s. 2(b) protection, e.g. if the documents sought are protected by privilege or if production of the documents would interfere with the proper functioning of the governmental institution in question. If the claim survives this second step, then the claimant establishes that s. 2(b) is engaged. The only remaining question is whether the government action infringes that protection.[39]
>
> . . .
>
> To show that access would further the purposes of s. 2(b), the claimant must establish that access is necessary for the meaningful exercise of free expression on matters of public or political interest. . . .[40]
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> In sum, there is a prima facie case that s. 2(b) may require disclosure of documents in government hands where it is shown that, without the

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[38] at para. 31.
[39] at para. 33.
[40] at para. 36.

> desired access, meaningful public discussion and criticism on matters of public interest would be substantially impeded.[41] . . .
>
> If this necessity is established, a prima facie case for production is made out. However, the claimant must go on to show that the protection is not removed by countervailing considerations inconsistent with production.[42]
>
> . . .
>
> The first question is whether any access to documents that might result from applying the s. 23 public interest override in this case would enhance s. 2(b) expression. This is only established if the access is necessary to permit meaningful debate and discussion on a matter of public interest. If not, then s. 2(b) is not engaged.[43]
>
> If necessity were established, the CLA, under the framework set out above (para. 33) would face the further challenge of demonstrating that access to ss. 14 and 19 documents, obtained through the s. 23 override, would not impinge on privileges or impair the proper functioning of relevant government institutions.[44] . . .

[102] From this, it can be seen that in order to establish that section 2(b) of the *Charter* has been breached in relation to a request under the *Act*, the following two requirements must be satisfied: (1) access to the information must be necessary for the meaningful exercise of free expression on matters of public or political interest; and (2) if requirement 1 is met, it must also be the case that there are no countervailing considerations inconsistent with disclosure, such as privileges, and/or evidence that disclosure would impair the proper functioning of the university.

[103] The first full iteration of the test I have quoted from *CLA*, above, adds what might be seen as a third requirement: "The only remaining question is whether the government action infringes that protection." In the circumstances of this appeal, the action in question is the denial of access, which we know has occurred. Requirement 1 asks whether access is necessary for the meaningful exercise of free expression on matters of public or political interest, and requirement 2 asks whether, if that is the case, other factors such as privilege or impaired functioning of the university are engaged. The question of whether there is a breach of section 2(b) will therefore be determined, in this appeal, by applying requirements 1 and 2.

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[41] at para. 37.
[42] at para. 38.
[43] at para. 58.
[44] at para. 60.

Preliminary Issues

The university's argument that it is not a "government actor" for the purposes of the Charter

[104] Referring to section 32 of the *Charter*,[45] the university submits that the *Charter* does not apply to it because it is not a "government actor."

[105] It relies on *McKinney v. University of Guelph*[46] as authority for this proposition. *McKinney* finds that the University of Guelph is not a "government actor" and that the *Charter* therefore does not apply to its retirement policies. These policies are not statutory, and therefore the question in *McKinney* was whether the *Charter* applies to free-standing activities of a university that were not undertaken to implement a statutory scheme or government policy. *McKinney* finds that "private activity" is excluded from the *Charter*. In that regard, the Court states that:

> . . . the *Charter* was not intended to cover activities by non-governmental entities created by government *for legally facilitating private individuals to do things of their own choosing* without engaging governmental responsibility. . . .
>
> . . .
>
> The *Charter* apart, there is no question of the power of the universities to negotiate contracts and collective agreements with their employees and to include in them provisions for mandatory retirement. *These actions are not taken under statutory compulsion, so a Charter attack cannot be sustained on that ground.* [Emphases added.]

[106] In my view, however, *McKinney* is distinguishable because, in the appeal under consideration in this order, the university acts as an institution under the *Act*, and in so doing, it is expressly applying and administering the provisions of a statute enacted by the Ontario Legislature, and performing a statutory duty. As subsequent jurisprudence makes clear, non-government actors who effect public policies or programs are subject to the *Charter* with respect to those activities.

[107] A leading decision on that point is *Eldridge v. British Columbia (Attorney General)*,[47] in which the Supreme Court of Canada found that hospitals (who, like universities, are "private" entities, or, put slightly differently, are not part of "government"), are subject to the provisions of the *Charter* when they deliver statutorily

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[45] Section 32 of the *Charter* states, in part: "This Charter applies . . . (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province."
[46] [1990] 3 SCR 229.
[47] Cited above.

mandated health services.

[108] The Court begins its analysis in *Eldridge* by asking whether the alleged *Charter* violation "arises from the impugned legislation itself or from the actions of entities exercising decision-making authority pursuant to that legislation."[48] This distinction plays into the question of whether legislation might be found to be unconstitutional *per se* (where the *Charter* violation "arises from the impugned legislation") or constitutionally inapplicable (where the violation "arises . . . from the actions of entities exercising decision-making authority"). As I have already noted, the appellant in this case argues both of these positions.

[109] Elsewhere in *Eldridge*, the Court describes its categorization of alleged *Charter* violations as a question of whether "the legislation itself is constitutionally suspect" or whether the alleged breach arises from the "actions of the delegated decision-makers in applying it." The Court finds that, in the circumstances of that case, the debate focuses on the latter – the actions and not the statute itself. Implicitly, however, the Court's language here suggests that the role of the "actor" – be it governmental or non-governmental – is not determinative where the question is whether the legislation in question is, *per se*, unconstitutional. This view finds further support in section 52(1) of the *Constitution Act, 1982*, which states:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[110] Accordingly, in my view, where the constitutionality of section 65(6)3, *per se*, is at issue, the university's role as a non-governmental actor is irrelevant. The subject of scrutiny is the law itself.

[111] The university's role only takes on potential significance in the context of its *actions* or, put slightly differently, where the focus is whether a statutory provision purportedly applied by a non-governmental actor can be constitutionally inapplicable because of a *Charter* violation.

[112] Significantly, the Court in *Eldridge* determined that the source of the alleged *Charter* violation was the *actions* of the hospitals and the Medical Services Commission, and that these were subject to *Charter* scrutiny:

> . . . In my view, the *Charter* applies to both [hospitals and the Medical Services Commission] *in so far as they act pursuant to the powers granted to them by the statutes*.[49] [Emphasis added.]

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[48] at para. 22.
[49] at para. 19.

. . .

> . . . There is no doubt, however, that the *Charter* also applies to action taken under statutory authority. The rationale for this rule flows inexorably from the logical structure of s. 32. As Professor Hogg explains in his *Constitutional Law of Canada* (3rd ed. 1992 (loose-leaf)), vol. 1, at pp. 34-8.3 and 34-9:
>
> > Action taken under statutory authority is valid only if it is within the scope of that authority. Since neither Parliament nor a Legislature can itself pass a law in breach of the Charter, neither body can authorize action which would be in breach of the Charter. *Thus, the limitations on statutory authority which are imposed by the Charter will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority.*[50] [Emphasis added.]

[113] The clear import of these statements is that where an entity that is not "part of government" acts pursuant to a statute, the *Charter* is engaged by that action. This view is confirmed by the Supreme Court's reasons in *Blencoe v. British Columbia Human Rights Commission):*[51]

> Bodies exercising statutory authority are bound by the *Charter* even though they may be independent of government. [52]

[114] For all these reasons, I conclude that both positions advocated by the appellant – that section 65(6)3 itself is unconstitutional, and alternatively, that it is "constitutionally inapplicable" because of alleged damage to freedom of expression caused by the university's decision to rely on it in this case – are properly before me in this appeal. [53]

The appellant's argument that he has "public interest" standing

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[50] at para. 21.
[51] 2000 SCC 44.
[52] at para. 35.
[53] The university also relied on *Moghadam v. York University*, 2014 ONSC 2429, a brief judgment of the Divisional Court that cites *McKinney* and finds that York's actions in a number of matters, including the treatment of a request under the *Act*, were "not governmental in nature" and the applicant's *Charter* rights to procedural fairness had therefore not been impinged. As the present appeal does not relate to procedural fairness rights, *Moghadam* is distinguishable on its facts and, in any event, does not engage in any detailed discussion of occasions when a private entity's actions warrant *Charter* scrutiny, as extensively canvassed in *Eldridge*, which is a decision of a higher court that is, clearly, binding.

