Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3828-I

Appeal PA16-162

University of Toronto

March 16, 2018

Summary: This interim order addresses parts of the University of Toronto's access decision in response to a request for records related to issues of tuition and student debt considered by a committee that organized a class reunion for the Faculty of Law. Of the 25 pages identified as responsive, the university withheld 17 pages in full under sections 49(b)/21(1) (personal privacy) and 49(a), together with section 18(1)(c) (economic interests). In this order, the adjudicator finds that some records contain the personal information of individuals other than the appellant, while others contain both their information and the appellant's own personal information. The adjudicator also finds that some of the withheld information does not qualify as personal information. The adjudicator concludes that section 18(1)(c) does not apply. The adjudicator orders the information that is not personal information and which does not qualify for exemption under section 49(a) disclosed to the appellant. She defers consideration of section 49(b)/21(1), the exercise of discretion and the public interest override, pending notification of affected parties.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) definition of "personal information," 2(3), 18(1)(c), 24(1) and 49(a).

Orders and Investigation Reports Considered: Orders PO-2619, PO-2794 and MO-1485-F.

OVERVIEW:

[1] This interim order addresses certain issues raised by a request under the

Freedom of Information and Protection of Privacy Act (the *Act*) to the University of Toronto (the university) for access to the following information:

1. All emails, text, in-app messages (example: Blackberry Messenger or WhatsApp) or other phone messages, correspondence including internal correspondence, meeting notes or other documents, whether in paper or electronic form, about the selection of a student to speak at the Faculty of Law Class of 1975 Reunion Dinner held on or around September 9, 2015, and all emails, text, in-app or other phone messages, correspondence including internal correspondence, meeting notes or other documents, whether in paper or electronic form which refer to that speech or its subsequent publication at [named websites].

2. All emails, text, in-app or other phone messages, correspondence, meeting notes or other documents, whether in paper or electronic form, from October 1, 2015 to February 1, 2016 about a letter of November 16, 2015 from alumni expressing concerns with high tuition and debt load at the Faculty of Law.

3. Any emails, text, in-app or other phone messages, correspondence, meeting notes or other documents, whether in paper or electronic form which refer to [requester] between April 1, 2015 and February 1, 2016. This request is being made both as a freedom of information request and as a request for access to personal information of the requestor. …

[2] A graduate of the University of Toronto's Faculty of Law submitted the request. The individual indicated that he had been invited by the class reunion organizing committee to speak to the Class of 1975 about the effects of high tuition on student life, career choice and diversity in the profession. After the reunion, a group letter, "signed by more than 40 recent graduates, each of whom had graduated with over $100,000 in debt … was submitted to the Dean of the Faculty later in the fall. ... [We] never received a substantive reply to the issues raised in the letter. Because [of this], I filed the request at issue in this inquiry."

[3] After locating 25 pages of responsive records, the university issued a decision granting partial access to them. Eight pages of records were to be disclosed upon payment of the fee. For the remaining 17 pages, the university relied on the discretionary exemptions in sections 49(a) (discretion to refuse requester's own information), in conjunction with section 18(1)(c) (economic and other interests) and 49(b) (personal privacy) to deny access to them in full. A portion of one page was also withheld as non-responsive.

[4] The requester, now the appellant, appealed the university's decision to this office and a mediator was appointed to explore the possibility of resolving the appeal. The fee issue was resolved when the university agreed to lower the fee. However, as the appellant continued to seek access to the withheld records and the university maintained its position on the exemption claims, the appeal could not be resolved.

[5] The appeal was transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. The adjudicator sought, received and exchanged representations provided by the university and the appellant in response to a Notice of Inquiry setting out the issues. Each party provided two sets of representations, culminating in the receipt of sur-reply representations from the appellant. The appeal was then moved to the orders stage and was subsequently transferred to me.

[6] In this interim order, I find that the records contain the personal information of the appellant and other individuals. Certain personal information is removed from the scope of the appeal as non-responsive according to the appellant's position on this issue. I do not uphold the university's severance of a portion of one of the emails as non-responsive. I find that section 18(1)(c) does not apply and, consequently, that section 49(a) also does not. I defer consideration of the remaining issues with the personal privacy exemption, the university's exercise of discretion and the public interest override, pending notification of affected parties.

RECORDS:

[7] There are 10 records (17 pages) consisting of emails and the minutes of a conference call.

