Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER PO-3893-I

Appeal PA15-265

Lakehead University

October 30, 2018

Summary: The appellant made a request to Lakehead University (the university) for records relating to her as a doctoral student. The university identified responsive records granting partial access but denied access to some records or parts thereof citing the discretionary exemption at section 49(b) (personal privacy) with reference to the presumptions in section 21(3)(d) (employment or educational history) and section 21(3)(g) (personal evaluations). The university also cited section 65(6)1 and 3 (labour relations or employment-related matters) as well as section 65(8.1)(a) (university research) to exclude certain records. The appellant appealed the university's decision, also claiming that the university did not conduct a reasonable search and further records should exist. On appeal, the adjudicator finds that the exclusions in section 65(6)1 and section 65(8.1)(a) apply to some of the records. The adjudicator upholds, in part, the university's decision with respect to section 49(b) but orders some portions of records disclosed. Finally the adjudicator orders the university to conduct a further search for responsive records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2, 21, 24, 49(b), 65(6), 65(8.1)(a).

Orders and Investigation Reports Considered: Orders PO-2694, PO-3642 and PO-3713.

BACKGROUND:

[1] The following request was made to Lakehead University (the university) under the *Freedom of Information and Protection of Privacy Act* (the *Act*):

> Any and all documents or records relating to me as a student, my dissertation or my dissertation process including but not limited to all external examiner reports whether or not they are still on my student record or accepted by Lakehead University.
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> Any and all documents, records or communications (including but not limited to emails, phone records, voice mails, faxes) involving Lakehead University faculty, administration, and staff concerning me as a student, my dissertation or my dissertation process in any way.
>
> Any and all documents, records or communication (including but not limited to emails, phone records, voice mails, faxes) related to me as a student, my dissertation, or my dissertation process involving Lakehead University faculty, administration and staff and faculty, administration and staff of any other university. This would include but not be limited to any and all communications between Lakehead University faculty, administration and staff and [a specified professor], [another named university,] and [a specified professor], University of Ottawa, in relation to me as a doctoral student, my dissertation, my dissertation process, my status as a student, or any other matter pertaining to me.

[2] The university sought clarification of the request from the requester, who confirmed that she was not seeking the following information:

a. Purely administrative, background records in the University's student information ("ERP", Datatel Colleague) system and files, such as your admission and registration records at Lakehead, transcripts from other institutions, your Lakehead University academic transcript, your contact and emergency information, and your financial and awards information;

b. Records related to your work in courses NOT in any way connected to your dissertation or the dissertation process; and

c. Records of your transactions at the University libraries, residences, cafeterias, athletic facilities, commercial outlets, Security Services (e.g. for parking) and the like.

[3] The requester also provided the following further clarification:

> By phone records, I would be interested in phone logs indicating contact between Lakehead University faculty, administration, and staff and [2 specified professors]. Any transcripts of voice mails (should they exist) left for LU faculty, administration, and staff that were related to me as a doctoral student are also of particular interest to me. I do not need records related to telephone contact between LU and me, specifically.

> My priority is to access records of communication (including but not limited to emails, phone records, faxes) related to me as a student (with the exceptions of the information noted above (a, b and c,) my dissertation, or my dissertation process as noted on the form. Also, all documents (official, unofficial, accepted or not accepted by LU) that exist related to my dissertation and my dissertation process.

[4] The university initially emailed the requester to advise her that they were issuing a time extension pursuant to section 27 of the *Act*, extending the time period for a response. The university also advised the requester that, pursuant to section 28 of the *Act,* they would be notifying affected parties of the request.

[5] The university issued two access decisions and then several other access decisions during mediation at this office when further records were found or consent to disclose information was received.[1] Initially, the university issued a decision regarding some records, granting partial access to the records responsive to the request. Access to the withheld information was denied pursuant to the exemption at sections 13(1) (advice to government); 49(b) (personal privacy) with reference to 21(2)(f) (highly sensitive), 21(2)(h) (supplied in confidence) and 21(3)(d) (employment or educational history); 49(c.1)(i) (evaluative or opinion material), and the exclusions at sections 65(6)3 (employment or labour relations) and 65(8.1)(a) (research) of the *Act.*

[6] The university issued a revised decision, regarding all responsive records. The university provided a revised index of the records responsive to the request and confirmed that partial access would be granted. Access to the withheld information was denied pursuant to sections 13(1); 49(b) with reference to 21(2)(f), 21(2)(g) (information unlikely to be accurate), 21(2)(h), 21(2)(i), 21(3)(d) and 21(3)(g) (personal recommendation/evaluation); 49(c.1)(i), 65(6)3 and 65(8.1)(a) of the *Act.*

[7] The requester (now the appellant) appealed the university's decision to this office.

[8] During mediation, the appellant indicated that she believed further records responsive to her request should exist. The appellant also noted certain withheld information that she was seeking access to related to affected parties. The university conducted a further search for responsive records. With regard to the information related to affected parties, the university advised that it would notify six affected parties of the appellant's request and seek their consent to disclose the withheld information to the appellant.

[9] The university issued a revised decision granting further access to previously withheld information, noting affected parties who had consented to the disclosure of their information to the appellant. The university also advised that it would be relying

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[1] By the end of the mediation process, five access decisions were issued.

on the exclusion under section 65(6)1 of the *Act*, to withhold certain specified records, and responded to several questions posed by the appellant.

[10] The university subsequently issued yet another revised decision disclosing further records responsive to the appellant's request, located as part of her further search request and responding to specific issues she had raised. Access to the withheld information was denied pursuant to sections 49(b) with reference to the factors in sections 21(2)(f), 21(2)(h), 21(2)(i), and the presumptions in sections 21(3)(d) and 21(3)(g); and the exclusions in section 65(6)1 and 3 and section 65(8.1)(a) of the *Act.*

[11] The appellant confirmed receipt of this information and advised the mediator of several further specific records responsive to her request that she believed to exist at the university. The appellant also noted certain withheld information that she was seeking access to. The mediator requested clarification of certain exemptions relied upon by the university and requested that they conduct a further search for the records specified by the appellant.

[12] The university then issued another revised decision advising the appellant that further records responsive to her request had been located. Partial access was granted to the responsive records. Access to the withheld information was denied pursuant to section 49(b) with reference to the presumption in section 21(3)(d) and the factors in 21(2) of the *Act.*

[13] Finally, the university issued a subsequent revised decision, amending the exemptions or exclusions previously relied upon for five specified records.

[14] The appellant confirmed that she wishes to pursue access to all of the information withheld by the university and takes issue with the late raising of discretionary exemptions. The appellant also believes that further responsive records exist at the university. Subsequent to mediation and during the inquiry stage of adjudication, the appellant advised that she does not seek access to the few records which are not responsive to her request and therefore Records 8 and 194 are not at issue in this appeal.

[15] As no further mediation was possible, the file was transferred to the adjudication stage of the appeals process, where an adjudicator conducts a written inquiry under the *Act*. The parties were invited to submit representations which were shared in accordance with section 7 of IPC's *Code of Procedure* and Practice Direction 7.