[115] The appellant makes a number of arguments to the effect that he has "public interest" standing to make a constitutional challenge.[54] These submissions are similar to arguments made to demonstrate that a party is entitled to be granted intervener status in a court action or application. Other than the authorization under section 52(8) for the Commissioner to summon and examine "any person who, in the Commissioner's opinion, may have information relating to the inquiry," the *Act* does not contemplate the granting of standing or special status in an appeal.

[116] In any event, it is not necessary for the appellant to establish public interest standing. He has standing to make constitutional arguments because he is a party to this appeal, and the *Act* must be constitutional if it is to apply.[55] Moreover, as already noted, it is clear that the IPC has the power to make constitutional determinations.[56]

The appellant's arguments that section 65(6)3 is unconstitutional because it limits privacy protection

[117] Because this order deals with an access request and the ensuing appeal from a denial of access, the *Charter* issue before me is whether section 65(6)3 is unconstitutional, or constitutionally inapplicable, based on section 2(b) of the *Charter*.

[118] In addition to providing representations on this subject, however, the appellant's submissions on the *Charter* contain many arguments based on his view that section 65(6) is unconstitutional because it abrogates his privacy rights.

[119] For example, he submits that the report was prepared without his knowledge or consent, and this activity is shielded from any transparency or accountability by section 65(6)3. He also states that, due to the section 65(6)3 statutory exclusion, his privacy regarding the report and other records in the hands of the university is not protected by law. He argues that if section 65(6)3 has the effect of negating the application of privacy protection to these alleged violations of his privacy, this would be grounds to find section 65(6)3 unconstitutional.

[120] For the most part, this is a separate and distinct issue from the question of whether section 65(6)3 is unconstitutional with respect to *access* rights, which are at issue in this appeal. This is not a privacy complaint investigation, and the appellant's allegations of privacy breaches in the preparation of the report do not assist with the threshold question of whether the denial of access to the records under the *Act* breaches his right to the meaningful exercise of free expression under section 2(b) of

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[54] In this regard, the appellant refers to *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236.
[55] See section 52(1) of the *Constitution Act, 1982* (quoted in full above).
[56] See *Nova Scotia (Workers' Compensation Board) v. Martin,* as cited and quoted at footnote 26, above.

the *Charter*.[57] At most, the privacy issues raised by the appellant could impact the question of whether the subject matter he wishes to discuss is a matter of public or political importance.

[121] In any event, for the sake of completeness, I will review the appellant's foundational arguments in relation to privacy.

[122] As part of this discussion, the appellant refers to jurisprudence describing the federal *Privacy Act* as having a quasi-constitutional mission.[58] Even if this means that the *Act* is quasi-constitutional, however, this does not alter the general principles of statutory interpretation.[59] Nor does this create a more general constitutionally-mandated right of privacy. Accordingly, I do not accept the appellant's argument that section 65(6) is unconstitutional because privacy is a constitutionally protected value, and section 65(6) precludes privacy protection of excluded materials such as the report.[60]

[123] The appellant also argues that, under section 8 of the *Charter*, privacy is a protected right. However, section 8 of the *Charter*, which provides that "Everyone has the right to be secure from unreasonable search or seizure," comes into play most often when an individual is under investigation for a possible offence. In order for section 8 to apply, there must be an actual search or seizure.[61] That has not occurred here. Moreover, it is clear from its wording and interpretation that section 8 does not create constitutionally-protected privacy rights of more general application.

[124] While I agree with the appellant that ". . . the *Act* must itself be constitutional," I disagree with his statement that the *Act* ". . . cannot without sufficient justification exclude a particular area from both privacy protection and oversight of privacy protection." [Emphasis in original.] The *Act* is simply providing that the privacy rights it creates (which have not been found to be constitutionally required) do not apply in some instances.

[125] The appellant makes further arguments to the effect that the contents of the report demonstrate that its preparation involved "egregious violations of the appellant's

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[57] Access to one's own personal information is also an aspect of privacy. The *Act* implicitly recognizes this right in section 47(1), which provides a right of access to one's own personal information, subject to the exemptions in section 49.

[58] *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 at para. 24.

[59] See *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 at para. 40, where the Court makes this observation about the quasi-constitutional *Access to Information Act*.

[60] This finding that there is no general free-standing constitutionally-mandated right of privacy includes a finding that there is no free-standing constitutionally-mandated right of access to one's own personal information based on privacy principles. Moreover, as already noted, this right is formally recognized in section 47(1) of the *Act*.

[61] *R. v. Jarvis*, 2002 SCC 73 at para. 69

privacy;" that searches for additional records may reveal additional privacy breaches; and he was not informed by the university that it had provided the records at issue to the IPC. As regards the first two points, I will address the appellant's privacy concerns, and the issue of reasonable search, later in this order. I have already dealt with the fact that the records were provided to the IPC in the discussion of section 65(6)3, above.

International Covenant on Civil and Political Rights

[126] The appellant also refers to the *International Covenant on Civil and Political Rights* (the *Covenant*) and argues that, unless it conforms to Canada's obligations under this instrument, the *Act* is invalid. The *Covenant* was adopted by the United Nations General Assembly and has been in force since 1976.

[127] In different parts of his representations, the appellant refers to the articles in the *Covenant* that protect privacy and freedom of expression. These articles state:

> *Article 17*. 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.
>
> *Article 19*. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

[128] In his initial representations, the appellant submits that that an objective definition of "free and democratic society" cannot be confined to mean whatever Canada does, but rather, must be informed by the relevant international declarations and covenants ratified by Canada, and especially the *Covenant*. In making this argument, the appellant is referring to one of the elements of section 1 of the *Charter*. Section 1 only comes into play where there is an established *Charter* breach. I agree that the contents of international agreements may have a bearing on the meaning of "free and democratic society," and this could be an indication that in some cases, they merit consideration in assessing section 1 issues. Because of the conclusions reached in this order, it will not be necessary for me to refer to section 1 of the *Charter*.

[129] At sur-reply, in a reference to *CLA*, the appellant concedes that the IPC does not have the authority to override a Supreme Court of Canada judgement (*CLA*) that establishes a test about the interpretation of the *Charter*. However, he also submits that the IPC has both the authority and the duty to interpret the *CLA* test in a manner that is consistent with the *Covenant*, in the circumstances of this appeal.

[130] In support of this argument, the appellant quotes from *Saskatchewan Federation*

of Labour v. Saskatchewan.[62] In that case, the Supreme Court of Canada struck down a Saskatchewan law that limited the right of public sector employees to strike as a violation of section 2(d) of the *Charter* that was not saved under section 1. The Court considered international covenants as part of its *Charter* reasoning. The appellant submits that:

> . . . the authority and duty of the IPC [to interpret the *CLA* test in a manner that is consistent with the *Covenant*] derive from recently reaffirmed Supreme Court of Canada jurisprudence:[63]
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> > LeBel J. confirmed in *R. v. Hape*, 2007 SCC 26 (CanLII), [2007] 2 S.C.R. 292, that in interpreting the Charter, the Court "has sought to ensure consistency between its interpretation of the Charter, on the one hand, and Canada's international obligations and the relevant principles of international law, on the other": para. 55. And this Court reaffirmed in *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 (CanLII), [2013] 3 S.C.R. 157, at para. 23, "the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified".