ISSUES:

A. Is there non-responsive information in the records?

B. Do the records contain personal information?

C. Do the discretionary exemptions in sections 49(a) and/or 18(1)(c) apply to the records?

D. The personal privacy exemption

DISCUSSION:

A. Is there non-responsive information in the records?

[8] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. These responsibilities include providing sufficiently clear detail about the information sought so that an experienced employee of the institution can identify responsive records with a reasonable effort.

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

[10] The university's access decision advised the appellant that "part of one of these [withheld] pages is not responsive to your request." The relevant page was not identified in the decision letter at that time or later, when the university provided representations. However, this matter was clarified by the university during the preparation of the order to relate to a brief portion of a March 26, 2015 email (record 1).

[11] Additionally, the appellant indicated that he did not seek access to information about the members of the committee in a personal capacity. The appellant specifically identified personal email addresses and "non-professional communications, including [information] about personal travel, family members, etc.," as falling into that category. I have reviewed the records to single out this type of information, and I will confirm my findings in the discussion of the personal information issue, below.

[12] The appellant did not comment on the university's severance of information from record 1 as non-responsive. I could construe this as a concession that he does not pursue information severed on this basis. For completeness, however, I reviewed the record to determine whether it contains non-responsive information in addition to the personal information removed from the appeal's scope by the appellant. Based on my review of record 1, I find that the portion of the sentence withheld as not responsive to the request is, on the required generous and liberal reading of the request, responsive. In my view, withholding this portion of the email as non-responsive would be an unduly strict and literal reading of the request, and I do not uphold it. As this sentence fragment is part of a larger record withheld in its entirety, I will consider whether the information is otherwise exempt on the basis of the university's exemption claims, below.

B. Do the records contain personal information?

[13] Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution, but this right of access is qualified by section 49, which states, in part:

> A head may refuse to disclose to the individual to whom the information relates personal information,

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[1] Orders P-134 and P-880.
[2] Orders P-880 and PO-2661.

(a) where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information;

(b) where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

[14] Before I review sections 49(a) and 49(b), however, I must first decide which records contain the appellant's personal information or that of other individuals.

[15] In section 2(1) of the *Act*, "personal information" is defined as "recorded information about an identifiable individual," including information such as: an individual's age or marital status (paragraph (a)), educational or employment history (paragraph (b)), address (paragraph (d)), their views and opinions, unless they relate to another individual (paragraph (e)), correspondence sent to the institution of a private and confidential nature (paragraph (f)) or views and opinions of another individual about the individuals (paragraph (g)). The list of examples of personal information under section 2(1) is not exhaustive. Information that does not fall under paragraphs (a) to (h) may still qualify as personal information.

[16] Section 2(3) provides an exception to the definition for the "name, title, contact information or designation of an individual that identifies the individual in their business, professional or official capacity."

[17] To qualify as personal information, the information must be about the individual in a personal capacity. Generally, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[3] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[4]

Representations

[18] In its initial submissions, the university characterizes the records as relating to a "private … gathering for the purpose of significance to the individuals" – a "shared intention to give back [to the University of Toronto's Faculty of Law] in a philanthropic manner." On this basis, the university argues that the records contain the personal information of private individual donors and potential donors who are all members of the identified graduating year from the faculty. The university submits that the emails consist of private and confidential correspondence sent to the university by these individuals, thereby fitting within paragraph (f) of the definition. The university maintains that the information about these individuals constitutes "substantial, nuanced, detailed sensitive personal information…" As for the appellant, the university

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[3] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[4] Orders P-1409, R-980015, PO-2225 and MO-2344.

submits that the records contain only occasional, passing references to him and that, "effectively, there is no substantial/significant information about him."

[19] The university maintains that the correspondence is not about these individuals in a business or professional capacity because it is about them in a personal capacity, including their status as alumni, donors or potential donors. These confidential communications, the university submits, reveal personal and sensitive views, opinions and strategies about class fundraising efforts at the time of a class reunion.

[20] The appellant responds to this submission by describing the context of the request, which centred on concerns about student tuition, debt loads and financial assistance. He submits that while he cannot comment of the veracity of the university's claim that the records contain only "occasional minor mentions" of his name, he maintains that since his own story is used as part of the discussion of the issue by committee members, this is a personal narrative *about* him and necessarily contains his personal information.

[21] Regarding the capacity of the reunion organizing committee, the appellant maintains that it was operating as an official committee of the Faculty of Law. He provides a list of reasons why the committee ought to be characterized as an official committee, such as there being a paid university staff member sitting on the committee, access to the faculty's alumni database and the Dean of the Faculty attending and giving a speech at the event.

