Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4065

Appeal PA14-239

Laurentian University

September 15, 2020

Summary: Laurentian University (the university or Laurentian) received a multi-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information about the requester, over a 12-year period. The university issued a decision granting partial access to the responsive records, claiming the application of the mandatory personal privacy exemption at section 21(1) and the discretionary personal privacy exemption at section 49(b), as well as section 49(a) (discretion to refuse a requester's own information), read in conjunction with sections 19(a) and (c) (solicitor-client privilege), to the information that it withheld.

The requester, now the appellant, appealed the university's decision and raised issues with respect to the university's search, and its decision letters and indices. He also claimed that a number of his rights under the *Canadian Charter of Rights and Freedoms* (the *Charter*) have been infringed upon.

In this order, the adjudicator upholds the university's decision and dismisses the appeal. Specifically, she finds that, the university's decision letters and indices comply with the *Act*; the university's search for responsive records was reasonable and the exemptions that it claimed for the information that it withheld, apply. Additionally, she dismisses the appellant's *Charter* arguments due to insufficient evidence.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 2(1) (definition of "personal information"), 19(a), 19(c), 49(a) and 49(b); *Canadian Charter of Rights and Freedoms*, Part 1 of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK),* 1982, c.11, ss. 2, 7, 11, 12 and 15.

Orders Considered: Orders M-913, MO-2467, MO-3253-I, MO-3900, P-282, P-307, P-537, PO-2087-I, PO-3154 and PO-3819.

Cases Considered: *McKinney v. University of Guelph*, [1990] 3 SCR 229, 1990 CanLII 60 (SCC) and *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 SCR 809, 2004 SCC 31 (CanLII).

OVERVIEW:

[1] Laurentian University (the university or Laurentian) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*), for access to the following information created between specified dates over the course of approximately 12 years:

1. All Documents named in the Code of Student Conduct (non-academic), such as:

    a. The Occurrence Report mentioned in [an identified individual's] January 25th expulsion letter.

    b. The Complainant's Written Statement.

    c. The Investigator's Report.

    d. The Written Report of the Complaints Officer, if any.

    e. The Notice of Decision of the Sanctioning Body.

2. All filed documents, reports and information in regards to my meeting with [two identified individuals] @ 2011/2012 and the problems addressed in this meeting, including but not limited to the D2L messages and any other documents, messages, correspondence or evidence.

3. Any other information pertaining to the matter of my expulsion from the social work program at Laurentian University, my efforts at appealing this expulsion within Laurentian University and my current application to the Human Rights Tribunal of Ontario (with the exception of official FORMS used in the Human Rights Tribunal of Ontario procedures, such as Respondents forms).

4. Any and all documents that name and describe myself or instances involving myself that have been filed with Laurentian University for ANY REASON. ANY AND ALL DOCUMENTS that name and describe me that have been used to apply sanctions or take action against me or that have been used as testimony or evidence in the determination of the appropriateness of sanctions taken against me.

5. Copies of information used to document my past enrollment in actual classes that I have attended, payment for these classes as well as any bursaries, rewards and scholarships that I have received in the past (e.g. Hartman Award, automatic scholarship/bursary for academic achievement at LU).

[2] In the cover letter to the access request, the requester indicated that he also sought access to the names and contact information of students in several identified classes in which he has been enrolled.

[3] The university located records responsive to items 1, 2, and 5 of the request and issued a decision denying access to portions of them. Access was denied pursuant to the mandatory personal privacy exemption at section 21(1) and the discretionary personal privacy exemption at section 49(b) of the *Act*.

[4] With respect to item 3 of the request, the university advised that it required a time extension under section 27(2) of the *Act* to respond to that portion of the request.[1]

[5] With respect to item 4 of the request, the university sought clarification about the sanctions and which offices or departments might contain records responsive to that portion of the request. The requester subsequently provided clarification.[2]

[6] The requester, now the appellant, appealed the university's decision to the Information and Privacy Commissioner of Ontario (this office or the IPC).

[7] During mediation, the appellant questioned the constitutional applicability of the *Act* and sought a remedy under the *Canadian Charter of Rights and Freedoms* (the *Charter*).[3] The appellant filed a Notice of Constitutional Question (NCQ) with this office, which he also served on the Attorneys General of Canada and Ontario. Neither of the Attorneys General responded to the NCQ.

[8] The appellant confirmed that he is appealing the university's application of the exemptions at sections 21(1) and 49(b). He clarified that other than the portion of his request for names and contact information for students in some of his classes, he does not seek access to any dates of birth, addresses, telephone numbers or email addresses that might appear in the records, just the names of individuals.

[9] While mediation was ongoing, the university issued a supplementary decision disclosing portions of 900 pages of records responsive to item 3 of the appellant's request. The university advised that it denies access to portions of some of those records pursuant to the discretionary personal privacy exemptions at sections 49(a), read in conjunction with sections 19(a) and (c) (solicitor-client privilege) and 49(b) of the *Act*. It also advised that it denies access to some portions of records pursuant to

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[1] The university issued its access decision with respect to item 3 of the request during the mediation of the appellant's appeal.
[2] The university issued its access decision with respect to item 4 of the request, as clarified, during the mediation of the appellant's appeal.
[3] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.

the mandatory personal privacy exemption at section 21(1) of the *Act*. The university identified some information that it determined was not responsive to the appellant's request and is withholding on that basis. The university enclosed two indices of records with its decision letter setting out the records and indicating whether they were disclosed in full or in part. Index #1 describes records 1 to 6 and index #2 describes records 7 to 88.