[131] This presumption is described by the Court in *Saskatchewan Federation of Labour* as helping to "frame the interpretive scope" of the section of the *Charter* under consideration there.

[132] It is also to be noted that in *Hape*, the Supreme Court affirmed that the presumption of conformity is rebuttable, and that clear and unequivocal legislation that is in breach of international law must be followed by domestic courts. The Court expressed these points as follows: [64]

> . . . It is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law. The presumption of conformity is based on the rule of judicial policy that, as a matter of law, courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result. R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 422, explains that the presumption has two aspects. First, the legislature is presumed to act in compliance with Canada's obligations as a signatory of international treaties and as a member of the international community. In deciding between possible interpretations, courts will avoid

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[62] 2015 SCC 4.
[63] *Saskatchewan Federation of Labour v. Saskatchewan*, cited above, at paras. 64-65.
[64] 2007 SCC 26 at paras. 53-54.

> a construction that would place Canada in breach of those obligations. The second aspect is that the legislature is presumed to comply with the values and principles of customary and conventional international law. Those values and principles form part of the context in which statutes are enacted, and courts will therefore prefer a construction that reflects them. The presumption is rebuttable, however. *Parliamentary sovereignty requires courts to give effect to a statute that demonstrates an unequivocal legislative intent to default on an international obligation*. . . . [My emphasis.]
>
> The presumption of conformity has been accepted and applied by this Court on numerous occasions. In *Daniels v. White*, [1968] S.C.R. 517, at p. 541, Pigeon J. stated:
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> > [T]his is a case for the application of the rule of construction that Parliament is not presumed to legislate in breach of a treaty or in any manner inconsistent with the comity of nations and the established rules of international law. . . . *[I]f a statute is unambiguous, its provisions must be followed even if they are contrary to international law . . . .* [Underlining added by the Court for emphasis. Italics are my emphasis.]

[133] The Court also stated:[65]

> In interpreting the scope of application of the *Charter*, the courts should seek to ensure compliance with Canada's binding obligations under international law where the express words are capable of such a construction.

[134] I now turn to consider the impact of the two sections of the *Covenant* cited by the appellant in the context of this appeal.

[135] Article 19, paragraph 2 of the *Covenant* and section 2(b) of the *Charter* both address freedom of expression. In my view, the wording of section 2(b) of the *Charter* as interpreted in *CLA* is in conformity with Article 19, Paragraph 2 of the *Covenant*. I reach this conclusion because *CLA* recognizes the right of freedom of expression, and also recognizes that section 2(b) may require access to government-held documents. No special interpretation is required to enforce conformity as it is already present in the existing *Charter* provision and the relevant jurisprudence that interprets it in the context of the *Act* (*CLA*).

[136] With respect to section 17 of the *Covenant*, I note that privacy rights are protected in Part II of the *Act* ("Protection of Individual Privacy"), including rules about

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[65] at para. 56.

collection, use and disclosure of personal information by institutions, and a right of access to one's own personal information, subject to exemptions and exclusions.

[137] From the jurisprudence I have referred to above, it is clear that the approach of encouraging tribunals to adopt interpretations that are "consistent" with the *Covenant* (as urged by the appellant) has its limits. Where the statutory language will not bear such an interpretation, courts and tribunals are required to follow the statutory language.

[138] In this case, I have found that section 65(6)3 applies to exclude the records from the scope of the *Act*. Section 65(6)3 is clear and its application to the records is, in my view, irrefutable regardless of the interpretive lens that is used. Accordingly, based on the relevant jurisprudence, I have concluded that even if section 65(6)3 of the *Act* does not conform to the requirements of the *Covenant* (a conclusion which, to be clear, I have *not* reached), this is not a case where I can intervene and, in effect, amend the *Act* in order to ensure conformity with the *Covenant*.

[139] In the discussion that follows, the remaining issue is whether the appellant is entitled to access, despite section 65(6)3. I have found, above, that the test in *CLA* is consistent with Canada's obligations under Article 19, Paragraph 2 of the *Covenant*. Accordingly, in this order, I will apply the *CLA* test.

Representations

University's initial representations

[140] Some of the university's representations address the onus of proof the appellant must meet in order to establish a breach of section 2(b). In that regard, the university submits:

- the right of access to government records discussed in *CLA* in relation to section 2(b) is a narrow, derivative right, arising from an appellant's freedom of expression only where the appellant can demonstrate the existence of specific preconditions; and

- as a result, it is not enough to consider whether section 65(6) may hypothetically lead to an infringement; rather, the appellant must demonstrate that, in his specific circumstances, section 2(b) is engaged and the application of section 65(6) has resulted in an infringement of his section 2(b) rights based on the facts of this case.

[141] In *CLA*, the Supreme Court did not use the word "narrow" to describe the right of access that might arise under section 2(b). I will apply *CLA* by referring to words that the Court actually did use in describing the circumstances in which section 2(b) would require access to records under the *Act*.

[142] However, I agree with the university that the onus is on the appellant to demonstrate, based on the evidence, that his section 2(b) *Charter* rights have been infringed. As the Supreme Court notes in *CLA*,[66] "[t]o demonstrate that there is expressive content in accessing such documents, *the claimant must establish* that the denial of access effectively precludes meaningful commentary. *If the claimant can show this*, there is a prima facie case for the production of the documents in question." [Emphasis added.]

[143] The university also submits that *CLA* sets out a test based on the *necessity* of access in order to permit meaningful public discussion on a matter of public importance. The university submits that the appellant has not met the section 2(b) test articulated in *CLA* because:

- access to the report is not necessary as the appellant has already demonstrated that he is capable of "meaningful discussion" regarding the university's relationship with its employees, which he alleges to be a matter of public importance;
- the appellant has already received a copy of the report;
- the university's relationship with its employees is a private matter and not a matter of public importance;
- the report is in any event related to the university's relationship with the appellant, rather than its relationship with its employees broadly.

[144] These arguments relate primarily to the first requirement under section 2(b) as articulated in *CLA*, which stipulates that access must be necessary for the meaningful exercise of free expression on matters of public or political interest.

[145] In that regard, the university goes on to submit that "necessity" is a high threshold and even if the appellant can show that discussion would be limited or incomplete without access, this is not sufficient; rather, the appellant must demonstrate that meaningful discussions cannot occur without access. The Court did not state that necessity is a high threshold. To reiterate, I will apply the language that the Court actually used in *CLA* in my assessment of whether access is required under section 2(b).

[146] The university also argues that since his dismissal, the appellant has engaged in "meaningful expression" regarding his alleged mistreatment by the university, and that he maintains websites dedicated to highlighting events at the university that he believes warrant public discussion, including repeated and public questioning of the university's approach to his employment and dismissal. The university provides links to these

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[66] at para. 33.

websites, only one of which appears to be functional at the present time.

[147] The website that remains active contains many posts that illustrate the university's point, including the following:

- commentary on the arbitration process and the progress of the judicial review of the arbitration award;
- commentary on the disclosure process within the arbitration;
- commentary on the appellant's dismissal and the legal proceedings that followed it;
- links to media stories about the appellant and the grievance arbitration;
- video links to commentary by the appellant and others concerning his suspension, dismissal and treatment by the university; and
- critical references to the university's tactics in connection with the dismissal of the appellant.