[22] In reply, the university refutes the appellant's suggestion that this committee was operating in an official capacity, instead characterizing the committee as a "group formed by graduates who self-select by volunteering." The university submits that the committee's efforts are not rendered institutional in any sense simply because their shared interest happens to align with the Faculty. The university also argues that the "minor logistical help provided by the Faculty," which included providing a contact list of the members of the Class of 1975 and other assistance such as the involvement of an advancement official, does not render the information of individuals "any less personal." The university maintains that the personal views of private individuals acting in a personal capacity must be respected and protected, consistent with *FIPPA.*

[23] The appellant's response to this submission in sur-reply is that the characterization of the committee is relevant, but not determinative, of the issue of whether the information about the members constitutes personal information. He states that it is clear from the facts that the committee was organizing a reunion and that the university was actively involved in the form of providing the assistance of an advancement official.

Analysis and findings

[24] The parties' representations contained a great deal of argument as to how the

class reunion organizing committee should be characterized: that is, whether it was an official committee of the university or not. I do not find it necessary to settle on one characterization of the reunion committee or the other because this is not determinative of the issue of whether the records contain "personal information" according to the definition in section 2(1) of the *Act*. Certainly, there is no dispute that the records are in the custody or under the control of the university and, therefore, that a right of access to them exists under *FIPPA*, subject to limited and specific exemptions.

[25] To begin, however, I disagree with the university that there are only "occasional, passing reference[s]" to the appellant and that such references do not "entitle the appellant to access to the records." Records 4 to 10 contain the appellant's name along with other personal information about him, including the opinions of others about him and his activities. I note that committee members' views and opinions about the appellant and his activities qualify as the *appellant's* personal information, not theirs. This is the distinction highlighted by paragraphs (e) and (g) of the definition of personal information. However, I acknowledge that it is not always possible to draw a "bright line" between an appellant's personal information and that of other individuals. This challenge aside, however, I am satisfied that records 4 to 10 contain information about the appellant that fits within paragraphs (b), (e), (g) and (h) of the definition of personal information in section 2(1) of the *Act.* Under section 47(1) of the *Act*, therefore, the presence of the appellant's personal information in the records does, in fact, afford the appellant a greater right of access to them. Based on my review of records 1 to 3, I find that they do not contain the appellant's personal information.

[26] In addition to the appellant, the records also contain the names of 18 other individuals who were either members of the reunion committee or were mentioned by them. For seven of these individuals, the record contains nothing more than their name and, for some, a work email address. It appears that these individuals from the Class of 1975 were copied on the emails or were mentioned in the minutes, but did not participate in the discussions that led to the creation of these responsive records. On the face of it, the names of these seven individuals may fit within paragraph (h) of the definition in section 2(1), while the latter information may fall under the exception in section 2(3), discussed below.

[27] Records 1-3, 5 and 7-10 contain personal information about four other identifiable individuals that is shared by committee members as part of the discussion around student tuition and debt loads. These individuals are not members of the Class of 1975 and the references to them appear to be incidental to the work of the committee. I find that the personal information about those four individuals fits within paragraphs (a), (b), (g) and (h) of the definition in section 2(1).

[28] The records also contain personal information about the remaining seven individuals who were more active participants in the class reunion organizing committee – three of them, in particular. While I do not agree with the university's position that the personal information about these individuals is nuanced, substantial or detailed, I

find that the information nonetheless fits within paragraphs (a), (b), (d), (e), (g) and (h) of the definition in section 2(1).

[29] An important aspect of my finding in this section is that there is information in these records that does not qualify as "personal information" at all, but rather represents objectively ascertainable fact about the university, the faculty or program administration matters. This is true of some of the content communicated by the active committee members. It is true of most of the information conveyed by the university's development officer. This individual is essentially considered to be "giving voice to the views of the organization," and I find that the information is provided in his professional capacity in the course of routine employment responsibilities. Since this information would not, therefore, reveal anything of a personal nature *about* him, it does not qualify as personal information under the *Act*. The one exception to this finding is that there is personal information about this individual in record 9 that fits within paragraph (e) of the definition in section 2(1).

[30] This particular finding brings me to reviewing the appellant's position on the "personal information" of other individuals. The comment in record 9 by the university's development officer that I noted above is the type of information the appellant has indicated may be removed from the scope of the appeal. The records contain other information of this type about other individuals. Specifically, based on my review of the personal information in the records, I noted brief portions of Records 8, 9, and 10 that consist of non-professional communications, such as details about personal travel, personal contact information or other family members. I find that this personal information is removed from the scope of the appeal, and I will identify it by highlighting it in orange on the copy of any records provided to the university. I will not review this specific information again.