[16] In this order, I uphold the decision of the university with regard to some of the records it claims are excluded from the *Act* pursuant to section 65(6)1 and section 65(8.1)(a). I also uphold the university's claim of section 49(b) for most of the records, while others are found to not contain the personal information of affected parties and are ordered disclosed. Finally, I find the university's search for responsive records is not reasonable and I order it to complete a further search.

RECORDS:

[17] The records remaining at issue include email correspondence and attachments.

[18] During the inquiry, the university disclosed three records on the basis of the consent received by an affected party. There are 55 remaining records at issue that total 128 pages withheld in whole or in part.

ISSUES:

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

B. Does section 65(8.1) exclude the records from the *Act*?

C. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

D. Does the discretionary exemption at section 49(b) apply to the information at issue?

E. Did the institution properly exercise its discretion under section 49(b)?

F. Did the institution conduct a reasonable search for records?

DISCUSSION:

Preliminary Issues

[19] The appellant raised a number of issues in her representations that I will address here.

[20] The appellant refers to another appeal with the IPC related to another request for documents with the university. The appellant notes that she did not see any reference to that appeal being consolidated with this appeal for the adjudication process despite her request to do so. However, the appellant was contacted by this office and informed that the earlier appeal file was closed by the IPC after the university issued an access decision and there was no appeal of that access decision.[2] Therefore, there is no other open appeal file to consolidate with this present appeal.

[21] The appellant referred to delays in the university's search noting that she initially filed her request on November 4, 2014 and it was more than a month following the request that documents were requested from some individuals with some contacted

[2] The appellant was contacted and informed of this by email dated January 20, 2017.

even later. I agree that the university is required to respond to the appellant within thirty days[3] after the request was received, giving notice as to whether or not access to the records would be given pursuant to section 26. However, section 27(1) of the *Act* allows the university to extend this time limit for a reasonable period of time under certain circumstances, which the university states it invoked in this circumstance. Since the appellant did not appeal the time extension in this present appeal, I will not be dealing with this issue in this order.

[22] The appellant took issue with the way the university redacted the records. She notes that the documents were not provided to her in their original form and instead were altered though copying, cutting and pasting into word and pdf documents. The appellant submits that the university failed to maintain the chain of evidence which prevented her from seeing how much information was being withheld within the relevant context. The appellant suggests that it would have been possible to black out redactions electronically which may have been less time intensive than the cutting and pasting process the university chose. In its representations, the university stated that it took the most efficient and cost effective method for redacting the records.

[23] Section 30(3) of the *Act* deals with "Copy of part" of a record and provides:

> Where a person examines a record or a part thereof and wishes to have portions of it copied, the person shall be given a copy of those portions unless it would not be reasonably practicable to reproduce them by reason of their length or nature.

[24] The *Act* does not set out a requirement on the institution to sever the records in a particular way and I find that the university's process was reasonable; therefore, this issue will not be dealt with further in this order.

[25] Finally, as mentioned there were a number of access decisions relating to the appellant's request in this appeal. It appears that the appellant raised the issue of the university's potential late-raising of discretionary exemptions at one point during mediation and this was raised in the Notice of Inquiry sent to the parties.[4] Neither party addressed this issue in their representations. I find that the appellant has been provided with the opportunity to review and respond to the university's representations on the application of the exemptions. Accordingly, the raising of additional discretionary exemptions by the university has not prejudiced the appellant's ability to participate fully in the inquiry process. In any event, the appellant was invited to address the discretionary exemptions raised by the university and in my review of her representations this issue was not raised. I therefore, find that if there was a late raising of a discretionary exemption, the appellant was not prejudiced by it in any way.

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[3] Subject to sections 27, 28 and 57.

[4] Section 11 of the IPC's *Code of Procedure* allows an institution to claim additional discretionary exemptions only within 35 days after it is notified of an appeal.

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

[26] The university submits that the *Act* does not apply to some of the records on the basis of the labour relations exclusion found at sections 65(6)1 and 65(6)3. Section 65(6) is record-specific and fact-specific. If section 65(6) applies, and none of the exceptions found in section 65(7) apply, section 65(6) has the effect of excluding the records from the scope of the *Act*.

[27] Section 65(6) provides, in part:

> Subject to subsection (7), this *Act* does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> > 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
> >
> > ...
> >
> > 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[28] The types of records excluded from the *Act* by section 65(6) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.[5]

[29] The university has claimed the exclusions in paragraphs 1 and 3 for parts of the records. The university submits that it invoked sections 65(6)1 and 3 for the redactions found in records 93, 96, 97, 98, 99, 103, 105, 110, 116, 164, 173, 175, 177, 178, 179, 182, 183 and 185 of the records as they relate to a dispute that arose concerning the appellant's dissertation and her supervision. According to the university, issues that relate to the core of the employment duties of specified professors became the basis of a grievance under the University Faculty Association's collective agreement with the university. The university states that during the mediation, it became clear that both sections 65(6)1 and 3 apply. With regard to section 65(6)1, the university submits that the records consist of materials related to a labour dispute which were used during that arbitration proceeding. With regard to section 65(6)3, the university submits the records should be excluded from the *Act*, as they are discussions or communications about employment-related matters in which the university has an interest.

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

[30] However, in this appeal, the university claims that the exclusion applies only to part of Records 93, 96, 98, 99, 103, 116, 164, 173, 177, 183 and 185 and seeks to withhold only discrete portions of emails in some of these records under section 65(6)1 and 3. The university claims that the section 65(6)1 and 3 exclusion applies to the whole of records 97, 105, 110, 175, 178, 179 and 182.

[31] This office has consistently taken the position that the exclusions at section 65(6) are record- and fact-specific.[6] Therefore, in order to qualify for an exclusion, a record is examined as a whole. The whole-record method of analysis is also described as the "record-by-record" approach.

[32] In Order PO-3642, Adjudicator Ryu dealt with a claim where an institution attempted to exclude part of a record under section 65(6). She stated that "[i]n making this claim, it is possible the ministry is implicitly acknowledging that the record, as whole, was not prepared in relation to discussions about labour relations or employment-related matters within the meaning of section 65(6)3." Adjudicator Ryu noted that the ministry in that appeal took the position that a portion of a record could qualify for exclusion, even where the record in which the portion appears is not itself excluded. The adjudicator concluded that an exclusion cannot apply to part of a record that is not itself excluded.

[33] Adjudicator Ryu reviewed several IPC orders where an institution attempted to exclude only part of a record under section 65(6). The adjudicator noted that in each case, "the question is whether the collection, preparation, maintenance or use of the record, as a whole, is sufficiently connected to an excluded purpose so as to remove the entire record from the scope of the *Act*." Adjudicator Ryu found that this approach was consistent with the language of the exclusions, which applies to records that meet the relevant criteria and noted that it corresponds with the Legislature's decision not to incorporate a requirement for the severance of excluded records in the *Act*. Adjudicator Ryu found that the exclusion did not apply to the one record before her, as a whole, and ordered the ministry to issue a decision on access to the withheld portion of the record.

