Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4021-F

Appeal PA16-162

University of Toronto

December 30, 2019

Summary: This final order addresses the remaining issues arising from the University of Toronto's access decision in response to a request for records about issues of tuition and student debt considered by a Faculty of Law class reunion organizing committee. Following Interim Order PO-3828-I, the adjudicator remained seized to address the application of the personal privacy exemptions in sections 21(1) and 49(b) and the public interest override to the information remaining at issue, which required notification of affected parties.

The adjudicator finds that some personal information must be disclosed because it is not exempt, but she upholds the university's denial of access to the remaining personal information under section 21(1) or section 49(b). The adjudicator also finds that the public interest override in section 23 does not apply to the exempt personal information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 21(1), 21(1)(a), 21(2)(a), 21(2)(f), 21(2)(h), 23 and 49(b).

Orders Considered: Orders PO-3828-I and PO-2905.

OVERVIEW:

[1] This final order concludes my inquiry into the issues raised by a request submitted under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the University of Toronto (the university) for access to records about a Faculty of Law class reunion and concerns expressed by some alumni about high tuition and debt load for law students. The full request was set out in the interim order, Interim Order PO-3828-I, and the context of the request was explained as follows:

> 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."

[2] After searching for records that were responsive to the request, the university located 25 pages consisting of emails and meeting minutes, and granted partial access to them. The university denied access in full to 17 pages relying 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). The appellant appealed the university's access decision to this office. Mediation resolved several issues, including the fee to be paid. After the appeal was transferred to the adjudication stage, an inquiry was conducted and representations were exchanged between the university and the appellant in accordance with section 7 of the IPC's *Code of Procedure* and Practice Direction 7.

[3] In Interim Order PO-3828-I, I made findings on whether the records contained personal information and section 49(a), in conjunction with section 18(1)(c). I concluded that the records contain the personal information of the appellant and other individuals. I confirmed that certain personal information was removed from the scope of the appeal, but did not uphold the university's severance of a portion of one of the emails as non-responsive. I found that section 18(1)(c) did not apply and that the information for which section 18(1)(c) had been claimed could not be withheld under section 49(a). I ordered portions of the records disclosed to the appellant. Finally, I deferred consideration of the remaining issues — the application of the personal privacy exemption, the university's exercise of discretion and the public interest override — pending notification of affected parties.

[4] After the university disclosed the non-exempt information to the appellant in accordance with Interim Order PO-3828-I, he confirmed that he wished to continue with the appeal. Accordingly, I sent a supplementary Notice of Inquiry to three individuals whose interests could be affected by disclosure of the personal information remaining at issue.[1] I told the affected parties that "for the most part, this information

[1] As explained below, although the records also contain other individuals' personal information, I notified only three affected parties because I considered their personal information to make up the largest, substantive share of that type of information remaining at issue.

consists of your views and opinions about the subject matter of the request."[2] I received a reply from each of the three affected parties. Two of them provided written consent to the disclosure of their personal information, while the third affected party explained his reasons for objecting to the disclosure of his personal information.

[5] Next, I sent the affected parties' consents and submissions to the university, and invited the university to provide any representations supplementary to the ones provided during the earlier stages of the inquiry, which it did. In its supplementary representations, the university put into question the issue of its custody or control of the records for the first time, a submission I address below as a preliminary matter.

[6] I sought the submissions of the appellant, providing a non-confidential version of the university's representations and confirmation of the affected parties' positions on disclosure. The appellant submitted representations in response that were, in turn, provided to the university, to invite a reply, and a brief reply was received. Finally, I contacted an additional affected party, sent a supplementary Notice of Inquiry and sought his views on the disclosure of information relating to him, which I received.

[7] In this final order, I give effect to the written consents received and find that other personal information is not exempt under section 49(b), resulting in an order to the university to disclose this personal information to the appellant. I uphold the university's denial of access under sections 21(1) and 49(b) to the remaining personal information in records 1 to 10. Finally, I find that the public interest override in section 23 does not apply to the personal information that is exempt under section 21(1) or section 49(b).

RECORDS:

[8] Remaining at issue in this final order are portions of 10 records (17 pages) consisting of conference call minutes and emails.

ISSUES:

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

B. Did the university properly exercise its discretion under section 49(b)?

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[2] I provided the affected parties with descriptions of the personal information definition and personal privacy exemption. Regarding the former, I noted that I had decided the issue in Interim Order PO-3828-I, at pages 5-9, and provided a copy of the interim order.

C. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 21(1) or 49(b) exemption?

DISCUSSION:

Preliminary issue: custody or control

[9] In submissions provided after Interim Order PO-3828-I was issued, the university argued for the first time that the records are not in its custody or under its control, that it had "bare possession" of the records, and that I ought to "reconsider and reverse [my] finding at paragraph 24 of the interim order." There, in prefacing my findings on the personal information issue, I stated that "… 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." Despite the university's prior acknowledgement of the appellant's request and the actions taken in response to it to search for and identify the responsive records, it now argued that the records are not about official university activities but, rather, are only incidentally within the records of the "university official who was at the event" and do not relate to its purposes or functions.[3] The appellant disputes this position in his responding submissions, referring to the public nature of the reunion that was organized following the committee's discussions and the importance of the communications with the university's employee. The university did not pursue this position in its final representations, focussing instead on the privacy interests of the individuals involved. Nonetheless, I address this as a preliminary matter here.