[148] The website also attributes the views it sets out to the appellant, unless stated otherwise.

[149] One of the video links is a television interview with the appellant, which the university describes as "a vivid summary" of the conflict between the appellant and the university. I have reviewed the interview. It represents a significant expression of opinion by the appellant concerning his relationship with the university. Another is a link to a trailer for a film documentary, in which the appellant is prominently featured expressing his views about the university's decision to dismiss him.

[150] The university submits that:

> . . . it is clear from the Appellant's vigorous criticism of the University on his websites that his ability to engage in meaningful expression of his views regarding the University's treatment of its employees has not been prevented – or even impaired.

[151] The university states that in *CLA*, the Supreme Court found that the requester had not demonstrated that the withheld report was necessary for meaningful expression because this could occur on the basis of the public record. As noted earlier, *CLA* involved a request for an OPP investigation report and other records relating to alleged wrongdoing by the Crown and police in a murder case. The Supreme Court found that disclosure of the report and the other records was not required to permit meaningful discussion as the latter could take place based on the public record, which included the trial court's judgment staying the charges against the accused.

[152] The university then refers to the grievance arbitration process and the disclosure of documents to the appellant through that route. The university challenges the notion that disclosure of the records at issue, including the report, could be necessary to permit meaningful discussion because the appellant has "already received and reviewed the report."

[153] As already noted, the appellant is constrained from publicly discussing the contents of the report because of the implied confidentiality undertaking that attaches to records produced during the grievance arbitration and not introduced in evidence. In my view, because of this constraint, the fact that the appellant has received a copy of the report and the other records at issue does not negate the possibility that access under the *Act* could be required to permit meaningful discussion. As Adjudicator Catherine Corban stated in Order PO-3325, ". . . such restricted access is clearly not equivalent to the kind of unrestricted access that would be granted under the Act if it is found that no exclusions or exemptions apply. . . ."[67] I therefore reject the university's arguments to the effect that the appellant's *Charter* right to freedom of expression is not engaged because he has received the records at issue.

[154] Referring to the second requirement articulated in *CLA*, under which it must be demonstrated that disclosure "would not impinge on privileges or impair the proper functioning of relevant government institutions," the university submits that any resulting section 2(b) interest is "outweighed by the functional need for confidential space for the University to act as employer." The university submits that the Legislature clearly had this purpose in mind in enacting section 65(6). While that may be the case, I would find, on the evidence before me in this case, that disclosure would not, in any significant way, impinge on the proper functioning of the university, whether or not it can accurately be described as a "government institution."

[155] In its discussion of the second requirement articulated in *CLA*, the university does not refer to the impingement of privileges, nor to the fact that if I find that section 2(b) of the *Charter* applies to mandate disclosure, such disclosure might contradict and render meaningless the implied confidentiality undertaking imposed in the grievance arbitration proceedings. However, it is clear that such an application of section 2(b) would, in effect, constitute an "end run" around this undertaking. I will refer to these issues again in my discussion of the second requirement under "Analysis," below.

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[67] See also the commentary in *Ontario (Ministry of Correctional Services) v. Goodis* (cited above), at para. 50. In that case, the request was for records that were "informed by and reveal information learned on discovery," but the implied undertaking did not affect the access request. The Court stated that: ". . . the implied undertaking rule does not apply to these records. To the extent that these records reveal information provided on discovery, the information originates with the ministry and is not subject to an implied undertaking in its hands."

Appellant's initial representations

[156] Under the heading of "preliminary issues," the appellant submits that the university's statement that he already has the report "should be struck from its submissions as an abuse of process." The appellant describes this as a "false" argument.

[157] The *Act* does not contemplate a procedure for "striking" portions of a party's representations. In my view, the university's references to the appellant's possession of the records, a fact that is established on the evidence (given that he provided a copy to this office with his representations), is not an abuse of process. Regardless, in my discussion above, I did not accept the university's arguments to the effect that, because he has received the records at issue, the appellant's *Charter* right to freedom of expression is not engaged. I rejected these arguments because the records in the appellant's possession are constrained by the implied confidentiality undertaking.

[158] Later in his representations, the appellant introduces his submissions under section 2(b) by setting out some of the main themes of his argument.

[159] He alleges that the report contains "proof" of improper activities in the course of its preparation, and that he is barred from fully knowing about or communicating about it. He submits that these circumstances are incompatible with a free and democratic society, and Ontario's statutory exclusion that permits such a state of affairs is unconstitutional. It is evident that the appellant is fully aware of the contents of the report. The issue is his ability to discuss it publicly.

[160] The appellant also submits that access-to-information statutes have quasi-constitutional status in Canada.[68] On that point, I note that in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*,[69] the Court observed that "[w]hile I agree that the Access to Information Act may be considered quasi-constitutional in nature, thus highlighting its important purpose, this does not alter the general principles of statutory interpretation." Similarly, in my view, the fact of quasi-constitutional status does not, *per se*, impact on the question of whether the appellant's section 2(b) rights have been breached.

[161] He submits that the more an institution resists transparency, the more important it is to undertake a constitutional examination of statutes that protect access and privacy, and states that the university is using the *Act* as a shield against transparency. With respect to the importance of constitutional review where transparency is resisted, I am baffled as to what point the appellant is trying to make, given that one of the major issues to be addressed in this appeal is the constitutionality of section 65(6)3. I

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[68] *Canada (Information Commissioner) v. Canada (Minister of National Defence)* and *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, both cited above.
[69] Cited above.

do not see that this statement adds anything to the constitutional analysis being undertaken here.

[162] Nor is the appellant assisted by his argument that the university is using the *Act* as a "shield against transparency." The *Act* contains numerous exemptions and exclusions, which represent the Legislature's assessment of when access and privacy rights may or, in the case of mandatory exemptions, must bow to other public policy goals. In any such instance, the institution relying on these provisions may be alleged to be using them as a "shield against transparency." That does not, *per se*, make them unconstitutional. Rather, when the claim of unconstitutionality arises under section 2(b) of the *Charter*, the test in *CLA* must be applied.

[163] The appellant also states that by including section 65(6), the *Act* is out of step with modern norms of transparency and protection of privacy in modern free and democratic societies. He asks that I take judicial notice of the absence of a provision like section 65(6) in other Canadian and international access-to-information statutes. However, even if this were the case, the absence of similar provisions in other access-to-information legislation would not demonstrate that section 65(6)3 is unconstitutional.

[164] Later in his representations, the appellant makes a number of arguments specifically aimed at demonstrating that *CLA*'s criteria for determining whether section 2(b) has been breached, as set out above, have been met.

[165] With respect to the first requirement articulated in *CLA*, to the effect that access is necessary to permit meaningful discussion of matters of public or political interest, the appellant submits:

- the report demonstrates improper activity by the university;
- the report was prepared without him being interviewed;
- the report contains his personal information provided by others and he has no control over this personal information;
- there are no adequate legal protections to prevent such a report from being written and no mechanism for him to respond to and correct any harmful elements;
- the report is based on hearsay and its reasoning is faulty;
- examining the report will provide an opportunity to study, assess and critique professional methodology;
- the appellant is absolutely and permanently gagged from discussing the report, and therefore, from "meaningfully contributing to public discourse potentially

affecting an array of statutory and policy issues of importance to workers, students and concerned citizens at large;"

- the appellant has no other way to get access to the report and related records because both the author of the report and the university are refusing access;
- because section 65(6) is an exclusion, this office cannot review the university's exercise of discretion;
- the appellant has the means to make the meaningful expression that access would permit;
- the public's right to information is a fundamental value recognized by the *Charter*'s guarantees of free expression and freedom of the press.[70]

[166] With respect to the second requirement articulated in *CLA*, which deals with circumstances that are inconsistent with disclosure, the appellant submits that access would not encroach on protected privileges. He indicates that the university does not claim solicitor-client privilege and that the implied undertaking rule does not limit access obtained outside the arbitration process.[71] He also submits that access is compatible with the functioning of the university.