[34] I adopt the approach taken in Order PO-3642. As the application of an exclusion must be considered in the context of the whole record, for records where the university claims the exclusion only applies in part, I will consider the application of the exclusion to the whole record in order to determine the appellant's access rights under the *Act*.

[35] Using the record-by-record approach, if I find that a record is excluded from the *Act* under section 65(6), that does not mean the university's decision to disclose some of the record was improper. Section 65(6) is an exclusion, not a mandatory exemption. An institution may choose to disclose information outside of the *Act*.

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[6] This was noted by Adjudicator Ryu in Order PO-3642 where she also referred to a number of other orders including M-797, P-1575, PO-2531, PO-2632, MO-1218, PO-3456-I.

Section 65(6)1: court or tribunal proceedings

[36] For section 65(6)1 to apply, the institution must establish that:

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

2. this collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; and

3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.

Parts 1 and 2

[37] In examining the records where the institution has claimed the section 65(6)1 exclusion applies to the entire record (Records 97, 110, 175, 178, 179 and 182), I find that the records at issue were "collected, prepared, maintained, or used" by the university, in relation to "proceedings or anticipated proceedings before a court, tribunal or other entity," concerning a grievance brought by a specified professor. I find, therefore, that the first two parts of the test for section 65(6)1 are met for these records.

[38] In examining the records where the institution has claimed the section 65(6)1 exclusion applies to only part of a record (Records 93, 96, 98, 99, 103 and 173), I find that the collection, preparation, maintenance or use of Records 96, 98, 99 and 103 as a whole are in relation to proceedings or anticipated proceedings before a court, tribunal or other entity so as to satisfy Parts 1 and 2.

[39] However, I do not agree that the collection, preparation, maintenance or use of Records 93 and 173 as a whole is in relation to proceedings or anticipated proceedings before a court, tribunal or other entity. In each of these two records, the university has indicated that only small excerpts of emails are excluded while also claiming the same excerpts and others are also exempt under section 49(b). In my review of the contents of these records, I am satisfied that the records as a whole would not themselves qualify for the section 65(6)1 exclusion.

Part 3

[40] The university asserts that records 97, 110, 175, 178, 179 and 182 were used during an arbitration proceeding for the purpose of addressing a specified professor's labour dispute and that the whole record should be excluded under section 65(6)1.

[41] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships.

[42] In this case, the records were used at an arbitration concerning a specified grievance against the university by a specified professor. As such, I find that the proceedings that took place were about "labour relations" matters. Accordingly, I find that the section 65(6)1 exclusion applies to records 97, 110, 175, 178, 179 and 182. In examining the exceptions to section 65(6)1 set out in section 65(7), I find that none applies. Accordingly, I find that the *Act* does not apply to records 97, 110, 175, 178, 179 and 182. Since I have found that these records are excluded from the *Act* under section 65(6)1, there is no need to discuss whether these records are also excluded under section 65(6)3.

[43] However, with regard to records 96, 98, 99 and 103 the university claims that the section 65(6)1 exclusion applies to only part of a record.

[44] I will now consider whether each of these records as a whole is excluded as a record relating to a "proceeding or anticipated proceeding relating to labour relations or employment" within the meaning of section 65(6)1.

[45] In my review of records 96, 98, 99 and 103 where the university claims the exclusion only applies to part of a record, I find that even though portions of these records have been disclosed to the appellant, each record as a whole would qualify for the section 65(6)1 exclusion. It is clear each record as a whole was used by the university in relation to proceedings before a court or tribunal and these proceedings related to labour relations or to the employment of a person by the university and none of the exceptions to section 65(6)1 set out in section 65(7) applies. Accordingly, records 96, 98, 99 and 103 are excluded from the *Act* by section 65(6)1.

[46] In conclusion, I find that the section 65(6)1 exclusion applies to records 97, 110, 175, 178, 179 and 182 where the university has claimed this exclusion for the whole record and also applies to records 96, 98[7], 99 and 103 where the university has claimed this exclusion for only part of a record. As a result, I will not discuss those records further in this order. I do not find that the section 65(6)1 exclusion applies to Records 93 and 173, and these records will be considered under the exclusion at section 65(6)3 and the exemption at section 49(b) which the university has also claimed in relation to these records.

Section 65(6)3: matters in which the institution has an interest

[47] 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;

[7] Record 98 is duplicated in Record 176; the duplicate in Record 176 is also excluded from the *Act*.

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.

[48] The university submits that the exclusion at section 65(6)3 applies to all of records 93, 96, 97, 98, 99, 103, 105, 110, 116, 164, 173, 175, 177, 178, 179, 183 and 185. Since I have already found that records 96, 97, 98, 99, 103, 110, 175, 178 and 179 are excluded from the *Act* under section 65(6)1, they will not also be analysed under section 65(6)3. Therefore, the remaining records where the exclusion is claimed under section 65(6)3 are records 93, 105, 116, 164, 173, 177, 183 and 185. The university has claimed the section 65(6)3 exclusion to the whole of Record 105 and to parts of records 93, 116, 164, 173, 177, 183 and 185.

[49] In examining records where the institution has claimed the section 65(6)3 exclusion applies, I find that they were "collected, prepared, maintained, or used" by the university.

[50] However, I do not agree that the collection, preparation, maintenance or use of Records 93, 116, 164, 173, and 185 as a whole is sufficiently connected to meetings, consultations, discussions or communications about labour relations in which the university has an interest so as to remove the entire record from the scope of the *Act*. In each of these records, the university has indicated that only small excerpts of emails are excluded while also claiming the same excerpts and others are also exempt under section 49(b) and section 13. In my review of the contents of these records, I am satisfied that the records would not themselves qualify for the section 65(6)3 exclusion.

[51] For records 177 and 183, the university has only claimed section 65(6)3 for small excerpts within the emails and has claimed no exemption under the *Act* for these portions of the records. With regard to Record 177, I find it was not collected, prepared, maintained or used by the university in relation to meetings, consultations, discussions or communications about labour relations. Also, I find that Record 183 was not collected, prepared, maintained, or used by the university, in relation to meetings, consultations, discussions or communications about labour relations as it was clearly created after the labour relations matter had concluded.

[52] The university asserts that Record 105 was used in discussions or communications about labour relations or employment-related matters in which it has an interest. After reviewing this record, I find that the information it contains was used in discussions or communications about labour relations matters and specifically the professor's grievance. Based on my review of Record 105, I find that it relates to discussions and communications about a labour relations matter, specifically the professor's grievance. I further accept that the professor's grievance is a matter in which the university would have an interest.

[53] In conclusion, I find that only Record 105 is excluded from the *Act* by section 65(6)3. Since I do not find that the section 65(6)1 or 3 exclusions apply to records 93, 116, 164, 173 and 185, I will consider the application of section 49(b) to these records.