[10] The approach taken by this office and the courts to determinations of custody and control has been a broad and liberal one, as required to give full effect to the transparency purposes of the *Act.*[4] Factors that this office and the courts have considered in making determinations on custody or control include: whether the record was created by an officer or employee of the institution;[5] whether the content of the records relates to the institution's mandate and functions;[6] and where the institution possesses the record (as the university does here), whether it is more than "bare

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[3] The university cites *City of Ottawa v Ontario,* 2010 ONSC 6835, and Orders PO-1725 and PO-1947-F.
[4] *Ontario (Criminal Code Review Board)* v. *Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072 *Canada Post Corp.* v. *Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.), and Order MO-1251.
[5] Order 120.
[6] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above; *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.); and Orders 120 and P-239.

possession."[7] Looking at the matter, I am satisfied that the university has more than "bare possession" of the records at issue in this appeal.

[11] In determining custody or control, past orders have described the mandate of universities as involving teaching, research, and related administrative functions.[8] In my view, alumni relations, development and fundraising, including the organizing of class reunions, are part of the administrative functions of the university and its faculties. These records clearly relate to that part of the university's mandate. From this perspective, the involvement of the Faculty of Law's development officer is not merely incidental to this organizing; it is necessary to carrying out the university's development goals. I am satisfied that the records have some connection to public scrutiny of the activities of the university, an institution under the *Act.*[9]

[12] Given the connection between the content of these records and the university's alumni relations, development and fundraising functions, I am persuaded that these records relate to its mandate and functions. This situation is distinct from *City of Ottawa*, where the records at issue – the personal emails of one of its employees – had nothing to do with the mandate and functions of the city, or a "city matter." In the records before me, including the emails, the university's development officer is the creator of some, and a participant in, or at least recipient of, the rest.

[13] I find that the university has custody or control over the records under section 10(1) of the *Act.* Since the *Act* applies to the records, I will proceed by making findings on the application of the personal privacy exemptions in sections 21(1) and 49(b) and the public interest override in section 23.

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

[14] In Interim Order PO-3828-I, I determined that records 4-10 contain the appellant's personal information,[10] as well as that of other individuals,[11] while records 1-3 contain only the personal information of individuals other than the appellant. I also concluded that some of the information in the records did not qualify as personal information at all, and that it instead represented "objectively ascertainable fact about

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[7] Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.
[8] Order PO-3009-F at page 51. This order addressed the issue in the context of access to professor's records under *FIPPA*, including complex considerations involved in academic freedom.
[9] Order PO-3894.
[10] Specifically, at paragraph 25, I found that "records 4-10 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.*"
[11] At paragraphs 26 to 29, I found that the records contained personal information about individuals other than the appellant under paragraphs (a), (b), (d), (e), (g) and (h) of the definition in section 2(1).

the university, the faculty or program administration matters." As such, that information could not be withheld under the personal privacy exemptions.[12]

[15] Those findings mean that the mandatory personal privacy exemption in section 21(1) is the appropriate personal privacy exemption to consider in my review of the personal information in records 1-3, while the discretionary personal privacy exemption in section 49(b) is the relevant exemption for my review of the personal privacy exemption to records 4-10.

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

[17] In contrast, under section 21(1), where a record contains personal information of another individual but *not* the requester, the institution is prohibited from disclosing that personal information unless one of the exceptions in sections 21(1)(a) to (e) applies, or unless disclosure would not be an unjustified invasion of personal privacy under the exception in section 21(1)(f).

[18] When I sought the university's supplementary representations following notification of the affected parties after Interim Order PO-3828-I was issued, I told the university that I would be applying the two affected parties' written consents under section 21(1)(a) in this final order. By virtue of their consent under section 21(1)(a), their personal information is not exempt under either personal privacy exemption, and I will order it disclosed.

[19] I also identified information in several records for which I did not make a specific finding in Interim Order PO-3828-I as to whether it consisted of "personal information" according to the definition of the term in section 2(1) of the *Act.* This is information relating to a senior faculty official that appears in records 4, 8, 9 and 10. A few of these references are simply to the individual's title, while others convey the individual's views on the matters discussed. This faculty official is the affected party from whom I recently sought representations. In response, this affected party consented to the disclosure of the references to him in records 4, 8, 9 and 10. I deal with that consent, below.

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[12] Or under section 18(1) of the *Act*; see pages 15 to 17 of Interim Order PO-3828-I. The "factual, non-personal information" in records 1, 2, 4 and 9 was ordered disclosed.

[20] The only other section 21(1) exception that may be relevant to the remaining personal information at issue is section 21(1)(f), which allows for disclosure of personal information if it would not be an unjustified invasion of personal privacy.

[21] In applying either of the section 49(b) or 21(1) exemptions, sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Section 21(4) lists situations that would not be an unjustified invasion of personal privacy, such as the details of a discretionary financial benefit given to an individual by the institution.[13] I find that none of the situations in section 21(4) are applicable to the records at issue in this appeal.