[31] There is identifying information about several of these individuals that could arguably fit within the exception to "personal information" in section 2(3) of the *Act.* However, there is other information about these individuals as members of the reunion organizing committee that could reveal something of a personal nature about them, especially their views and opinions about the specific issues being discussed. The consequence of a finding that the identifying information does not qualify as "personal information" is that it would not qualify for exemption under the personal privacy exemption in section 21(1) (records 1-3) or section 49(b) (records 4-10) because its disclosure could not result in an unjustified invasion of personal privacy. As these individuals have not been notified, I will defer making any finding about this specific identifying information. I explain this approach further in the discussion under Issue D, below.

[32] In summary, therefore, I find that records 4-10 contain the mixed personal information of the appellant and other identifiable individuals, while records 1-3 contain only the personal information of other individuals. I begin my review of the exemption claims by considering the possible application of section 49(a) which allows an

institution to deny access to a requester's own personal information when another listed exemption, such as section 18(1), applies to the record.

C. Do the discretionary exemptions in sections 49(a) and/or 18(1)(c) apply to the records?

[33] The university claims that section 18(1)(c) applies to exempt the reunion organizing committee records from disclosure.

[34] In my findings on "personal information," above, I concluded that records 1-3 do not contain the appellant's personal information, while records 4-10 do. This latter finding makes section 47(1) of the *Act* relevant. Under it, the appellant is given a general right of access to his own personal information held by the institution, subject to certain exceptions, including section 49(a), which states:

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

[35] As stated, the university relies on section 18(1)(c) in this appeal to deny access. The exemption provides that:

> A head may refuse to disclose a record that contains,
>
>> information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

[36] In this appeal, therefore, I must review records 1-3 under section 18(1)(c) alone, while the application of section 18(1)(c) to records 4-10 must be considered through the lens of section 49(a). I will first consider whether the records qualify for exemption under section 18(1)(c).

[37] The purpose of section 18 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*. [5]

[38] In order to satisfy me that section 18(1)(c) applies, the university was required to provide detailed and convincing evidence about the potential for harm. The evidence must demonstrate a risk of harm that is well beyond the merely possible or speculative

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[5] Toronto: Queen's Printer, 1980.

although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[6]

[39] The failure to provide detailed and convincing evidence will not necessarily defeat the institution's claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 18 are self-evident or can be proven simply by repeating the description of harms in the *Act*.[7]

[40] The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.[8]

[41] This exemption is arguably broader than section 18(1)(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.[9]

Representations

[42] The university submits that within a very active charity fundraising sector, it must compete for donations with other universities and other faculties of law. The university explains that disclosure of these specific records, which it says contain the personal information of "donors and potential donors," could reasonably be expected to prejudice its economic interests or competitive position. The university's focus is on harms alleged to its future fundraising success with the specific members of the reunion organizing committee, but also regarding all of its alumni and the larger post-secondary sector, generally.

[43] The university elaborates on its concern about relations with the specific committee members by submitting that disclosure of the detailed, candid personal views shared amongst committee members and with the development officer would be inconsistent with the strong expectations of confidentiality of each of the individual

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[6] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[7] Order MO-2363.
[8] Orders P-1190 and MO-2233.
[9] Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.

members. The university argues that the free and open communication of their opinions, views and preferences was possible because they believed themselves to be communicating in a private setting and context. According to the university, disclosure of their personal information in this context "could reasonably be expected to dismay and upset these individuals and so significantly reduce the likelihood and/or amount of their present and future donations."

[44] Regarding the fund of the Class of '75 specifically, the university submits that disclosure would lay bare the group's specific confidential strategies and ideas, which could reasonably be expected to weaken the campaign and thereby prejudice the economic interests of the university "by strongly reducing the amount of this contribution." According to the university, "one reasonably foreseeable effect of such a reduction would be a corresponding decrease in available student financial aid."

[45] The university also argues that disclosure in this case would clearly communicate to donors and potential donors that their personal information could be disclosed, which would likely have a chilling effect, thereby resulting in fewer or smaller donations and a serious impact on goodwill and trust, as well as fundraising. The disclosure of records "pertaining to potential donors" will break trust and damage the university's fundraising efforts by compromising this specific fundraising effort of the Class of 1975; the university alleges that this harm "will flow forward to damage future fundraising efforts."