[167] The appellant also alleges that section 65(6) produces an absurdity that makes constitutional protection ineffective. In this regard, he states, in effect, that exclusion of the records from the *Act* would mean that he would not know the contents of the records and the IPC could not review them. However, neither of these allegations is true in the present case. The appellant has the records and knows their contents, and they have also been provided to the IPC for review.

[168] He also attempts to distinguish *CLA* because it dealt with exemptions and the exercise of discretion, whereas this appeal deals with an exclusion. I reject this distinction. As already pointed out, this office is entitled to review the records in appeals where exclusions have been claimed. The criteria established for a section 2(b) *Charter* breach in *CLA* are not specifically geared to discretionary exemptions, but are, rather, specific to the entire access-to-information context. The appellant seeks to buttress this argument by referring to the fact that in *CLA*, the records were subject to solicitor-client privilege, a recognized societal value override, and that extensive information was already known about the specific matter. These arguments only go to the issue of whether the result here should be the same as it was in *CLA*, as discussed later in this order. They do not lessen the applicability of the requirements for a breach of section 2(b) articulated in that case.

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[70] see section 2(b) of the *Charter*.
[71] The appellant cites Order PO-3325, which determined that the request that is at issue in this order was not frivolous or vexatious.

[169] The appellant also argues that section 65(6) is unconstitutional because it violates the fundamental principle of the rule of law. He submits that the section 65(6) exclusions "effectively bar him from access to justice." I disagree. I am not aware of any reason why, for example, the appellant would be constrained from making a professional complaint against the author of the report, if that were warranted, or from pursuing other actions at law if he has a cause of action, or from requiring production and introduction of the report in evidence if it is relevant in proceedings to which he is a party.[72] I also note that the judicial review of the arbitration award relating to his dismissal is ongoing.

[170] In a further argument, the appellant submits that the section 65(6) exclusions are arbitrary and contrary to the purposes of the *Act*. He says this means that, under the principle of the rule of law, they are unconstitutional. I disagree with this analysis. The rationale behind section 65(6) is explained in its legislative history. This was discussed in *Ontario (Ministry of Correctional Services) v. Goodis*[73] as follows:

> . . . Subsection 65(6) was added to the Act by the Labour Relations and Employment Statute Law Amendment Act, S.O. 1995, c. 1, s. 82. In introducing the bill, the Hon. Elizabeth Witmer, then Minister of Labour, described it as a "package of labour law reforms designed to revitalize Ontario's economy, to create jobs and to restore a much-needed balance to labour-management relations" (Ontario, Legislative Assembly, Official Report of Debates (Hansard) (4 October 1995)). The Hon. David Johnson, Chair of the Management Board of Cabinet, stated that the amendments to provincial and municipal freedom of information legislation were "to ensure the confidentiality of labour relations information" (ibid.).
>
> Moreover, s. 65(6) should be interpreted in light of the purpose of the Act, which is found in s. 1. . . .

[171] Two things are immediately clear from this: (1) the legislation that added section 65(6) to the *Act* was considered by the Legislature in light of the purpose of the new section being enacted, and (2) rather than contravening the purpose of the *Act*, section 65(6) is to be interpreted in light of that purpose, as it has been in the jurisprudence, including *Goodis*.

[172] Accordingly, in my view, the appellant's arguments relating to the rule of law and the purposes of the *Act* cannot succeed.

[173] The appellant provided an affidavit with his initial representations, which I have

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[72] The implied undertaking rule that constrains the appellant does not constrain the university because the report originated with it, as the body that produced it during the grievance arbitration. See *Ontario (Ministry of Correctional Services) v. Goodis*, cited above, at para. 50.

[73] Cited above, at paras. 25-26.

reviewed. In many respects, it makes the same points as the appellant's representations, as already outlined above, but the appellant also includes what he describes as "evidence" of the public importance of the conflict between himself and the university. In that regard, he refers to media coverage dealing with his relationship with the university and the grievance arbitration. He also cites conflicts between the university and others as evidence of the public importance of the university's relations with other employees.

University's reply representations

[174] In reply, the university clarifies that its purpose in raising the fact that the appellant already has a copy of the report was simply to argue that, since he already has the report, access cannot be a precondition of meaningful discussion.

[175] I have already addressed this argument in the discussion of the university's initial representations, above. I observed that the appellant's use of the records, which include the report, is restricted by the implied undertaking explicitly set out in an interim award issued by the grievance arbitrator. For this reason, I stated the appellant has not had the equivalent of access under the *Act*, and further, the appellant's receipt of a copy of the report, and the other records at issue, subject to the implied confidentiality undertaking, does not negate the possibility that access under the *Act* could be required to permit meaningful discussion.

[176] In response to this submission by the university, I reiterate this point. The issue here is whether access *under the Act* is necessary to permit meaningful discussion of an issue of public importance. The appellant's possession of the records is not the equivalent of access under the *Act*, as it is constrained by the implied undertaking. Again, I do not find the university's argument based on the appellant's constrained possession of the records to be persuasive.

[177] The university also reiterates that it is not a government actor for the purposes of the *Charter*. I have already addressed these arguments, above.

[178] The university characterizes many of the appellant's arguments relating to its alleged misconduct as a quest for evidence of that misconduct, and indicates that nothing in *CLA* ". . . provides an individual with a right of access to a record in order to 'prove' an assertion." While that may be true, I note that without receiving access to the report under the *Act*, the implied undertaking would preclude the appellant from making any comments that would divulge its contents, let alone using it to "prove" anything.

[179] The university amplifies its earlier submissions relating to the fact situations in *CLA* and in this appeal. The university states that in *CLA*, ". . . details regarding the murder investigation and prosecution were already in the public domain as a result of judicial proceedings in respect of same," and here, "the details of the University's

treatment of the appellant have already been explored in the public domain through an arbitration process." In *CLA*, these details were contained in a published judgment,[74] and in this appeal, the arbitration process produced reasons in the form of the final arbitral award, which contains significant details of the appellant's relationship with the university. This submission goes to the first requirement articulated in *CLA*, which stipulates that disclosure of the records at issue under the *Act* must be necessary to permit the meaningful exercise of free expression on matters of public or political interest. I will discuss this further under "Analysis," below.

[180] Referring to the implied confidentiality undertaking that attaches to the records as produced during the arbitration, the university submits that:

- the restrictions on use resulting from the undertaking were imposed with the consent of the parties, including the union, and the appellant could have challenged them through the union but chose not to;

- the constraints on the appellant's ability to make "meaningful expression" are therefore by his own agreement;

- the appellant could have raised the criticisms of the university set out in his initial representations during the arbitration, and thereby could have made "meaningful expression" at that time; and

- the appellant could have decided to introduce the report into evidence at the arbitration, which would have removed the implied confidentiality undertaking, but did not do so.

[181] I believe that the existence of the confidentiality undertaking is relevant to the appellant's *Charter* challenge, and in particular, to requirement 2 articulated in *CLA*, as discussed under "Analysis," below. However, I am not persuaded by these arguments of the university which, in essence, allege that the appellant is the author of his own misfortune in relation to the confidentiality undertaking.

[182] Again, the question before me is whether disclosure under the *Act* is necessary to permit meaningful expression concerning a matter of public importance, and if so, whether such disclosure is inconsistent with privileges or would interfere with the proper functioning of the university. The appellant's failure to take the steps in the arbitration that could have avoided the confidentiality undertaking applying to the report or other records at issue is not determinative of this issue.