[22] If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy. The university does not argue that any of the presumptions against disclosure in section 21(3) apply to the personal information at issue, and on my reading of the records, I agree that none apply.[14]

[23] When the records are not covered by a presumption in section 21(3), section 21(2) lists various factors that may be relevant in determining whether disclosure of the personal information would be an unjustified invasion of personal privacy under section 21(1). The information will be exempt under section 21(1) unless the circumstances favour disclosure.[15]

[24] For records that contain the requester's personal information that are claimed to be exempt under section 49(b), this office will consider, and weigh, the factors in section 21(2) and balance the interests of the parties in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.[16]

[25] The list of factors under section 21(2) is not exhaustive. The university was required to consider any circumstances that are relevant, even if they are not listed under section 21(2).[17] If established, the factors in sections 21(2)(a) to (d) weigh in favour of disclosure, while the factors in paragraphs (e) to (i) weigh in favour of privacy protection.

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[13] Section 21(4)(c).
[14] Under section 21(1) (where the records that do not contain the requester's personal information), a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if a section 21(4) exception or the "public interest override" at section 23 applies; see *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.
[15] Order P-239.
[16] Order MO-2954.
[17] Order P-99.

Representations

[26] In the supplementary representations offered after the interim order in this appeal, the parties asked me to refer also to their initial representations on the personal privacy issue, and I have done so.[18]

[27] The university submits that disclosure of the records would be an unjustified invasion of personal privacy under section 21(1) or section 49(b) because, it says, all 17 pages reflect private and confidential discussions and their content relates to a "by-invitation dinner gathering at a private home and follow up discussions respecting the group's philanthropic activities, intentions and strategies."

> Their shared interest happens to align with the interests of the Faculty, which is part of a FIPPA-governed institution (the University). This alignment of interest does not render their efforts in any sense institutional, nor does it alter the personal nature [of] their personal information in the records.

[28] The university acknowledges that the extent to which each individual whose information appears in the records will be aggrieved by disclosure will vary. Generally, however, its arguments in favour of privacy protection correspond with the strong opposition to disclosure of the notified affected party who did not consent to disclose his personal information.

[29] The university submits that there are candid and frank personal views expressed in the records for which there was a clear expectation of privacy, as reflected by the tone and nature of the communications. The university submits that the expectation of privacy in these communications "is supported by long-established practice of alumni groups." This suggests the possible application of the factor weighing against disclosure in section 21(2)(h), regarding which the university submits:

> The donors and potential donors who supplied the information and the university staff member who received it all had an expectation that the information would be treated confidentially, and this expectation is and was reasonable in the circumstances.

[30] The university observes that members of the Class of '75 have a high degree of legal sophistication and submits that these individuals understood their participation in the reunion activities to be in a personal capacity. The limited and confidential sharing of their personal information with Faculty Advancement staff for the purpose of

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[18] There are no representations on the personal privacy exemption from the two consenting affected parties, and I accepted the third affected party's position that his representations should be withheld as confidential.

organizing the reunion dinner would still have been subject to a reasonable expectation that "their personal information in the custody or under the control of a *FIPPA* institution (such as the university) would be protected consistent with *FIPPA* privacy requirements."

[31] On the reasonableness of any expectation of confidentiality under section 21(2)(h), the appellant agrees that the reunion organizing committee members have legal training and long, distinguished careers in legal practice. In the appellant's view, however, it should come as no surprise to any of them that their communications as part of the committee of a public institution are subject to access rights under *FIPPA.* He points to the lack of evidence of any agreement to protect the confidentiality of the communications.

[32] The university submits that "disclosure would harm the donors and potential donors and this harm would be unfair to private individuals" under the factor favouring privacy in section 21(2)(e). The university argues that the personal information at issue is highly sensitive and says there is a reasonable expectation of significant personal distress if the information is disclosed, leading to the factor in section 21(2)(f) weighing strongly against disclosure. The appellant disputes this position, given his view that the contributors' "comments are not about their own medical, financial, familial or marital situations" which, in any event, would be personal information about them to which he does not seek access.[19]

[33] The university also submits that disclosure would result in unfair damage to the reputation of the donors and potential donors, and section 21(2)(i) is strongly relevant accordingly. The appellant's view is that this harm is speculative and unsupported by the university's evidence. The appellant also submits that there is no evidence, provided by the university or otherwise, that disclosure would cause the affected parties financial harm under section 21(2)(e).

[34] Regarding the factors in section 21(2) that may apply to favour disclosure, the university maintains that none apply. In particular, section 21(2)(a) does not apply, the university argues, because disclosure would not subject its activities to public scrutiny, but would, instead, subject the views, intentions, strategy and actions of private individuals to public scrutiny. The university also maintains that there is no evidence to support the application of the factors favouring disclosure in sections 21(2)(b), (c) and (d).

[35] In response to these arguments about the section 21(2) factors favouring disclosure, the appellant does not suggest that paragraphs (b), (c) or (d) of section 21(2) apply here. Rather, his focus is on the public scrutiny factor in section 21(2)(a).

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[19] And which was addressed in Interim Order PO-3828-I.