[46] The university relies on Order MO-1485-F, arguing that it supports protection of project or campaign strategies where the institution operates in competitive territory for securing donations from private individuals. The university submits that:

> Donors are often very private individuals – not only as a matter of right, protected by legislation, but also because they intentionally seek to make charitable and donation arrangements consistent with causes and purposes that matter to them personally. This is a highly personal activity, comprised of sensitive personal information which many donors would be … strongly motivated to protect.

[47] The university also relies on Orders PO-2619 and PO-2794 where agreements entered into by a university and a donor were found to be exempt under section 18(1)(c). The university claims that the records at issue here contain "detailed strategy and arrangements developed by this group of highly sophisticated donors, to maximize donation[s] by each other, and by their peers." In the university's view, the records here are even more sensitive than the records at issue in Orders PO-2619 and PO-2794 because their disclosure would offer insight into the university's methods and strategy for working with donors and donor groups to secure large donations.

[48] On a larger scale, the university submits that disclosure in this case of "personal information of donors from a major university" could reasonably be expected to

similarly compromise the Ontario university sector overall. According to the university, "donors would understand that donations to Universities do not include protection of their personal information, and many of them would donate elsewhere."

[49] The appellant begins by commenting that the university has "presented no evidence whatsoever" to satisfy the onus of establishing the alleged prejudice to its economic interests. The appellant refutes the university's characterization of the request and the records as being about donations and refers to the nature of his access request for records related to efforts to draw attention to high tuition and debt. The appellant then offers a response to each of the university's "remote and speculative" arguments, which he summarizes thematically by referring to them as follows: "the Hurt Feelings Theory, the Class of '75 Theory, the Chilling Effect Theory and the University Strategy Theory."

[50] In urging me to reject the university's "Hurt Feelings Theory," the appellant submits that it would require me to find, first, that disclosure of the records would cause hurt feelings and, second, that those hurt feelings would lead the individuals to withdraw their donations. The appellant submits that the likelihood of this result is remote because,

> This is the very group that invited me to speak. They are alive to the important issues of tuition and accessibility. … It seems just as reasonable to conclude that they would be pleased that their nuanced and thoughtful discussion [would] be part of the public discourse on the issue.

[51] Next, the appellant argues that the second supposition – that members would withdraw their donations due to hurt feelings – is pure speculation. As the appellant views it, if the records are ordered disclosed,

> there is no reason to think that the hurt feelings will be directed at the University. If there is anger or resentment, the rational object of it would be the Information and Privacy Commissioner, or *FIPPA* itself, or me. It would be irrational for the members, after the University's efforts to shield their comments from release, to hold any animosity toward the Faculty.

[52] The appellant also urges me to reject this particular theory "for policy reasons," suggesting that mere allegations that disclosure of records would hurt the feelings of Committee members do not provide a good reason at law for finding the records to be exempt under section 18(1)(c).

[53] Connected to the "Hurt Feelings Theory" is what the appellant calls the "Class of '75 Theory" whereby the university "baldly asserts" that other members of the class would cease to donate if these records were to be disclosed which would, in turn, reduce financial aid available to law students. The appellant submits that the university's submissions on this point simply do not establish that this form of prejudice

to its interests could result from disclosure of these records. He submits that there is no evidence that their content would reflect poorly on the university, the Faculty of Law or the reunion organizing committee. Further, the appellant observes that to the extent these discussions centred on how to approach the Class of 1975 for donations, "those plans have already been actualized" and disclosure is not likely to change the outcome of outreach efforts.

[54] The appellant also submits that given high tuition and the growing gap between tuition and financial aid, any discussion of these subjects by the organizing committee is "not new or secret," and he submits that it is just as likely that disclosure would "promote more interest in donations, and could have a positive effect."

[55] With respect to the university's concern about the consequences of disclosure on donor relations (the "Chilling Effect Theory"), the appellant argues that the records at issue here are qualitatively different from those at issue in the IPC decisions relied upon by the university. The appellant argues that the records in this appeal contain "general discussion of important issues affecting the Organizing Committee's work" whereas in the orders mentioned by the university, they relate to agreements, contracts or details of a *specific* donation. In the latter situation, the appellant argues, the connection between disclosure of the records and a chilling effect on other donors is clear, while the link between disclosure of the general issue discussion here and the harm alleged by the university is not borne out. The appellant suggests that any chilling effect from disclosure here would much more likely be on committee members' desire to express themselves freely, not on the willingness to make donations in future.