[54] For Records 177 and 183, the university did not claim any exemptions with regard to these records; accordingly, I will order the university to issue an access decision in respect of them.

Issue B: Does section 65(8.1)(a) exclude the records from the *Act*?

[55] The university claims that records 14, 28, 100, 138, 139 and 142 are excluded from the *Act* under section 65(8.1) which states:

> This *Act* does not apply,
>
> > (a) to a record respecting or associated with research conducted or proposed by an employee of an educational institution or by a person associated with an educational institution;

[56] Section 65(10) is an exception to the exclusion found at section 65(8.1). This section states:

> Despite subsection (8.1), this *Act* does apply to evaluative or opinion material compiled in respect of teaching materials or research only to the extent that is necessary for the purpose of subclause 49(c.1)(i).

Section 65(8.1)(a)

[57] Research is defined as "… a systematic investigation designed to develop or establish principles, facts or generalizable knowledge, or any combination of them, and includes the development, testing and evaluation of research." The research must be referable to specific, identifiable research projects that have been conceived by a specific faculty member, employee or associate of an educational institution.[8]

[58] This section applies where it is reasonable to conclude that there is "some connection" between the record and the specific, identifiable "research conducted or proposed by an employee of an educational institution or by a person associated with an educational institution."[9]

[59] The purpose of the section 65(8.1)(a) exclusion is to protect academic freedom and competitiveness. If section 65(8.1)(a) applies to a record, and the exceptions found in sections 65(9) and (10) do not apply, that record is excluded from the scope of the *Act*.

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[8] Order PO-2693.
[9] Order PO-2942; see also *Ontario (Attorney General) v. Toronto Star*, 2010 ONSC 991 (Div. Ct.).

[60] The university submits that section 65(8.1)(a) applies to parts of records 14, 28, 100, 138, 139 and 142. It submits that the withheld portions of these records include editorial comments on a doctoral dissertation, a research exercise.

[61] The appellant does not speak to the application of section 65(8.1)(a) in her representations.

Analysis

[62] In this appeal, the information sought to be excluded under section 65(8.1)(a) includes parts of emails and one attachment to an email, with the remaining information disclosed to the appellant. Similar to my analysis under section 65(6), the exclusion found under section 65(8.1)(a) applies to a whole record. This was confirmed by Adjudicator Bhattacharjee in Order PO-3713, where he found that section 65(8.1)(a) applies to a "record," not parts of a record. Consequently, even though the university claims that parts of some records are excluded from the *Act* under section 65(8.1)(a), I will be determining whether each record as a whole is excluded under that provision.

[63] Based on my review, I find that only records 28 and 100 are properly excluded from the *Act* by section 65(8.1)(a). In my review of those records, it is clear that the section 65(8.1)(a) exclusion applies to the contents of the whole record despite the fact that the university has disclosed portions to the appellant. I agree that each of these records is a record respecting research as each of these records contains an affected party's comments relating to the appellant's PhD dissertation, a research project. As stated, research has been defined as "a systematic investigation designed to develop or establish principles, facts or generalized knowledge, or any combination of them." Also, the "research" must be referable to specific, identifiable research projects that have been conceived by an associate of the university. A PhD dissertation, in my view, fits into this definition of research. Further, I find that there is some connection between the actual record and the "research." Records 28 and 100 each contain an affected party's comments relating to the external review of the appellant's dissertation. Further, upon examination of the records, I find that the exception found in section 65(10) does not apply, since these two records do not evaluate the actual dissertation and instead are comments relating to the external review process. Therefore, I find that records 28 and 100 are excluded from the scope of the *Act*.

[64] However, I find that records 14, 138, 139 and 142 are not properly excluded from the *Act* by virtue of section 65(8.1)(a). While each of these records reference the appellant's PhD dissertation, I do not find that there is a connection between the record and the specific research project because the affected parties within the records are speaking to issues that are not related to the PhD dissertation. For example, in Record 14, the university has claimed that one excerpt, in one of several emails, is excluded from the *Act* by section 65(8.1)(a). In my review of the record as a whole, I find that it is not reasonable to conclude that there is some connection between this record and the PhD dissertation as the comment in this record is about some other matter only

tangentially related to the dissertation.

[65] Similarly, in my review of records 138 and 139, I find that the whole record is not about research. Any small portions that relate to research do not, in my view, bring the entire record within the ambit of section 65(8.1)(a). Finally, in my review of Record 142, I do not find that the whole record is a record respecting or associated with research that would meet the definition of "research" found in section 65(8.1)(a) and is therefore not excluded from the scope of the *Act*.

[66] In conclusion, I find that the section 65(8.1)(a) exclusion applies to the whole of Records 28 and 100[10], even though the university has claimed this exclusion to only part of a record. I will therefore not consider these records further in this order. I do not find that the section 65(8.1)(a) exclusion applies to Records 14, 138, 139 and 142 and I will consider the application of section 49(b) to these records which the university has also claimed for the same information it withheld under section 65(8.1)(a).

C: Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[67] In order to determine whether the personal privacy exemption at section 49(b) applies it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates. That term is defined in section 2(1), in part, as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> > (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
> >
> > (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
> >
> > (d) the address, telephone number, fingerprints or blood type of the individual,
> >
> > (e) the personal opinions or views of the individual except if they relate to another individual,

[10] A portion of Record 100 is duplicated in Record 177; the duplicate portion in Record 177 is also excluded from the *Act*.

> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[68] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[11]

[69] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[12]

[70] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[13]

Representations

[71] In its representations, the university submits that the withheld information in the records relates to other individuals and does not contain the appellant's information. The university submits that disclosure of this information could, especially in view of the small number of individuals involved in the academic context of the request, result in the identification of those individuals amounting to an unjustified invasion of their personal privacy. The university notes that in many cases this information is provided in a professional context, but submits that it usually involves revealing something of a personal nature about the individual involved (i.e. in the expression of opinion or emotion).

[72] The university also submits that opinions about other individuals, even if the person expressing the opinion could be characterized as operating in a professional or business capacity, become the personal information of the individual about whom it is expressed.

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[11] Order 11.
[12] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[13] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[73] In her representations, the appellant did not specifically speak to whether the withheld information in the records constitutes personal information.

Finding

[74] From my review of the records, I find that all of them contain information that qualifies as the personal information of the appellant and that some of them also contain the personal information of affected parties.[14] The affected parties' names and other information about them falls within the ambit of paragraphs (b), (d), (e), (f), (g) and (h) of the definition of personal information set out in section 2(1) of the *Act*. Some of the affected parties' personal information includes recorded personal information that together with their name reveals something personal about them or information relating to the education or employment history in which the affected party was involved or contain an affected party's personal opinions or views that do not relate to another individual.

[75] The appellant has requested records that include her own personal information as well as the personal information of affected parties. In responding to the request, the university disclosed as much of the information to the appellant as possible without disclosing the personal information of affected parties. I agree with the university that much of the severed information is the affected parties' personal information, parts of which are intertwined with the appellant's information. I find that it is not possible to further sever the appellant's personal information without revealing personal information belonging to the affected parties. I further find that the affected parties would be identifiable to the appellant if their information is disclosed.