The appellant submits that despite the university's efforts to minimize it, the alumni organizing and fundraising efforts took place "under the shadow of high tuition and student debt" and relate closely to matters of public controversy:

> High tuition is an important policy decision of the University. The downstream effects of it – the need for extensive fundraising and students taking on high debt loads – are important pieces of public discussion. … As such, the disclosure of documents furthers the public interest in subjecting the issues raised to public scrutiny, as per s. 21(2)(a).

[36] The university's additional comments suggest that due to the nature of the events and venue that contextualize the records, the personal information of the appellant and other individuals in the remaining portions of the records is so inextricably entwined that the whole "should be viewed as the personal information of others" such that any non-exempt information cannot be severed and disclosed. Further, the university submits, disclosure of "any significant portion" would necessarily result in an unjustified invasion of the personal privacy of the individuals to whom it relates.

[37] In its final representations, the university highlights the sensitivity inherent in the exercise of severance regarding the exchanges between the reunion organizing committee members. It says this is due to the entwined nature of the personal information of multiple individuals appearing in the form of "views or opinions" under paragraphs (e) and (g) of the definition of personal information in section 2(1). The university submits that, given the potential for disclosing information for which there has not been consent, any decision to disclose the personal information of the individuals who have consented must also involve careful assessment of the information to avoid the incidental release of entwined personal information of other individuals. On balance, the university says that it believes the appellant's interest in access is outweighed by the "substantial and reasonable" interest in protecting the privacy of other individuals, a statement with which the appellant disagrees.

[38] The senior faculty official who provided consent to disclose any references to him in records 4, 8, 9 and 10 adds that his consent should not be considered to apply to "the release of any part of Records 4, 8, 9, and 10 that constitutes the personal information of individuals other than myself." Regarding section 49(b), this affected party states that although he makes no representations on the exemption on his own behalf, he notes that "the invasion of privacy that would occur for the other individuals whose personal information appears in Records 4, 8, 9, and 10 is not justified by any offsetting public or private interest."

Analysis and findings

Disclosure with consent

[39] In concluding that the university must disclose some of the withheld personal information remaining at issue, I will begin by addressing the written consents received

from two of the three affected parties notified after Interim Order PO-3828-I. The exception to the personal privacy exemption in 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,
>
> > upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;

[40] The consents that these two affected parties provided to this office in response to my notifying them are in writing and explicit. I am satisfied that these consents meet the requirements of section 21(1)(a), because they address the disclosure of the two affected parties' personal information in the context of this access request and because these records are ones to which they would be entitled to have access. These consents demonstrate that the individuals signing them understood that their personal information would be disclosed to the appellant. I find that the section 21(1)(a) exception to the personal privacy exemption applies, and I will order the disclosure of personal information about them in the records. For clarity, this disclosure may include the views of other individuals about them, as contemplated by paragraph (g) of the definition of "personal information."

[41] There is also information about the senior faculty official in records 4, 8, 9 and 10, regarding which consent to disclose was also provided. When notifying this affected party recently, I referred to pages 5-9 of Interim Order PO-3828-I, where I decided the issue of "personal information," and mentioned the aspect of my review of the issue related to certain information in the records that did not appear to be personal information, because it could be viewed as "giving voice to the views of the organization." I advised this affected party that I was considering whether the references to him, because they were in his professional capacity, did not qualify as his personal information. As stated, this individual responded by providing consent to disclose the references to him. In this context, therefore, it is not necessary to make a finding about whether these references contain his personal information or not. Either they consist of his personal information and the consent exception in section 21(1)(a) applies, or they do not, and the information cannot be withheld under the personal privacy exemption in section 49(b) in any event. As a result, I will order disclosure of the references to, and information about, the senior faculty official in records 4, 8, 9 and 10. Accordingly, those portions of the records are not reviewed in my analysis of the application of section 49(b) to the remaining personal information, below.

Disclosure based on weighing and balancing the factors in section 21(2)

[42] The premise upon which the university argues the application of the personal privacy exemption is that "the remaining records are the mixed personal information of the appellant and of various individuals who were at the gathering," a "by-invitation dinner gathering at a private home." Although such an event is alluded to in several of the records, none primarily relate to such a situation. Records 1 to 3 are emails that

relate to a March 2015 conference call, while records 4 to 10 consist of conference call meeting minutes and emails exchanged in September and October 2015, all authored by certain members of the reunion organizing committee (the notified affected parties) and a Faculty of Law development officer.

[43] The university does not argue, nor would I find based on my consideration of the personal information remaining at issue, that any of the presumptions against disclosure in section 21(3) apply. Apart from applying section 21(1)(a), my finding rests on the factors in section 21(2).