[183] The university also submits that the subject matter on which the appellant wishes to make "meaningful expression" is ". . . actually in essence a continuation of the Appellant's personal dispute with the university regarding the termination of his

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[74] *R. v. Court* (1997), 36 O.R. (3d) 263, 1997 CanLII 12180 (ON SC).

employment." The university submits that this is a private matter, not a matter of public importance, and therefore does not enjoy *Charter* protection under section 2(b). In support of this, the university refers to the points raised by the appellant in his affidavit and observes that they concern the relationship between the appellant and the university.

[184] Although it would only be necessary to consider this issue if I were to conclude that access under the *Act* is required for meaningful expression, I feel compelled to point out that I do find this argument persuasive. The university is an important publicly-funded institution. Depending on the circumstances, I believe that allegations of impropriety in the university's relationship with its employees, including the appellant, may be a matter of public importance. Because of my conclusions, below, it is not necessary to determine whether that is so in the present case.

[185] With respect to the appellant's "rule of law" arguments, which I have rejected above, the university essentially submits that the basis for granting the *Charter* relief the appellant seeks is the approach articulated by the Supreme Court in *CLA*. For the reasons stated earlier in this order, I agree.

Appellant's sur-reply representations

[186] In sur-reply, the appellant refers to the university's arguments that section 2(b) of the *Charter* does not require disclosure of "evidence" to support meaningful expression, and makes the following submission which, in my view, raises a slightly different question, namely, how much expressive ability constitutes "freedom of expression" and how textured is the information that must be disclosed in order to support it? The appellant submits:

> . . . the [university] is again trying to cast the *Criminal Lawyers* test as whether meaningful expression about any related but broad and generic topic "is possible without the record". . . .

[187] He argues that this view "would render the *Criminal Lawyers* test meaningless." He goes on to focus in particular on the report and the other records at issue, stating that "it is illegal for the Appellant to make expression about the Report, and about other respondent records." [Emphasis in original.]

[188] He states further:

> To be clear, the Appellant argues that to adopt the institution's overly broad alleged interpretation of the words "on a matter" in the Criminal Lawyers test "where access is necessary to permit meaningful discussion on a matter of public importance" — alleged to mean generically about the Appellant's . . . labour conflict with the institution, without needing to include the matters about the Report and about all the records in issue —

> would, in the circumstances of the instant appeal, lead to a result that makes no logical sense. . . .

[189] With respect to the kind of access that is required under section 2(b), the appellant submits:

> The [university]'s insistence that the case-law phrase "where access is necessary to permit meaningful discussion on a matter of public importance" [citation omitted] in-application [sic] means any generic expression about any broadly-related matter, which does not depend on access, is incorrect. The institution's position would make the [*CLA*] test both meaningless and unconstitutional.

[190] The appellant also states that "generic" is antithetical to "meaningful." In my view, the degree to which access must be provided to comply with section 2(b) is a significant issue. I will discuss it further under "Analysis," below.

[191] The appellant also responds to a number of the university's other arguments made at reply.

[192] He argues that the university's submissions relating to the failure to introduce the records into evidence at the grievance arbitration are without merit and "should be struck." As I have already observed, the *Act* does not contemplate a procedure or "striking" portions of a party's representations. However, in my review of the university's representations, I have already rejected its submissions relating to the fact that the records were not introduced at the arbitration.

[193] In responding to an argument by the university that the IPC has the power to compel production of records claimed to be excluded, which is in fact the case as alluded to earlier, the appellant argues that he must still make fact-dependent arguments without seeing the records, which is the "'absurdity' that is argued by the Appellant." He goes on to say that "[t]he said absurdity occurs if one applies the [CLA] test without contextual interpretation and without recognizing that the circumstances of the [CLA] case are distinguished from the instant appeal. . . ."

[194] This argument does not stand up to scrutiny. The appellant has the records, and he has discussed them extensively – particularly the report – in his representations in this appeal. Therefore, he has had the opportunity to "contextualize" his arguments. As regards his attempt to distinguish *CLA* from this appeal, I have rejected these arguments in my discussion of the appellant's initial representations, above.

Analysis

[195] The essential issue remaining after the discussion of the parties' representations, above, is whether the requirements developed in *CLA* to establish a breach of section 2(b) have been satisfied in the circumstances of this appeal. If so, subject to any

additional analysis that may be required under section 1 of the *Charter*, the possible outcomes of this appeal include a declaration that section 65(6)3 is unconstitutional, or a finding that it is constitutionally inapplicable in the circumstances of this case.

[196] To reiterate, as determined in *CLA*, in order to conclude that there has been a breach of section 2(b) at first instance, both of the following requirements must be satisfied: (1) access to the information must be necessary for the meaningful exercise of free expression on matters of public or political interest; and (2) if requirement 1 is met, it must also be the case that there are no countervailing considerations inconsistent with disclosure, such as privileges, and/or evidence that disclosure would impair the proper functioning of the university.

Requirement 1: Is access necessary for the meaningful exercise of free expression on matters of public or political interest?

[197] An examination of this requirement reveals two components: (1) is access necessary for the meaningful exercise of free expression? (2) if so, is the subject of the proposed expression a matter of public or political interest?

[198] With respect to item (1), the positions of the parties may be summarized as follows.

[199] The university submits that access is not necessary because the appellant has already demonstrated that he is capable of "meaningful discussion" regarding the university's relationship with its employees. To support this contention, the university refers to websites that serve as vehicles for the appellant's discussion of his dismissal. I have discussed one of these websites, and other examples of the appellant's expressions of opinion concerning his dismissal, above.

[200] The appellant submits that he is absolutely and permanently gagged from discussing the report, and therefore, from "meaningfully contributing to public discourse potentially affecting an array of statutory and policy issues of importance to workers, students and concerned citizens at large." He also states that he has no other way to get access to the report and related records because both the author of the report and the university are refusing access.

[201] In reply, responding to the appellant's arguments that *CLA* is distinguishable (which I have already discussed above, and found that the *CLA* test must be applied in this case), the university submits that the facts here are analogous to those in *CLA* because in that case, details regarding the investigation and prosecution were already in the public domain as a result of judicial proceedings, and in this case, details of the university's treatment of the appellant have already been explored in the public domain through the arbitration process. In *CLA*, the details were contained in a published

judgment,[75] and in this appeal, the arbitration process produced reasons in the form of the final arbitral award, which contains significant details of the appellant's relationship with the university.

[202] In sur-reply, the appellant submits that the *CLA* test is broader than the university says it is, and that because of the implied confidentiality undertaking, "it is illegal for the Appellant to make expression about the Report, and about the other respondent records." He characterizes the university's position as meaning that the ability to make generic expression about any broadly-related matter is sufficient to meet the requirements of section 2(b), and he disputes this approach. He also observes that "generic" is antithetical to "meaningful."

[203] I agree with the university. The appellant has had the opportunity to engage in a very detailed and public expression of opinion about his relationship with the university, including his dismissal and the grievance proceedings that followed it. This is evident from the discussions in the website cited by the university that I looked at. It is also evident from media articles that discuss the situation, and the television interview I have referred to above.

[204] The appellant has asserted that he is not able to discuss the report. However, the report is but one aspect of the appellant's dismissal. In assessing the interests at stake here, the context is significant. The appellant seeks access to the records by applying the *Charter* to invalidate or render inapplicable an enactment of the Ontario Legislature. This is not a finding to be made lightly. Accordingly, I have concluded that the appellant's claim that section 65(6)3 is unconstitutional or constitutionally inapplicable under section 2(b) is not established where the evidence demonstrates that he is able to express himself meaningfully in relation to the subject matter in question, which in this case is his relationship with the university, including his dismissal. In my opinion, the evidence establishes this ability here. Nor, in my view, is he constrained from entering into meaningful public discussion of the university's relationship with its employees.