[76] However, there is some information in the withheld portions of the records that the university indicated was personal information that I find is actually the professional information of affected parties. Specifically, this is the information withheld in Records 138, 139 and 166 and portions of Records 142 and 164. As only personal information can be exempt under section 49(b), I find this information is not exempt under section 49(b). Moreover, as the university has not claimed any discretionary exemption for this information and no other mandatory exemptions apply, I will order this information disclosed.

[77] Specifically with respect to Record 174, the university has not claimed any exemptions and instead has indicated that Record 174, being email correspondence, has already been copied to the appellant. It appears that it was on that basis that the university decided not to disclose the record. However, the fact that the requester may already have the information in their possession[15] is not an exemption under the *Act* and does not provide a basis to withhold the information in that record. In my review of

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[14] Since each record as a whole contains the appellant's personal information, the correct personal privacy exemption to consider is the discretionary exemption at section 49(b): see Order M-352.
[15] It is not evident from my review of this record whether it was or was not copied to the appellant.

this record, I find that it contains the personal information of the appellant but it does not contain the personal information of any other individuals. Pursuant to section 47(1) (see below), this information should be disclosed to the appellant and I will order the university to do so.

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

[78] The records remaining at issue after my findings concerning sections 65(6) and 65(8.1) that some records are excluded from the scope of the *Act* are Records 5, 14, 22, 33, 34, 37, 40, 41, 42, 46, 78, 82, 85, 93, 101, 114, 115, 116, 122, 130, 131, 132, 135, 136,[16] 137, 142, 143, 146, 164, 172, 173, 176, 185, 192 and 193. These records contain the personal information of both the appellant and the affected parties, so section 47(1) applies in this appeal. Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

[79] Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the appellant. Since the section 49(b) exemption is discretionary, the institution may also decide to disclose the information to the appellant.[17] This involves a weighing of the appellant's right of access to her own personal information against the other individual's right to protection of their privacy.

[80] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 49(b), sections 21(1) to (4) provide guidance.

Section 21(1)

[81] Some of the information at issue in this appeal may fall under section 21(1)(a). Section 21(1)(a) states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
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> > (a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;

[82] For section 21(1)(a) to apply, the consenting party must provide a written

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[16] Record 136 is duplicated in Record 186 and will only be addressed under Record 136.

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

consent to the disclosure of his or her personal information in the context of an access request.[18] In this appeal, the affected party who provided representations consented, in part to the release of some of her personal information.

Sections 21(2) and (3)

[83] The factors and presumptions at sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Additionally, if any of paragraphs (a) to (c) of section 21(4) apply, disclosure is not an unjustified invasion of personal privacy and is not exempt under section 49(b). No party has argued that section 21(4) applies and in my review of the records, I find that it does not.

[84] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 49(b), this office considers and weighs the factors and presumptions in sections 21(2) and 21(3) and balances the interests of the parties.[19]

Section 21(3) presumptions weighing in favour of non-disclosure

[85] The university submits that the presumption at section 21(3)(d) (employment or educational history) of the *Act* applies to exempt some of the information from disclosure and that section 21(3)(g) (personal recommendations) applies to the information withheld in two records.

[86] Sections 21(3)(d) and (g) state:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (a) relates to employment or educational history;
>
> (b) consists of personal recommendations or evaluations, character references or personnel evaluations;

[87] Prior decisions of this office have found that information which reveals the dates on which former employees are eligible for early retirement, the start and end dates of employment, the number of years of service, the last day worked, the dates upon which the period of notice commenced and terminated, the date of earliest retirement, entitlement to and the number of sick leave and annual leave days used and restrictive covenants in which individuals agree not to engage in certain work for a specified

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[18] Order PO-1723.
[19] Order MO-2954.

duration has been found to fall within the section 21(3)(d) presumption.[20]

[88] Information contained in resumes[21] and work histories[22] falls within the scope of section 21(3)(d).

[89] A person's name and professional title, without more, does not constitute "employment history".[23]

[90] The terms "personal evaluations" or "personnel evaluations" refer to assessments made according to measurable standards.[24]

[91] The thrust of section 21(3)(g) is to raise a presumption concerning recommendations, evaluations or references about the identified individual in question rather than evaluations, etc., by that individual.[25]

Representations

[92] In its representations, the university submits that section 21(3)(d) applies to portions of records 41, 78, 85, 101, 115, 116, 122, 132, 136, 137, 142, 143, 146, 164, 172, 192 and 193. The university notes that in a number of records, specifically 41, 78, 101, 115, 122, 164, 192, and 193, there is reference to employment and/or educational history of other individuals. In the rest, records 132, 137, 142, 143, 146, and 172 the university submits that there is reference to employment and educational history, sometimes in the form of detailed C.V.'s of individuals involved in or considered for the appellant's dissertation process. Although the university did not specifically refer to records 85, 116 and 136 in their submissions regarding section 21(3)(d), the records and index provided were marked citing this section and will be included in this analysis.

[93] In her representations, the appellant submits that the university initially withheld information inappropriately, noting that she received some of the withheld information during mediation. The appellant notes that on receipt of this previously withheld information, it was apparent that the redactions were done inappropriately and that they contained important evidence related to violations of doctoral regulations. The appellant submits that it is reasonable to expect that the university's over-inclusive use of redactions would have continued throughout the process.

[94] Seven affected parties were invited to provide representations on the issue of personal privacy. Of the seven affected parties, one provided representations and

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[20] Orders M-173, P-1348, MO-1332, PO-1885 and PO-2050; see also Orders PO-2598, MO-2174 and MO-2344.
[21] Orders M-7, M-319 and M-1084.
[22] Orders M-1084 and MO-1257.
[23] Order P-216.
[24] Orders PO-1756 and PO-2176.
[25] Order P-171.

another indicated that they do not consent to the release of their personal information. Five of the affected parties did not make representations in this appeal.

[95] The affected party who provided representations indicated that she consents, in part, to the release of any document that she authored. The affected party consents to the release of her personal information except any segments where she has quoted or paraphrased others who attacked her personally and professionally. The affected party requests that any of the withheld information that contains attacks upon her not be disclosed.

Analysis and findings

[96] I do not agree with the university's suggestion that the appellant's personal information does not appear in Records 41, 78, 101, 115, 122, 164, 192 and 193. Even though the undisclosed portions of these records do not contain any personal information of the appellant, the records relate to the appellant and thus the analysis is under section 49(b) and not section 21(1). A record-by-record analysis means I will consider the possible application of section 49(b) and not section 21(1) to all the records.[26]

Section 21(1)(a)

[97] If this section applies, it means disclosure of the personal information is not an unjustified invasion of personal privacy for the purposes of section 49(b). As noted, one affected party consented, in part, to the disclosure of some of her personal information. Although this affected party consented to the release of some of her personal information, she did not consent to the release of any personal information where she has quoted or paraphrased others who attached her personally or professionally.