[44] As mentioned above, records 1-3 contain the personal information of individuals other than the appellant, and do not contain the appellant's personal information, so the appropriate personal privacy exemption to consider is section 21(1). For me to order disclosure of the remaining personal information of other individuals in records 1 to 3, I must be satisfied that the circumstances favour its disclosure.[20]

[45] For the mixed personal information of the appellant and others remaining at issue in records 4 to 10 under section 49(b), I must consider, and weigh, the relevant factors in section 21(2) and balance the interests of the parties to determine whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.[21]

[46] Regarding the university's argument that the "pecuniary or other harm" factor weighing against disclosure in section 21(2)(e) applies, I find that it does not. For this factor to apply, the evidence must demonstrate that the harm envisioned is present or foreseeable, and that this damage or harm would be "unfair" to the individual involved. Based on the university's submissions and the nature of the personal information, I am not persuaded that its disclosure could reasonably be expected to result in harm to these individuals, pecuniary or otherwise. Next, the application of section 21(2)(i) is not dependent on whether the damage or harm envisioned by the clause is present or foreseeable, but whether this damage or harm would be "unfair" to the individual involved.[22] I am similarly unpersuaded by the university's submissions and the personal information at issue that the factor in section 21(2)(i) applies, and I find it does not.

[47] The appellant did not argue that the factors favouring disclosure in sections 21(2)(b), (c) or (d) apply. I have also considered these factors, and agree that they are not relevant to the personal information at issue.

[48] Rather, based on the circumstances of this appeal, the parties' representations, and for the reasons given below, I find that the applicable factors are those at sections

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[20] Order P-239.
[21] Order MO-2954.
[22] Order P-256.

21(2)(a), (f) and (h), which state:

> 21(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> > (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
> >
> > (f) the personal information is highly sensitive; and
> >
> > (h) the personal information has been supplied by the individual to whom the information relates in confidence[.]

Weighing in favour of disclosure

[49] Looking at section 21(2)(a), which would favour disclosure of personal information, I note that its objective is to ensure an appropriate degree of scrutiny of government and its agencies by the public. This is distinct from subjecting the views or actions of private individuals to public scrutiny.[23] The university argues that disclosure would only serve to subject the views, intentions, strategy and actions of private individuals to public scrutiny. The appellant disputes this, and argues to the contrary, providing a rationale that is at least partly persuasive.

[50] In my review, I considered Order PO-2905, where Commissioner Brian Beamish found that the subject matter of a record need not have been publicly called into question or have been a matter of public debate as a condition precedent for the factor in section 21(2)(a) to apply; rather, this fact would be one of several considerations leading to its application. In the circumstances, I find that the subject matter of the records – addressing issues of high tuition and student debt at the Faculty – is strongly suggestive of an accountability interest, one which I understand to have been raised publicly.

[51] Through Interim Order PO-3828-I, there has been disclosure of substantial "factual, non-personal information" in records 1, 2, 4 and 9 – information that sheds light on the activities of the university. After reviewing the personal information that remains at issue, I am satisfied that disclosure of brief, discrete portions of records 6 and 8 could reasonably be expected to shed further light on the manner in which the university chooses to address the difficult issues related to high tuition and debt. These brief portions are connected with the university's accountability for how it carries out its alumni relations, fundraising and development functions. Therefore, I find that the

[23] Order P-1134.

factor in section 21(2)(a) applies in respect of discrete sections of records 6 and 8.

[52] I have considered whether the public scrutiny factor in section 21(2)(a) applies to the personal information about the remaining individuals who were not notified. The scope of this personal information is very limited: for example, names and work email addresses, or other personal information lacking in significant detail. These individuals were not participating in the discussions in a substantive manner that involved views and opinions being expressed about the specific issues of concern to the appellant. Some of the factual information in the records in which this type of personal information appears has also already been disclosed from records 1, 2, 4 and 9, as noted above. I find that the snippets of personal information about the remaining individuals are not sufficiently connected to the public scrutiny purpose identified by the appellant to warrant the application of the factor in section 21(2)(a).

[53] In sum, based on my review of the records remaining at issue and the representations of the parties, I find that the public scrutiny factor in section 21(2)(a) applies only in relation to brief portions of the emails at records 6 and 8 and does not otherwise apply to favour disclosure under section 49(b).

Weighing in favour of privacy protection

[54] Based on my consideration of the content of the records remaining at issue, and the parties' representations, I find that the factors in section 21(2)(f) and 21(2)(h) apply to the personal information of individuals other than the appellant in the records, as discussed below.[24]

[55] To establish the application of section 21(2)(f), I must be satisfied that disclosure of the particular information could reasonably be expected to cause significant personal distress to the individual to whom it relates.[25] The personal information that is at issue was provided in the context of organizing a class reunion; this would not, on its own, necessarily attract the application of this factor. Given the context, however, I accept that the factor in section 21(2)(f) applies to the personal information of the individuals regarding whom there is more than a limited reference to their personal information, such as their name or email address, for example. This is the personal information in records 1-3, 5 and 7-10 identified in Interim Order PO-3828-I (at paragraph 27) about other identifiable individuals "that is shared by committee members as part of the discussion around student tuition and debt loads."[26] These individuals are not members of the Class of 1975 and, as I said in the interim order, the references to them appear to be "incidental to the work of the committee." These individuals did not provide their

[24] Except, of course, to the personal information of the consenting affected parties.
[25] Orders PO-2518, PO-2617, MO-2344 and PO-2916.
[26] According to paragraphs (a), (b), (g) and (h) of the definition of "personal information" in section 2(1).

own information to the committee and in this context, I am satisfied that its disclosure could reasonably be expected to result in significant personal distress to them. Additionally, based on the third affected party's confidential representations, I am also satisfied that disclosure of his personal information could reasonably lead to significant personal distress on his part. For these individuals, I find section 21(2)(f) relevant and that it applies to weigh in favour of protecting their privacy.