[56] The appellant urges me to examine whether the records, which the university describes as containing the views of the committee members, actually represent the official strategy of the institution. If they do not, he says I must reject the "University Strategy Theory." Further, to the extent that the records may contain any official strategy of the university, the appellant observes that it is difficult to reconcile this theory with the university's claim that the committee was purely private and not part of the Faculty of Law's outreach.

[57] Regarding Orders PO-2619 and PO-2794, the appellant argues that the signed agreements at issue in these orders more clearly show the strategy of the institution than these discussions do. The appellant also observes that in those decisions, the institutions had already provided almost complete access to the agreements in question; whereas, here, "… it is not a matter of the University withholding a specific piece of text which would provide concrete insight into the University's strategy." Further,

> As a practical matter, to the extent that the records refer to testamentary gifts or targeted giving, these are matters of common knowledge and common sense. It is no secret and every university deploys these tools.

[58] In reply, the university submits that the appellant presents an "artificially narrow" interpretation of the purpose of section 18(1)(c) in his representations, which does not give adequate consideration to the very real economic prejudice that can be expected with the "disclosure of personal records dealing with private philanthropic intentions." The university refers, in particular, to its concern with disclosure of "detailed fundraising strategies and the detailed development of those strategies." The university points to the significance of the efforts of "purely private, independent groups of individuals" as a valuable source of income for the university. It is not about "hurt feelings," the university maintains, but rather about the dismay and upset these committee members would feel if records documenting such efforts were to be disclosed, and the resulting impact on their present and future donations to the university.

[59] The university states that the question of whether "plans have already been actualized" is not determinative of the reasonable likelihood of harm with disclosure of "the details of strategy and its formulation" under section 18(1)(c). Further, the university submits that while "some strategies discussed may not be those of the university," because they are the views of the individual contributing committee member, their disclosure can nevertheless also be reasonably expected to lead to harm under section 18(1)(c). Further, the reason Orders PO-2619 and PO-2794 are relevant, notwithstanding the difference in the form of the records at issue, is that the back-and-forth of strategy formulation here "more clearly reveals the strategies than particular contractual covenants based on them."

Analysis and findings

[60] Section 18(1)(c) is a harms-based exemption under which the university bore the onus of demonstrating a reasonable expectation of harm with disclosure. The determination of whether the exemption applies depends on the quality of evidence provided by the party asserting the claim.[10] It requires the presentation of sufficient evidence to establish that the claimed exemption applies to withhold the information that is otherwise subject to a right of access under the *Act*.

[61] Based on my review of the university's representations, the appellant's submissions, and the content of the records at issue, I am not persuaded that disclosure could reasonably be expected to prejudice the university's competitive position or its economic interests, as contemplated by section 18(1)(c).

[62] I will begin by addressing the university's characterization of the records as "clearly and obviously about donations." It is this characterization that underpins the university's arguments about the section 18(1)(c) harms that it claims could reasonably be expected to result from disclosure. I have reviewed these records, and I do not share the university's view. The request submitted by the appellant was clear and

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[10] Order PO-2569.

guided the university in identifying the responsive records. The subject of the request was specified by the following key wording: "the selection of a student to speak at the Faculty of Law Class of 1975 Reunion Dinner;" "that speech or its subsequent publication…;" "a letter of November 16, 2015 from alumni expressing concerns with high tuition and debt load at the Faculty of Law;" and related records about "… the appellant." The responsiveness of the records to this request is not in dispute.[11] I proceed on that basis and by considering the university's submissions in relation to the content of the records.

[63] I recognize that in the context of post-secondary education today, the university's economic interests are closely connected to the success of its fundraising efforts. That reality makes it necessary for the university to cultivate and protect sources of revenue, one of which is its alumni, and I accept that the university has an interest in developing relationships with alumni to further its fundraising goals. I also accept as a general proposition that the university competes with other worthy charities to attract funding to its faculties and programs. Overall, however, I find that the university's evidence of a purported link between disclosure of the records at issue here with harms to its economic interests in securing funds from alumni fails to rise above the merely possible or speculative.

[64] One line of the university's position on section 18(1)(c) is premised on members of the Class of '75 reunion organizing committee taking personal affront to disclosure of these records because the records contain their highly sensitive and candid views about donations, which the university claims is their personal information. Further, although the university presented no specific evidence in support of this assertion,[12] the university maintains that committee members had strong expectations of confidentiality around these discussions. In my view, this submission and other elements of the university's representations on section 18 conflate in some sense the issues of protection of personal privacy with protection of institutional economic interests.