[98] In my review of the records and keeping in mind the limits of the consent, I find that this affected party's personal information found in part of Records 33, 114, and all of the severances in Records 37, 93, 130, 138 and 139 and should be disclosed as there is consent to do so. For the remainder of the withheld information in Records 33 and 114 and for any personal information where there was no consent for disclosure, I will continue to see if the personal privacy exemption applies to it.

Section 21(3) presumptions

[99] After a review of the records for which the university claims the presumption in section 21(3)(d), I find this presumption applies to the withheld portions of records 41, 78, 85, 101, 136, and 137 along with some of the withheld portions of records 115, 116, 142, 192, 193. These records or portions of them refer to employment and/or educational history of affected parties and therefore section 21(3)(d) applies. I do not

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[26] See footnote 13 above and Order M-352.

agree that section 21(3)(d) applies to records 122, 132, 143, 146, 164 and 172 because they do not contain employment or educational history.

[100] The university also raised the possible application of the section 21(3)(g) presumption with regard to records 14 and 185. In its representations, the university states that a portion of records 14 and 185 contains personal evaluations, and thus the presumption applies.

[101] Section 21(3)(g) protects information revealing assessments or evaluations about an individual. Such assessments must be made according to measureable standards.[27] After a review of the relevant portions of these records, I do not find that the section 21(3)(g) presumption applies to the withheld portion of record 14, but I do find that it applies to the portion of Record 185 which contains a personal evaluation about an individual.

[102] I will now consider any factors in section 21(2).

Section 21(2) factors

[103] Section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.[28] The factors listed at paragraphs 21(2)(a) through (d), if present, generally weigh in favour of disclosure, while the factors listed at paragraphs 21(2)(e) though (i), if present, generally weigh in favour of non-disclosure.

[104] The list of factors under section 21(2) is not exhaustive; the institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2).[29]

[105] I will begin by discussing whether there are any factors weighing in favour of non-disclosure. The university submits that factors at sections 21(2)(f), (h) and (i) apply.

Section 21(2) factors weighing in favour of non-disclosure

Section 21(2)(f) highly sensitive

[106] The university submits that the section 21(2)(f) factor applies to the redactions in records 28, 34 and 172. The university states that disclosing this information might allow identification of the individuals involved in relation to very sensitive matters.

[107] To be considered highly sensitive, there must be a reasonable expectation of

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[27] Order P-447.
[28] Order P-239.
[29] Order P-99.

significant personal distress if the information is disclosed.[30]

[108] After a review of the records, I do not find that this factor applies to records 28, 34 and 172. With regard to record 172, I do not see information in this record that if disclosed would reasonably result in significant personal distress to the affected party. In Record 34, although the affected party is referencing a serious matter, I do not accept that disclosing this information would result in significant personal distress to an affected party.

Section 21(2)(h) expectation of confidentiality

[109] The university submits that section 21(2)(h) applies to the redactions in records 5, 14, 33, 42, 46, 78, 82, 101, 114, 115, 116, 122, 131, 135, 136 and 173 as well as portions of records 14, 34, 142 and 172. The university states that there is usually no explicit declaration that this type of information is confidential, however, it submits that a reasonable analysis would lead to the conclusion that the sensitive information being conveyed would not have been written down and communicated without the expectation of confidentially.

[110] This factor applies if both the person supplying the information and the recipient had an expectation that the information would be treated confidentially and that expectation is reasonable in the circumstances. It does not have to be explicitly stated that the communication is intended to be confidential. On my review of the various records, I find that section 21(2)(h) factor applies to some but not all of the abovementioned records.

[111] I find that the section 21(2)(h) factor does not apply to records 114, 115, 116, 122, 142 and 173. The information in these records does not appear to be conveyed with an expectation that it would be treated confidentiality. However, I find that this factor applies to records 5, 14, 33, 34, 42, 46, 78, 82, 101, 131, 135, 136, 137 and 172. The information in these records appears to be communicated in confidence implicitly, and I conclude that the information being conveyed is of a sensitive nature that would not have been communicated without the expectation of confidentiality.

Section 21(2)(i) damage to reputation

[112] The university submits that the factor in section 21(2)(i) applies to the redactions to the affected parties' personal information in records 14, 172 and 185.

[113] The applicability of this section is not dependent on whether the damage or harm envisioned by the clauses is present or foreseeable, but whether this damage or

[30] Orders PO-2518, PO-2617, MO-2262 and MO-2344.

harm would be "unfair" to the individual involved.[31]

[114] Based on my review of the records, I do not agree that this factor applies to any of these records because it is not apparent that disclosure of this information would cause damage to reputation and that any damage or harm would be unfair to the affected individuals involved.

Section 21(2) factors weighing in favour of disclosure

[115] In her representations, the appellant's focus is mostly on the university's search and in fact, she raises no factors under section 21(2) that might support disclosure of the affected parties' personal information. In my own review of section 21(2), and the records, I do not see that any of the listed factors apply. However, the list of factors under section 21(2) is not exhaustive. All relevant circumstances must be considered, even if they are not specifically listed under section 21(2). In my review, the unlisted factor of fairness to the appellant is relevant in this appeal.

Unlisted factor: fairness to the appellant

[116] As stated, the appellant did not refer to any enumerated factor in section 21(2) to support disclosure of the personal information in the records. However, I will examine the unlisted factor of fairness to the appellant as clearly she wishes to know, as a matter of fairness, information relating to her contained in these records.

[117] After a review of the records, I find that this unlisted factor applies to records 138, 139 and 172. However, the personal information in Records 138 and 139 will be disclosed given the consent of the affected party. In my review of Record 172, I find that this factor applies; however, it does not apply to the remainder of the records because the undisclosed excerpts in those records relate to an affected party and are not about the appellant.

Reasons and conclusions

[118] I have found that the personal information at issue in records 5, 14, 28, 33, 34, 42, 46, 78, 82, 101, 130, 131, 135, 136 and 172 was communicated with an expectation of confidentiality. Therefore, I find that the factor at section 21(2)(h) weighs in favour of non-disclosure of this information. In all the circumstances, I find this weighs strongly in favour of non-disclosure.

[119] I found that the personal information at issue in records 14, 28, 172 and 185, if disclosed would not cause damage or harm which would be unfair to the affected individuals involved. Therefore, I find that section 21(2)(i) is not a factor in this appeal.

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[31] Order P-256.

[120] With regard to factors that support disclosure of the information, I have found that the personal information in record 172 relates to the appellant and in fairness should be disclosed to her. I find that this factor weighs in favour of disclosure of this information. Given the circumstances, I attach significant weight to this factor.

[121] In conclusion, I have found that some of the personal information at issue is subject to the presumption in section 21(3)(d) and that there are certain factors that favour non-disclosure and others that favour disclosure. Based on balancing the presumption and the factors, I find the information in the following records to be exempt under section 49(b): Records 5, 14, 33, 41, 42, 46, 78, 82, 85, 101, 115, 116, 131, 135, 136, 142, 172, 185, 192 and 193 and these records should not be disclosed to the appellant.