[56] The factor at section 21(2)(h) applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. The factor requires an objective assessment of the reasonableness of any confidentiality expectation.[27] The appellant says there is no evidence of any agreement to protect the confidentiality of the communications. This may be true, but there are other considerations apart from a written or otherwise express agreement that may support the reasonableness of the confidentiality expectation for the factor in section 21(2)(h).

[57] I accept the university's position that there was at least an implicit expectation of privacy in the communications exchanged by members of the reunion organizing committee (and the development officer), supported by the "long-established practice of alumni groups." Aside from the three notified affected parties and the university staff member, there are other named individuals, some active committee participants and others not. Given the nature of their personal information and the context in which these records were created, I accept that these individuals could reasonably have expected that their personal information was supplied confidentially in the circumstances, and I find that section 21(2)(h) applies accordingly.

[58] Regarding the individuals whose personal information appears in records 1-5 and 7-10 as part of the reunion organizing committee's discussions, it is clear they did not directly supply it. There is no evidence that assurances of confidentiality were given to them. However, I found directly above that the members of the committee reasonably held an expectation of confidentiality, in part due to "long-established practice of alumni groups." In the circumstances, therefore, I am satisfied that the personal information of these particular individuals was shared confidentially by the committee members who provided it and that this expectation of confidentiality in the shared personal information was reasonable in the circumstances. I find that the factor weighing in favour of non-disclosure in section 21(2)(h) also applies to this personal information.

[59] Finally, regarding the third notified affected party who participated in the email discussions about high tuition and student debt, it was suggested that the consents provided by the other two notified affected parties might impugn the reasonableness of his expectation of confidentiality. However, the third affected party's expectations of

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[27] Order PO-1670.

confidentiality in these communications are clear from his response to the notification process after the interim order. And in my consideration of section 21(2)(h) as a whole, I accept the university's position that the two notified affected parties' consent to disclosure does not diminish the reasonableness of the third affected party's expectation that the views he expressed on the subject matter of the emails would remain confidential.[28] I find that the factor favouring privacy protection in section 21(2)(h) applies to the personal information of the third affected party whose personal information was conveyed to the university in this context, and that it weighs in favour of non-disclosure of it.

[60] I have also considered whether the parties' representations or the circumstances of this appeal raise other, unlisted factors in section 21(2) that favour disclosure or privacy protection, and are relevant to my determination under sections 21(1) or 49(b). I am satisfied that they do not.

Conclusion: records 1 to 3 – other individuals' personal information with section 21(1)

[61] Regarding the personal information of individuals other than the appellant in records 1 to 3, I have asked whether the circumstances favour its disclosure under the mandatory personal privacy exemption in section 21(1).[29] Based on my review of the relevant circumstances, I am not satisfied that they do. Apart from ordering the disclosure of the personal information of the two consenting affected parties under section 21(1)(a), I find that the remaining personal information is exempt under section 21(1) because no factors favouring disclosure apply and its disclosure would therefore result in an unjustified invasion of the personal privacy of the individuals to whom it relates.

Conclusion: records 4 to 10 – personal information of the appellant and others with section 49(b)

[62] For the mixed personal information remaining at issue in records 4 to 10 under section 49(b) after giving effect to the consents under section 21(1)(a), I have weighed the applicable factors in sections 21(2)(a), (f) and (h) and balanced the interests of the parties. Based on my analysis, for the brief portions of records 6 and 8 that I concluded above are related to the issues of high tuition and debt for the Faculty of Law, I find that sections 21(2)(f) and (h) apply, but are outweighed by the public scrutiny factor in section 21(2)(a). Therefore, I find that disclosure of discrete portions of records 6 and 8 would not be an unjustified invasion of the personal privacy of the individual to whom

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[28] See also paragraph 77 of Interim Order PO-3828-I, where I acknowledge the interplay of paragraphs (e) and (g) of the definition of "personal information." Additionally, to reiterate, some personal information has been removed from the scope of the appeal by the appellant, who does not seek access to it. See paragraph 30 of the interim order.
[29] Order P-239.

they relate under section 49(b).[30]

[63] Conversely, I find that no factors favour disclosure of the rest of the personal information remaining at issue, and that sections 21(2)(f) and (h) weigh against its non-disclosure. I find, therefore, that disclosure of the remaining personal information at issue in records 4 to 10 would be an unjustified invasion of the personal privacy of individuals other than the appellant, and that it is exempt under section 49(b), subject to my consideration of the university's exercise of discretion, below.