[65] For the most part, the university's concerns about the effect of disclosing the members' personal views or opinions is more properly addressed in a review of the application of the personal privacy exemption in section 49(b), a matter I deal with in the next section. However, I would like to address the university's assertion under section 18 that disclosure could "reasonably be expected to similarly compromise the Ontario University sector generally [because] … donors would understand that donations to Universities do not include protection of their personal information, and many of them would donate elsewhere." I reject this submission, not only as speculative, but because it is entirely without foundation. The university withheld these particular records in their entirety. Their disclosure, in full or in part, would not be the

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[11] I note that I did not uphold the university's decision to sever a brief portion of record 1 as non-responsive under Issue A, above.
[12] The university did not notify any of the affected parties to seek their views about the possibility of disclosure.

result of any capricious or blameworthy action by the university, but rather the outcome of the principled application of *FIPPA* to the facts of this appeal by this office on appeal.

[66] The university also links the suggested personal affront experienced with disclosure of the reunion organizing committee emails and minutes with a corresponding disinclination to donate to the university by those particular individuals, by the university's alumni community and, indeed, the entire university sector. The harmful consequences alleged with disclosure include detriment to successful fundraising and donations, student aid, goodwill and trust, and reputation.

[67] As stated, I will be addressing the individual committee members' concerns with disclosure under section 49(b), keeping in mind that not everything contained in the records qualifies as "personal information" under the definition in section 2(1) of the *Act.* As for the suggestion that disclosure could lead to fewer or smaller donations and negatively impact the availability of student aid as a result, I am simply not persuaded by this bald statement. As I noted above, any disclosure that takes place will be as a consequence of the operation of the *FIPPA* regime.

[68] Furthermore, as intimated by my comments above regarding the nature and scope of the access request, the responsive records are concerned with discussion of student tuition and debt issues and what role the Class of 1975 could play in the issue. As the appellant observes, the planning for that class reunion is complete. In my view, disclosure of the committee discussions contained in the records does not naturally lead to an expectation of compromise to donations in frequency or amount by these individuals or the larger alumni community. It appears equally plausible that bringing greater transparency to the issues of high tuition and student debt levels by disclosing the committee's discussions could, as the appellant posits, encourage donating behaviour by alumni. The records were created, after all, in circumstances where the appellant was sought out as a recent graduate of the law faculty to speak to the Class of 1975 about those very issues. Further, to the extent that views expressed by an individual member of the committee might result in embarrassment for that person or for the university, this is not sufficient to support exemption of these records under section 18(1)(c).[13]

[69] In considering the university's submissions and the IPC decisions quoted in support, I have also considered how these records reveal strategies or the development of strategy by the university. I am urged to find, on the one hand, that disclosure would jeopardize the university's confidential, detailed strategies for fundraising and, on the other hand, that disclosure would amount to the release of "personal records dealing with private philanthropic intentions." I agree with the appellant that it is difficult to reconcile these two characterizations of the records. Apart from reiterating that personal views or opinions can be addressed under section 49(b), I am also of the view

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[13] Order PO-3233.

that to the extent that the records may refer to certain approaches to raising funds from alumni, these are matters of common knowledge. On my review of the records, I find the fundraising approaches discussed there appear to be ubiquitous in the fundraising sector generally, and I reject the argument that their disclosure could reasonably be expected to result in a competitive disadvantage to the university.

[70] The university sets out a lengthy excerpt from Order MO-1485-F in support of its argument that disclosure of the committee's campaign strategy would have a chilling effect on fundraising, goodwill and trust. However, the university has not quoted from the findings of the former Assistant Commissioner, but rather from the position taken by the institution in opposing disclosure. On a reading of the decision, the former Assistant Commissioner clearly upheld section 11(c) of *MFIPPA*[14] only in relation to limited portions of the capital campaign strategy at issue. As is clear from my previous comments, these records do not contain a detailed capital campaign strategy and I note, as well, that the institution in that appeal had disclosed the records nearly in full. Order MO-1485-F does not support the university's position here.

[71] Looking at the other decisions cited by the university, I find the nature of the records again distinguishes the basis for the finding. Unlike the situation in Orders PO-2619 and PO-2794, where parts of agreements entered into by a university and a specific donor were found to be exempt under section 18(1)(c), no such completed covenant, or unique strategy or method of attracting funding to the law school or the university is at issue here. In contrast to the present appeal, the adjudicators were persuaded by the evidence that the particular clauses withheld under section 18(1)(c) were "unique to the negotiation and securing of this donation" at issue and that their disclosure could reasonably be expected to prejudice the universities' future competitiveness in securing funding. As stated, I reject the university's position in this appeal that disclosure could provide competing universities with insight into the University of Toronto's approaches to fundraising, thereby prejudicing its economic interests or competitive position.