[122] However, Records 22, 40, 114, 122, 132, 143, 146, 164 and 173 all contain the personal information of an affected party and no presumptions or factors are found to apply to the information. In the circumstance, I uphold the university's decision not to disclose the withheld portions of Records 22, 40, 114, 122, 132, 143, 146 and 164 as in my review of the information in these records, there is limited if any relevance and the redacted snippets would not appear to address the appellant's request in any meaningful way. However, with regard to Record 173, I find that the withheld information is relevant and does address the appellant's request and will order it disclosed.

[123] I do not accept the appellant's assertion that because the university subsequently released redacted information, that is evidence that it was over-inclusive in its use of redactions at the outset. As explained by the university in its reply representations, the redacted information in question was initially redacted pursuant to section 49(b) but was subsequently released after an affected party indicated to the university that they consent to the release of their personal information. The university asserts, and I accept, that any record subsequently released to the appellant was as a result of first obtaining the consent of an affected party to do so.

[124] The university also claimed the discretionary exemption at section 13(1) to the redactions in records 28, 105 and 131. Since I have found that records 28 and 105 are excluded from the *Act* under section 65(6) and that record 131 should not be disclosed as it would be an invasion of an affected party's personal privacy under section 49(b), I do not need to also consider whether the exemption at section 49(a) in conjunction with the section 13(1) exemption also applies to these records.

Issue E: Did the institution exercise its discretion under section 49(b)? If so, should this office uphold the exercise of discretion?

[125] The university submits that it exercised its discretion in invoking section 49(b) to withhold information from the appellant in this case. It submits that it took into account all relevant factors and tried to avoid irrelevant ones in the exercise of this discretion.

[126] The university notes that it has disclosed to the appellant her personal information, but with regard to the personal information of affected parties, it has also been motivated to uphold the connected principles that:

- the privacy of both university personnel and students must be protected as much as possible; and,

- it is in the public interest, and certainly essential for the maintenance of a healthy and positive atmosphere for teaching, research, and learning in the university, that university faculty and staff feel that their engagement in free and frank discussion on academic and administrative issues will have adequate confidentiality protection.

[127] In the appellant's representations, she again refers to information that was initially withheld which she subsequently received and submits that the initial redactions were done inappropriately as they contained important evidence related to violations of doctoral regulations and concerning practices by the faculty and staff of the university involved in the dissertation process. The appellant provided an example noting that certain emails were subsequently released to her which confirm contact between the faculty of education and the external examiner which is prohibited. It is the appellant's position that the university was over-inclusive in its redactions to the records.

[128] In its reply representations, the university submits that all redactions made to the records were done in good faith with painstaking attention to the disclosure exemptions authorized or mandated by the *Act*. The university states that there was no deliberate attempt to hide information and it approached its search and review of records, solely with the intent of honouring the appellant's right to access her own personal information all the while respecting the privacy of others and ensuring the university's interests would be upheld to the extent permitted by the *Act*. The university states that the records that were subsequently disclosed which were previously withheld, as in the specific instance the appellant cites, it was always as a result of having obtained the consent of the individuals whose privacy rights would arguably have been violated.

[129] The appellant was sent a copy of the university's reply representations and was invited to provide sur-reply representations, which she chose not to do.

Finding

[130] Having reviewed the records and the parties' representations, I find that the university appropriately exercised its discretion in withholding the information that I have found to be exempt from disclosure. The university took into account the appellant's right of access to her own personal information, but also the privacy interests of the other individuals. Any records that were initially withheld and subsequently released by the university were only disclosed after the university received

the consent of the affected party.

[131] On the whole, I am satisfied that the university did not exercise its discretion in bad faith or for an improper purpose. The university considered the purpose of the *Act* and has given due regard to the fact that the records contain the appellant's personal information, as well as the nature and sensitivity of the information in the specific circumstances of this appeal. Accordingly, I find that the university took relevant factors into account and I uphold its exercise of discretion in this appeal.

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

[132] 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.[32] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[133] 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.[33] To be responsive, a record must be "reasonably related" to the request.[34]

[134] 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.[35]

[135] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[36]

[136] 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.[37]

Representations

[137] The university submits that all searches were undertaken with care and in good faith, but notes that this particular case has brought home the difficulties inherent in finding emails responsive to requests for access – particularly when the requests have a

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[32] Orders P-85, P-221 and PO-1954-I.
[33] Orders P-624 and PO-2559.
[34] Order PO-2554.
[35] Orders M-909, PO-2469 and PO-2592.
[36] Order MO-2185.
[37] Order MO-2246.

broad scope. The university notes that success of the search is dependent usually on the accuracy of the search terms fed into the email system, hence, the more specific a requester can be about the material being sought, the more likely a search is to be exhaustive. The university notes that subsequent searches produced only a few additional responsive records, and in at least one case this was due to the appellant providing more specific information about what she thought was missing.

[138] In its affidavit, the university set out the process it used in order to respond to the request. In the affidavit, sworn by the Director of Risk Management and Access to Information at the university, it is noted that the appellant was contacted for clarification on the same day the university received the request. The affidavit lists the various individuals the university contacted in order to have them forward any records in their possession that were responsive to the request and sets out the various responses including the dates that records were forwarded to him by the individuals. The affidavit also sets out that the chief officers of the university's technology services centre were contacted with a request to search for telephone logs sought by the appellant and that ultimately no logs of the kind sought by the appellant were found.

[139] In the appellant's representations, she submits that she was not initially approached by the university nor was her supervisor, in its actual search for records, which in her view would have been a very efficient way to begin a search. The appellant notes that she did not see any indication that staff and faculty were advised to preserve all documents immediately upon receiving her request. She also notes that there should have been some involvement of technology services beyond the search for telephone records and their involvement may have also been important in preventing the deletion of relevant documents.

[140] The appellant notes two of the individuals approached by the university confirmed that they had deleted records. In the appellant's view these records were not preserved but should have been for a one year period based on the university's retention schedule. The appellant notes that there was no evidence from the university of any attempts to retrieve the deleted files, which she states may still exist, with the assistance of technology services. Further the appellant notes that there was no evidence that the university took steps to preserve these documents. The appellant notes that prior to making her access request, she informed specified individuals, including the Director of Risk Management and Access to Information, that documents relating to her should be preserved for a review at a later date.

[141] The appellant submits that the university's selection of individuals to conduct the search was inappropriate. She notes that the Director of Risk Management and Access to Information himself acknowledged limited knowledge and expertise regarding technological matters and expressed a lack of confidence in responding to the request. The appellant submits that technology services is the department with the knowledge and expertise required to assist in this type of search. She submits that the individuals involved in the dissertation process (which she states involved violations of regulations

concerning academic practices) were the individuals the university requested to search for documents. The appellant states that these individuals were requested to search for documents that might incriminate them.