B. Did the university properly exercise its discretion under section 49(b)?

[64] After deciding that a record or part thereof falls within the scope of a discretionary exemption, the head is obliged to consider whether it would be appropriate to release the record, regardless of the fact that it qualifies for exemption. The section 49(b) exemption is discretionary, which means that the University of Toronto could have chosen to disclose information, despite the fact that it could withhold it. The university was required to exercise its discretion under this exemption.[31]

[65] On appeal, the Commissioner may determine whether the university failed to exercise its discretion. In addition, the Commissioner may find that the university erred in exercising its discretion where it did so in bad faith or for an improper purpose; where it took into account irrelevant considerations; or where it failed to take into account relevant considerations. In either case, I may send the matter back to the university for an exercise of discretion based on proper considerations.[32] According to section 54(2) of the *Act,* however, I may not substitute my own discretion in place of the university's discretion.

[66] I have upheld the university's decision to apply section 49(b) to portions of records 4 to 10 and I must, therefore, review its exercise of discretion in denying access under that exemption.

Representations

[67] The university submits that it considered the purposes of the *Act*, which include protecting the privacy of individuals, in exercising its discretion to withhold personal information under section 49(b). The university reiterates that it considered the records to contain "only occasional minor mentions of [the appellant's] name in passing and no substantial/significant information about him." In this context, therefore, the university

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[30] My findings are shown by the highlighting applied to the copies of the records sent to the University of Toronto with this order.
[31] There is no exercise of discretion under the mandatory personal privacy exemption in section 21(1).
[32] Order MO-1573.

considered that the privacy interests of individuals who are donors or potential donors took precedence over the appellant's access rights.

[68] The university argues that the appellant did not provide a sympathetic or compelling need to receive the information. Further, the university says it considered the personal and private nature of the information and its sensitivity to those individuals and concluded that disclosure would not increase public confidence in the institution.

[69] The university also refers to the other responsive records being disclosed in full to the requester, suggesting that this disclosure supports a good faith exercise of discretion.

[70] The appellant's position on the exercise of discretion under section 49(b)[33] is based on his view that the university failed to grapple with the importance of disclosure in a context where "there is an important public debate about high tuition and student debt ... and its impact on access to legal education" for many historically underrepresented populations.

[71] Regarding a sympathetic and compelling need to receive access, the appellant also states:

> The university also failed to consider my personal circumstances in its exercise of discretion, including: my status as an alumnus; my lived experience as a student from a modest-income family; my debt load; my interest in the subject matter; and the actions of me and my fellow classmates … to raise these issues with the Faculty and in the public discourse. Given that the university has now flagged my name, it is also fair to say I have a legitimate and heightened interest in all personal information about me in its control.

[72] The university responds by stating that, if anything, the "sympathetic and compelling need is for the protection of records of a private event at a classmate's home." The university maintains that it worked closely with the Faculty of Law to ensure that all relevant factors, and no irrelevant factors, were considered in the making of its decision.

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[33] As distinct from his initial representations on the university's exercise of discretion generally, which he impugns as a failure to exercise its discretion at all, given the complete denial of access to records 1 to 10. However, Interim Order PO-3828-I resulted in disclosure of information withheld solely under section 49(a), in conjunction with section 18(1)(c) and this final order therefore only addresses the exercise of discretion under the personal privacy exemption in section 49(b).

Analysis and findings

[73] I have considered the representations provided to me by the parties in this appeal. I have also considered the broader circumstances of the appeal in order to assist me in making a determination about the exercise of discretion by the University of Toronto under section 49(b).

[74] Some reservations remain about the university's decision to deny access to the records in their entirety, based as it was, at least partly, on the university's claim that "records of a private event at a [Class of '75] classmate's home" should be protected. As I observed above, these records only tangentially discuss a private dinner event and are instead primarily concerned with organizing the class reunion itself and discussing issues related to high tuition and student debt at the Faculty of Law. In spite of these concerns, however, on balance, I accept that the university properly exercised its discretion under section 49(b) to withhold the exempt personal information of individuals other than the appellant. And that is all that is at issue, since the review of the university's exercise of discretion is not conducted in relation to information that I did not find exempt under section 49(b) and which will be disclosed by reason of this order.

[75] I have considered the university's other submissions on the exercise of its discretion in relying on section 49(b) to deny access. These submissions include the consideration of relevant factors such as the sensitivity of that information to the other individuals and its conclusion that disclosure would not increase public confidence in the institution. There is, in the end, not sufficient evidence on which I could find that the university considered irrelevant factors in its decision to withhold the personal information of individuals other than the appellant.

[76] Accordingly, I find that the university exercised its discretion under section 49(b) to withhold the exempt information properly in the circumstances, and I will not interfere with it on appeal.

C. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 21(1) or 49(b) exemption?

[77] As I have concluded that there is personal information in the records that is exempt under section 21(1) or 49(b), I will review whether, as the appellant argues, the public interest override in section 23 of the *Act* applies to nonetheless require its disclosure.