[72] Based on the evidence presented and the content of the withheld records, I find that the university's assertions of harm to its fundraising and relations with the Class of 1975, the larger alumni community and the post-secondary sector overall are too remote and speculative to sustain its section 18(1)(c) exemption claim. As the university has failed to provide me with sufficiently detailed evidence to establish a link between the disclosure of the reunion organizing committee's emails and minutes with a reasonable expectation of either of the harms that section 18(1)(c) is intended to protect against, I find that it does not apply.

[73] Since section 18(1)(c) does not apply, section 49(a) is also inapplicable in the circumstances.

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[14] The municipal equivalent of section 18(1)(c).

D. The personal privacy exemption

[74] The university also withheld records 1-10 in their entirety under the personal privacy exemption in section 21(1) and 49(b) on the basis that there was no possibility of severing them under section 10(2) of the *Act* and disclosing any non-exempt portions.[15]

[75] Section 49(b) gives the university the discretion to deny access to information if its disclosure would constitute an unjustified invasion of another individual's personal privacy. Section 49(b) can only apply if the record contains the *personal* information of another identifiable individual along with that of the appellant. In this appeal, records 4-10 must be reviewed under section 49(b). Where a record does *not* contain the appellant's own personal information and only another individual's, as is the case with records 1-3, section 21(1) prohibits the university from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies.

[76] As I stated previously, the personal privacy exemptions in sections 49(b) or 21(1) can only apply to *personal* information, not information generally. Now that I have concluded that section 18(1)(c) does not apply, any information that I have found to be factual – that is, not to fit within the definition of personal information, such as the appendix to record 4, for example – does not qualify for exemption under section 49(a) or section 49(b)/21(1). Additionally, since section 18(1)(c) does not apply to these records, the appellant's personal information in records 4-10 cannot be withheld under section 49(a). It is also generally the case that disclosure of an appellant's own personal information to him or her would not be considered to result in an unjustified invasion of another individual's personal privacy, as section 49(b) requires. However, the individuals who authored certain emails and whose views contain the personal information of the appellant have not been notified in this appeal.

[77] For review under the personal privacy exemptions in sections 21(1) and 49(b), therefore, there is the personal information of individuals other than the appellant that he did *not* remove from the scope of the appeal. This personal information of individuals other than the appellant is contained in all ten records, but more prominently in Records 3, 5, 6, 7, 8 and 10. Some of these same records, such as Records 6 and 7, contain committee members' views or opinions, some of them about the appellant, that walk the line between paragraphs (e) and (g) of the definition of personal information, a point I previously addressed.

[78] Based on my consideration of the representations provided by the university and the appellant, and the content of the records, I have decided that I must notify individuals whose personal information is contained in the records as affected parties to seek their views, including if they would consent under section 21(1)(a) of the *Act* to

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[15] Under section 10(2) of *FIPPA*, an institution "shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions."

disclose their personal information.[16]

[79] In this interim order, therefore, I will order the university to disclose the factual, non-personal, information in Records 1, 2, 4 and 9 to the appellant. This will result in partial disclosure of the records containing generic summaries of the committee's meetings and information provided by the university's development officer.

[80] Given my decision to notify affected parties and seek further information, I will defer my review of the application of the personal privacy exemptions in sections 49(b) and 21(1), the university's exercise of discretion and the public interest override.

ORDER:

1. I order the university to disclose the portions of the records that I have found not to be exempt by reason of sections 49(a) and/or 18(1)(c) and information that does not qualify as "personal information". I order the university to disclose this information, which is highlighted in yellow on the copy of the records provided to the university with this interim order, by sending the non-exempt portions of the records to the appellant by **April 24 2018**, but not before **April 18, 2018.**

2. For certainty, any information that is highlighted in orange has been removed from the scope of the appeal by the appellant and is not to be disclosed.

3. I remain seized of this appeal to deal with the notification of affected parties and any other issues that may arise.

Original Signed by: March 16, 2018
Daphne Loukidelis
Adjudicator

[16] Section 21(1)(a) permits an institution to disclose an individual's personal information if written consent is obtained to that specific disclosure.