[142] The appellant provided emails which she states provide evidence of violations of doctoral regulations. She refers to an extensive communication with a university professor and the first external examiner which was, in her view, a clear violation of doctoral regulations. She also states that originally this record had been previously redacted and was clearly information that should have been provided to her at the outset. She points to this as evidence that the university's search was not reasonable.

[143] The appellant states that she has received next to nothing from the university. She refers to a specified university professor who had informed her that she had discussions at a joint Ph.D. committee meeting yet no related documents were provided by the university.

[144] The university was given a copy of the appellant's representations and provided further representations in reply. The university submits that it first approached the individuals it did to commence the search in order to identify university staff involved in the appellant's file because it concluded that they would have the most comprehensive and detailed knowledge on the subject. The university states that there was nothing preventing the appellant from including in her access request, the identities of the individuals the university should approach concerning the responsive records. The university notes that it contacted the appellant in order to narrow the request, which she did, and it could not see what, if any, additional limiting information it should have prompted her to provide.

[145] With regard to the appellant's suggestion of the possibility that university staff did not preserve records, the university points to its Freedom of Information and Protection of Individual Privacy Policy which states very clearly the obligations relating to retention, security and disposal of record, including electronic communications. The university notes that its personnel were approached about the appellant's records with the assumption that they would, in good faith, turn over everything they could find that was responsive. The university states that it felt no obligation to repeat what was already in the privacy policy. The university notes that in the course of collecting the records, two instances of significant record deletion were identified. It submits that two specified professors, in ignorance of the rules concerning disposal of records, deleted records, including emails concerning the appellant. The university also notes that it received assurance from one of these professors that their emails had gone to other professors, all of whom had provided responsive records, and on the assumption that the other professor's relevant email correspondence would have been included in others' emails that were retrieved, it did not pursue this matter further, other than reminding these individuals of their obligations.

[146] The university states that it did not contact technology services centre (TSC) in

its search, and that it was faster and simpler to approach the email account holders directly. In addition, it is likely that the account holders would have a much better idea about the contents of their own accounts and be better able to retrieve responsive emails.

[147] The university also states that the appellant asked the university to process a request under the *Act*. It notes that its role in searching for records is purely administrative and not prosecutorial. Therefore, the university approached individuals directly who were likely to have custody of responsive records. It sees no basis under the *Act* for questioning the integrity of those individuals or their motives.

[148] As noted, the appellant did not make sur-reply representations in this appeal.

Analysis and finding

[149] In this appeal, I have considered the appellant's representations in which she identifies reasons why she believes that further responsive records exist. I have also considered the university's initial and reply representations. In the circumstances of this appeal, I find that the university has not provided sufficient evidence to establish that a reasonable search was conducted for responsive records. I make this finding for one main reason. Despite the fact that the university has now completed three separate searches for records, I am concerned by the fact that two affected parties indicated that they deleted emails. The university referred me to its policy regarding email retention which clearly sets out that emails of this type are to be kept for a period of one year from when they were created. When it became apparent to the university that two of the affected parties unknowingly deleted emails outside of the email policy, it was incumbent upon the university to, as suggested by the appellant, at the very least, attempt to retrieve the deleted records by approaching the technology services centre (TSC). As noted by the appellant, it is not clear if these records could be recovered, but I agree that a reasonable search would include the university inquiring from its TSC IT department about an attempt to retrieve those records that relate to the appellant's request. Since the university did not do this, or explain why this would not be a reasonable prospect, I will order it to do so by completing a further search, specifically directing that IT attempt to retrieve those deleted records.

[150] For the remainder of the records, I find the university's search was reasonable.

[151] As noted above, although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist. On my review of the appellant's representations including correspondence sent to the mediator, the appellant refers to specific documents which should exist by extrapolating from what she already received from the university as well as information she personally has about the dissertation process she was following. The appellant lists the information that she has not yet received that she believes exists. I note, in my

review of the records and the representations, that much of that information exists but was redacted by the university as a result of their application of the exemptions and exclusions under the *Act*.

[152] The appellant took issue with the individuals contacted by the university to start its search. I accept the university's submission that contacting the authors (or recipients) of the emails directly was appropriate. I also agree that the authors of the emails are in the best position to search for the communications. Despite the appellant's submission that the people searching may have an interest in the records, I find that the university followed a reasonable process by approaching these individuals, the authors and recipients of the emails, to complete a search of their email systems.

[153] The appellant suggests that an appropriate place for the university to start its search was by approaching her and her supervisor. While her supervisor was ultimately approached, the university is obligated to search for records in its record holding and, therefore, contacting the appellant for records already in her possession was not necessary.

[154] Further, the appellant refers to initial redactions to certain records which were subsequently released to her and suggests that this is evidence that the university's search was not reasonable. As stated earlier, the university located records and identified a number of exemptions and exceptions resulting in redacting the records before they were given to the appellant. In addition, subsequently, some records were released to the appellant after the university received the consent from affected parties to do so. I do not find that redacting the records because of exemptions and exclusions or subsequently providing affected parties' personal information after they consented to its release is evidence that the university did not complete a reasonable search and that further responsive records should exist.

[155] Accordingly, I order the university to complete a further search for the deleted emails.

ORDER:

1. I uphold the university's decision that section 65(6) excludes Records 96, 97, 98, 99, 103, 105, 110, 175, 178, 179 and 182 from the *Act*.

2. I uphold the university's decision that section 65(8.1)(a) excludes Records 28 and 100 from the *Act*.

3. I uphold the university's decision with respect to section 49(b), in part:

    a. I order the university to disclose to the appellant the information in records 138, 139, 142, 164 and 166 that I have found is not personal information, in accordance with the highlighted records enclosed with the

university's copy of the order. To be clear, only the highlighted information should be disclosed to the appellant.

b. I order the university to disclose to the appellant the information in records 33, 37, 93, 114, 130, 166, 173 and 174 in accordance with the highlighted records enclosed with the university's copy of the order. To be clear, only the highlighted information should be disclosed to the appellant.

4. I order that the university make the disclosure referred to in paragraph 3(a) and 3(b) of this order, by **December 5, 2018** but not before **November 30, 2018**.

5. The university is ordered to conduct a further search in response to the appellant's request relating to this appeal by contacting the technology services centre and requesting that it attempt to recover the deleted emails from the three specified professors.

6. The university is to provide this office with an affidavit outlining its search by **November 30, 2018**. The affidavit is to include, at a minimum:

   a. The identity/ies of the individual(s) conducing the search and their titles

   b. The locations searched

   c. The results of the search.

7. If the university locates additional records as a result of its further search, I order it to provide the appellant with an access decision in accordance with the requirements of the *Act*, treating the date of this order as the date of the request.

8. The university shall issue an access decision with regard to Records 177 and 183 in accordance with the provisions of the *Act*, treating the date of this order as the date of the request.

9. I remain seized of this appeal in order to deal with any outstanding issues arising from item 4, 5 and 6 of this order.

Original Signed by: October 30, 2018

Alec Fadel
Adjudicator