[78] Section 23 of the *Act* provides that:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.[34]

[79] For section 23 to apply, there are two requirements that must be satisfied. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[80] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure that clearly outweighs the purpose of the exemption.[35]

[81] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[36] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[37]

[82] A public interest does not exist where the interests being advanced are essentially private in nature.[38] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[39]

[83] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[40]

[84] Any public interest in non-disclosure that may exist also must be considered.[41] A public interest in the non-disclosure of the record may bring the public interest in

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[34] Section 23 may also apply to override section 49(b); see Orders P-541, PO-3086, and others.
[35] Order P-244.
[36] Orders P-984 and PO-2607.
[37] Orders P-984 and PO-2556.
[38] Orders P-12, P-347 and P-1439.
[39] Order MO-1564.
[40] Order P-984.
[41] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

disclosure below the threshold of "compelling."[42]

Representations

[85] The appellant's position is based on the concerns he says have been raised with increased frequency by students, faculty and alumni about the accessibility of legal education. He submits that as tuition and fees have reached $35,000 a year at the university's Faculty of Law, very serious questions have been put to the Faculty about what plans, if any, it has for "bridging the growing gap between tuition and financial aid." He continues:

> The matter is a pressing issue of public importance, because barriers in access to legal education have very serious consequences for attempts to increase diversity in the legal profession and for access to justice more broadly.

[86] The appellant submits that "after years of effort to change the reality, lawyers and judges remain overwhelmingly white … and from privileged backgrounds." Further, high tuition and inadequate financial aid affects who can attend law school and also the areas of law they choose to practice upon graduation when, the appellant says, six-figure debts must be serviced by pursuing more lucrative specialties. The appellant contends that this self-selection away from areas like family law, and also rural and remote communities, further imperils access to justice. For this reason, the appellant argues, the public interest outweighs the other interests raised in this appeal.

[87] The university's response to the appellant's arguments about high tuition and student debt and access to justice issues is that disclosure of the information at issue would not significantly inform the public debate about them, if at all. The university argues that there is no substantial relationship between the information and the *Act*'s central purpose of shedding light on the operations of government. The university explains that:

> Accessibility of legal education, diversity, tuition, financial aid and access to justice are issues of profound importance to the University and the Faculty of Law. Considerable effort and resources are dedicated to them. But records about a private dinner party where classmates discuss their philanthropic goals are not relevant to these important subjects. The appellant has failed to establish a basis for the application of section 23.

[88] Each of the parties elaborate on their respective positions, but in light of my conclusion about section 23, these arguments are not described further.

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[42] Orders PO-2072-F, PO-2098-R and PO-3197.

Analysis and findings

[89] As stated, only the personal information of individuals other than the appellant that I found exempt under sections 21(1) or 49(b) is addressed in this analysis under section 23. In order for me to find that section 23 of the *Act* applies to override the exemption of the personal information under sections 21(1) or 49(b), I must be satisfied that there is a *compelling* public interest in the *disclosure of this particular information* that *clearly outweighs the purpose* of the personal privacy exemption.

[90] Notwithstanding the reference to the "private dinner party" context in its representations excerpted above, the university does concede, and I accept, that there is a public interest in the larger issues of high tuition and student debt at its Faculty of Law. And I accept that barriers to pursuing a legal education as a result of high tuition and insufficient levels of financial aid will inevitably impact access to that legal education for certain segments of society. In my view, the efforts of the university and its Faculty of Law to facilitate access for individuals from underrepresented communities or modest means is something that ought to be subjected to scrutiny by, or on behalf of, those individuals and society at large. I do not consider the "philanthropic goals" of alumni completely irrelevant to these issues, since these individuals could reasonably be expected to exert some influence over the initiatives of the faculty and university to address these valid public interest concerns.

[91] However, my consideration of whether there is a public interest does not end with a conclusion that one exists, because under section 23 of the *Act*, I must also be satisfied that the public interest is a *compelling* one. A compelling public interest has been found not to exist where, for example, a significant amount of information has already been disclosed and this is adequate to address any public interest considerations[43] or where the information does not respond to the applicable public interest raised by appellant.[44] And this is where the crux of the issue now lies: I am not satisfied that disclosure of the particular personal information I have found exempt under sections 21(1) and 49(b) responds to the public interest identified by the appellant. I found above that disclosure of certain discrete portions of the records is desirable for public scrutiny because it would shed further light on the manner in which the university chooses to address the difficult issues related to high tuition and debt. However, I am not persuaded that disclosure of the exempt personal information in the records could serve to inform the public debate around these same issues or otherwise contribute in a meaningful manner to the public's exercise of its democratic rights. I find, therefore, that there is no compelling public interest in the disclosure of the exempt personal information.

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[43] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[44] Orders MO-1994 and PO-2607.

[92] As the evidence does not satisfy me that there is a compelling public interest in the disclosure of the particular personal information, I find that the first part of the test under section 23 is not met. Since both components of the first part of the test for the application of the public interest override are not met, it is unnecessary for me to review the second part of the test. Accordingly, I find that section 23 does not apply in the circumstances of this appeal.

ORDER:

1. I partly uphold the University of Toronto's denial of access under section 21(1) or section 49(b) to the personal information of individuals other than the appellant. The exempt personal information is identified by highlighting on the copy of the records sent to the university with this order. This exempt personal information is **not** to be disclosed.

2. I order the University of Toronto to disclose the non-exempt portions of the records to the appellant by **February 5, 2020**, but not before **January 31, 2020**.

3. In order to verify compliance with this order, I reserve the right to require the university to provide me with a copy of the records disclosed to the appellant.

Original signed by: December 30, 2019

Daphne Loukidelis
Adjudicator