[205] I also conclude that the facts in relation to freedom of expression are analogous to those in *CLA*. In *CLA*, the court's judgment staying the murder charges contained a great deal of information about the grounds for doing so. However, access to the records, which were reports and other documents containing information relating to the subsequent police investigations, had been denied.

[206] The Court stated:

> In our view, the CLA has not demonstrated that meaningful public discussion of the handling of the investigation into the murder of Domenic Racco, and the prosecution of those suspected of that murder, cannot

[75] *R. v. Court*, cited above.

> take place under the current legislative scheme. Much is known about those events. In granting the stay against the two accused, Glithero J. stated:
>
> > . . . I have found many instances of abusive conduct by state officials, involving deliberate non-disclosure, deliberate editing of useful information, negligent breach of the duty to maintain original evidence, improper cross-examination and jury addresses during the first trial. [p. 300]
>
> The record supporting these conclusions is already in the public domain. The further information sought relates to the internal investigation of the conduct of the Halton Regional Police, the Hamilton-Wentworth Regional Police and the Crown Attorney in this case. It may be that this report should have been produced under the terms of the Act, as discussed below. However, the CLA has not established that it is necessary for meaningful public discussion of the problems in the administration of justice relating to the Racco murder.

[207] Similarly, in this case, the appellant has engaged in a grievance arbitration process that resulted in an arbitration award that is in the public domain and outlines the university's reasons for dismissing the appellant and his reasons for objecting to it. The university has denied access to records that contain further information about one aspect of the university's process in dismissing the appellant. In my view, the appellant has not demonstrated that access to this further information is necessary for meaningful public discussion of his dismissal, or of the university's relationship with its employees.

[208] That being so, it is not necessary to consider the second component under requirement 1 of the *CLA* test, *i.e.* whether the expression the appellant wishes to engage in is a matter of public or political interest.

[209] Because of my conclusion that access is not required in order for the appellant to exercise the right of free expression concerning his relationship with and dismissal by the university, or concerning the university's relationship with its employees, I find that the first part of the *CLA* test has not been met, and therefore, a breach of section 2(b) of the *Charter* has not been established.

[210] That is sufficient to conclude my discussion of this issue. However, I will also consider the second requirement established in *CLA*.

Requirement 2: Are there countervailing considerations inconsistent with disclosure, such as privileges, and/or would disclosure impair the proper functioning of the university?

[211] As I have already stated, I believe that the implied confidentiality undertaking is

relevant to this requirement, and in particular, to the fact that under *CLA*, a section 2(b) claim ". . . may be defeated by factors that remove section 2(b) protection, e.g. if the documents sought are protected by privilege. . . ."[76] Similarly, the Supreme Court in *CLA* refers to the onus on the applicant to "show that the protection is not removed by countervailing considerations inconsistent with production."

[212] From these quotes, it is clear that the Court is using privilege as an example of a circumstance that might be inconsistent with production. Like the implied confidentiality undertaking, the whole point of privileges is to keep information confidential. For example, solicitor-client privilege exists to ensure the confidentiality of communications between lawyers and their clients.[77] 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.[78] Settlement privilege is ". . . a common law rule of evidence that protects communications exchanged by parties as they try to settle a dispute."[79]

[213] In my opinion, the implied confidentiality undertaking under consideration in this case, which applies by virtue of the interim award of the grievance arbitrator, exists for a similar purpose: to ensure that records produced to the opposing party during the arbitration remain confidential unless they are introduced into evidence. Among other restrictions, it provides that "all documents are to be kept confidential as among the parties." As I observed earlier, applying the *Charter* to facilitate access would constitute an "end run" around the implied confidentiality undertaking.

[214] Past decisions have held that the access process under the *Act* is separate from discovery in the context of litigation.[80] In *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*[81], Lane J. had issued an order prohibiting publication of information obtained in the civil discovery process, including publication by third parties. A request was submitted under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*) for access to the contents of police files that were to be produced in the discovery process. Lane J. stated that his order in the civil proceeding was not intended to interfere with the operation of *MFIPPA*, and would not bar the publication of records obtained under *MFIPPA*. He stated:

> In my view, there is no inherent conflict between the Act and the provisions of the Rules [of Civil Procedure] as to maintaining

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[76] at para. 33 of *CLA*.
[77] See *Solosky v. the Queen*, [1980] 1 SCR 821 at p. 835. Also reported at 1979 CanLII 9.
[78] *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).
[79] *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35 at para. 31.
[80] See, for example, Order PO-2490.
[81] (June 3, 1997), Toronto Doc. 21670/87Q (Ont. Gen. Div.).

> confidentiality of disclosures made during discovery. The Act contains certain exemptions relating to litigation. It may be that much information given on discovery (and confidential in that process) would nevertheless be available to anyone applying under the Act; if so, then so be it; the Rules of Civil Procedure do not purport to bar publication or use of information obtained otherwise than on discovery, even though the two classes of information may overlap, or even be precisely the same.

[215] That decision arose in the context of a situation in which *MFIPPA* applied, and the scheme of exemptions it contains might or might not have come into play. That is a very different situation from the present case, where the impact of the confidentiality undertaking is being considered in a request for *Charter* relief that would render a section of the *Act* either unconstitutional or constitutionally inapplicable. In particular, the question arises under the second requirement established in *CLA* with respect to whether there are countervailing considerations inconsistent with disclosure, such as privileges. In this way, *CLA* requires me to consider whether the implied confidentiality undertaking is such a countervailing consideration.

[216] As I have already noted, privilege is given as an example of a circumstance that is inconsistent with production. There are striking similarities between the impact of privilege, as outlined above, and the confidentiality undertaking imposed during the grievance arbitration. Accordingly, I conclude that the implied confidentiality undertaking is akin to a privilege at law, and must therefore be considered as a circumstance that would be inconsistent with production. This means that, even if the appellant had established that disclosure is necessary for meaningful expression under requirement 1 (which I have found he has not done), there would be no breach of section 2(b) because the second requirement articulated in *CLA* has not been met.

Conclusion

[217] As discussed earlier in this order, in *Doré*,[82] the Supreme Court of Canada stated that in assessing claims under the *Charter*, an administrative law decision-maker ". . . balances the *Charter* values with the statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives."[83] The Court cites the approach taken to section 2(b) claims under the *Act* in *CLA* as an application of the "administrative law" approach, which *Doré* adopts as an alternative to more traditional *Charter* analysis in the administrative law context. I have already quoted this part of the judgment in *Doré*, but it bears repeating here:

> Other cases, and particularly recently, have instead applied an administrative law/judicial review analysis in assessing whether the

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[82] Cited above.
[83] *Doré* at para. 55.

> decision-maker took sufficient account of *Charter* values. This approach is seen in . . . *Criminal Lawyers' Association*. . . .[84]

[218] Having applied the template provided by *CLA*, I have followed the approach advocated in *Doré*. Moreover, my finding that section 2(b) has not been breached is consistent with the analysis advocated in *Doré*. As noted in *Ontario (Ministry of Correctional Services v. Goodis)*,[85] the legislative history of section 65(6) shows that its purpose was "to ensure the confidentiality of labour relations information." Given the wording of the section, this purpose must also include protecting the confidentiality of information about relations with employees. In this case, even without access under the *Act*, the appellant has had the opportunity to engage in a very detailed and meaningful public expression of opinion concerning his relationship with the university, including his dismissal and the grievance proceedings that followed it. He is not constrained from meaningful public discussion of the university's relationship with its employees. This respects the appellant's section 2(b) rights while also honouring the statutory purpose of section 65(6).

[219] For all these reasons, I find that the appellant's claim for *Charter* relief must fail.

Issue C. Did the university conduct a reasonable search for records?

[220] 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.[86]

[221] 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.[87] To be responsive, a record must be "reasonably related" to the request.[88]

[222] 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.[89]

[223] 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.[90]

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[84] Para. 32 of *Doré*. See also footnote 37.
[85] Cited above.
[86] Orders P-85, P-221 and PO-1954-I.
[87] Orders P-624 and PO-2559.
[88] Orders P-880 and PO-2554.
[89] Orders M-909, PO-2469 and PO-2592.
[90] Order MO-2246.

[224] In this case, the request was for access to a report prepared by a psychiatrist, relating to the appellant, and any other records "about the report." In both his initial and sur-reply representations, under the heading "Order requested," the appellant requests the following:

- an express finding that the search was inadequate, in that there is proof that there are more responsive records, including those used in making the Report, and including all meeting notes about preparing or using the report;
- An Order that a new search be performed, which is not limited to the offices of outside counsel and which includes a number of specified areas at the university.

Representations of the parties

Appellant's initial representations

[225] In his initial representations and affidavit, the appellant submits that:

- various written and audio records were used by the psychiatrist in preparing the report;
- such records are responsive to the request and have not been produced;
- the psychiatrist's interview notes relating to an interview he conducted while preparing the report would be a responsive record;
- the university's decision letter "appears to state" that only its external counsel's offices were searched, but no university offices were searched;
- the search is therefore inadequate.

[226] He also states:

> The Appellant seeks the Adjudicator's directions on how best to include the important issue of incomplete search. The Appellant would not object at this stage to postponing a resolution of the incomplete search issue until after the Adjudicator's determination is made concerning access to the report. [Emphasis added.]

University's reply representations

[227] The university submits:

> As suggested by the appellant, consideration of this issue should be deferred until after the application of s. 65(6) is determined. If the IPC accepts the University's submission that [the report] is a communication about an employment-related matter in which the University has an

> interest, then all records with "some connection" to the Report are excluded from the *Act* under s. 65(6)3, and further searches for those records would be moot. If the IPC rejects the University's submissions, then the university would be pleased to address the reasonableness of its searches at that time.

Appellant's sur-reply representations

[228] Given the appellant's statement in his initial representations to the effect that he would "not object at this stage to postponing a resolution of the incomplete search issue," it is somewhat surprising that he would open his submissions on this issue at sur-reply with the following statement:

> Contrary to the institution's statement [paragraph reference omitted], the Appellant did not suggest that "this issue should be deferred until after the application of s. 65(6) is determined". . . .

[229] While it is true that the appellant's comment relating to deferring this issue does not specifically refer to section 65(6), the appellant's initial representations clearly stated that the issue could be deferred.

[230] He also observes that the university had a duty to respond to his "evidence-based" submissions on this issue but instead remained silent. Given the appellant's statement that the issue could be deferred, I disagree. Moreover, as already noted, the failure of a party to respond to a particular argument does not mean that that I am bound to accept that argument. It is my responsibility to weigh the evidence and argument that has been presented.[91]

[231] The appellant also refers to a judicial finding that does not appear to address the existence of additional responsive records in relation to the request that is at issue here (*i.e.* records "about the report"). For reasons of confidentiality, I will not elaborate further on this judgment.

[232] He then submits that:

> . . . in the circumstances of this case, the [IPC] has the jurisdiction and the duty to request and examine all the respondent records obtained by a new and complete search, as these could be material to the main issues in the instant appeal.

[233] Here, the appellant attempts to conflate the issue of reasonable search with the supposed "duty" of this office to order new searches in order to assist with the

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[91] See *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information & Privacy Commissioner)*, cited above.

adjudication of this appeal.

[234] Although section 52(4) permits this office to require production of and examine any record in the custody or under the control of an institution, I have concluded that the evidence and argument before me are sufficient to permit the adjudication of the issues in this case without requiring the production of the additional records the appellant identifies, all of which appear to be documents that were referred to or relied on by the psychiatrist in his preparation of the report. Moreover, beyond the bald assertion I have just quoted, the appellant makes no suggestion as to how these records could be relevant to my determinations under section 65(6) of the *Act* or section 2(b) of the *Charter*.

Analysis

[235] Given the appellant's suggestion to defer the determination of this issue and the university's acceptance of it, and in spite of the appellant's attempt to resile from his earlier position, I could simply defer the issue and decide it in a future order.

[236] However, as the issue can be resolved now, there is no need to defer.

[237] As I have noted, the appellant's request was for access to a report prepared by a psychiatrist, relating to himself, and any other records "about the report." The primary records identified by the appellant and claimed by him to be responsive, in addition to those located by the university, are various written and audio records used by the psychiatrist in preparing the report, as well as interview notes he would have created in the course of preparing it.

[238] In my view, such records, which were underlying records relied on in preparing the report, as opposed to records describing or commenting on it, cannot reasonably be said to be "about the report." "About" in this context can be defined as "on the subject of; concerning"[92] A record that pre-existed the completion of the report and does not comment on it cannot reasonably be said to be "about" the report. Accordingly, such records are not "reasonably related" to the request[93].

[239] As noted above, under the heading "Order requested," in his representations, the appellant also refers to "*meeting notes* and *communications* about preparing or using the report." [Emphasis added.] In my view, such additional records, if they existed, would be excluded from the application of the *Act* under section 65(6)3, as the university submits, for essentially the reasons given above in my discussion of that provision.

[240] As they are described by the appellant, it is clear that such additional records, if

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[92] Oxford online dictionary: https://en.oxforddictionaries.com/definition/about
[93] Orders P-880 and PO-2554.

they existed, would have been collected, prepared, maintained or used by or on behalf of the university in relation to meetings, consultations, discussions or communications about the termination of the appellant's employment, which I have already found to be an employment-related matter in which the university has an interest. The records described by the appellant, if they existed, would either be prepared in relation to "communications" because they actually consist of communications, like the records under adjudication in this order, or they would have been prepared, used, etc. in relation to meetings.

[241] It is also clear that, if they were responsive, any written and audio records used by the psychiatrist in preparing the report, as well as interview notes he would have created in the course of preparing it, would also be excluded under section 65(6)3 for these same reasons.

[242] Accordingly, there is no basis to order the university to conduct further searches.[94] The appellant's appeal on the issue of reasonable search is therefore dismissed.

Additional Issue: The appellant's privacy concerns

[243] Under "Order Requested" at the end of both his initial and sur-reply representations, the appellant asks for "A Commissioner's undertaking to investigate the [university] for possible violations of the Act, given the evidence provided in the instant submissions."

[244] As I have pointed out previously, I am adjudicating an access appeal, not a privacy complaint. There is an established process for filing a privacy complaint with this office which the appellant should follow if he wishes to initiate such a complaint concerning the preparation of the report or any other matter.[95]

ORDER:

This appeal is dismissed.

Original Signed by: January 12, 2017
John Higgins
Adjudicator

[94] Similar determinations were reached in Orders MO-1412, PO-2015-F and PO-3004.
[95] An explanation of the complaint process is found at https://www.ipc.on.ca/privacy/processing-privacy-complaints/. The complaint form is found at https://www.ipc.on.ca/wp-content/uploads/Resources/cmpfrm-e.pdf.