[10] Following receipt of the supplementary decision letter, the appellant advised that he is also appealing that decision. He seeks access to the portions of the records responsive to item 3 of his request that were denied, including portions of records identified by the university as not responsive to his request. Additionally, he advised that he takes issue with the adequacy of the indices of records as he is of the view that they should contain more information about the records. Accordingly, the adequacy of the university's decision letters was added as an issue in this appeal.

[11] Subsequently, the university issued a second supplementary decision, addressing item 4 of the appellant's request, granting partial access to additional responsive records that had not been located in previous searches. For the information that was withheld, the university claims the application of section 49(a), read in conjunction with sections 19(a) and (c) of the *Act*. The university also identifies some of the information as not responsive to the request. The university enclosed an index of records detailing records 89 to 95 (index #3). The appellant confirmed that he seeks access to the records for which exemptions were claimed but he does not seek access to the information that was identified as non-responsive.

[12] As the appellant was not satisfied with the university's search for responsive records, the university conducted a further search and issued a third supplementary decision letter advising that no additional responsive records exist. The university stated that although two additional records had been located (described in index #4), they are not responsive to the request. The appellant continues to take issue with the reasonableness of the university's search and the responsiveness of the newly located records.

[13] During mediation, the appellant also noted that the university had not responded to his request for access to the names and contact information of students in several identified classes in which he was enrolled. The university took the position that because the appellant requested this information in the cover letter to the request and did not set it out in the standardized request form, the information does not fall within the scope of the request. As a result, whether the names and contact information of students enrolled in some of the appellant's classes falls within the scope of the request was added as an issue on appeal.

[14] As a mediated resolution could not be reached, the file was transferred to the adjudication stage of the appeal process. I began my inquiry in this appeal by sending a Notice of Inquiry setting out the facts and issues on appeal, to the university, initially. The university provided representations in response.

[15] In its representations, the university states that certain records at issue in this appeal were disclosed, in their entirety, to the appellant as part of the resolution of a claim before the Human Rights Tribunal of Ontario (HRTO): Records 3, 4, 5, 6, 7, 9, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 43, 45, 48, 49, 61, 65, 66, 70, 78, 85, 87, 96 and 97. As a result, these records are no longer at issue in this appeal. However, as the appellant states that he is not certain as to whether he has received copies of these records and I have no evidence before me to confirm whether they have been disclosed to him, I will order the university to do so to resolve the matter.

[16] Also in its representations, the university advises that as a result of the resolution of the claim before the HRTO, it disclosed the following records, in their entirety, to the appellant: Records 10, 11, 25, 26, 27, 28, 30, 31, 34, 35, 36, 39, 40, 41, 44, 46, 47, 50, 51, 55, 56, 57, 58, 59, 60, 62, 63, 64, 67, 68, 71, 72, 74, 75, 76, 77 and 88. As a result, these records are not longer at issue in this appeal. Although the university has provided me with a letter addressed to the appellant which indicates these records were enclosed and therefore disclosed to him, the appellant states that he never received copies of them. I cannot determine the truth of either assertion, but I will order the university to provide these records to the appellant to resolve the matter.

[17] In its representations, the university addresses and revisits its earlier position that the appellant's request for the names and contact information of students, as set out in his cover letter to the request form, falls outside of the scope of the request. The university notes that previous orders have established that in order to best serve the purposes and spirit of the *Act*, institutions should adopt a liberal interpretation of a request and that generally, ambiguity in the request should be resolved in the requester's favour.[4] It states that as a result of the approach taken in those orders, it no longer disputes that the student names and contact information fall within the scope of the appellant's request but argues that this information is exempt from disclosure under section 21(1) of the *Act*. The issue of whether this information falls within the scope of the request is therefore, now moot because there is no live issue between the parties regarding it. However, as both parties have had the opportunity to make submissions on whether the requested student names and contact information is exempt from disclosure under section 21(1) of the *Act*, I will consider it.

[18] I then sent a Notice of Inquiry to the appellant, together with a copy of the university's representations, seeking representations. The appellant provided representations in response.

[19] In this order, I make the following findings:

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[4] Orders P-134 and P-880.

- there is insufficient evidence before me to conclude that the appellant's rights under sections 2, 7, 11, 12 and 15 of the *Charter* have been infringed upon as a result of the application of the *Act*;
- the university's decision letters and corresponding indices comply with the requirements of the *Act*;
- the withheld portions of record 8 (index #2) are not responsive to the appellant's request;
- the university conducted a reasonable search for records responsive to the appellant's request;
- the discretionary exemption at section 49(a), read in conjunction with the solicitor-client privilege exemption at section 19, applies to the records for which it was claimed;
- section 49(b) applies to the names and contact information of the students enrolled in the identified classes; and
- the university's exercise of discretion not to disclose the requested information under sections 49(a) and (b) was appropriate.

As a result, I uphold the university's decisions and dismiss the appeal.

RECORDS:

The records that remain at issue in this appeal are the following:

Index Number	**Record Number**	**Exemptions Claimed**
2	8	Non-Responsiveness $15
	22, 23, 24, 29, 32, 33, 37, 38, 42, 52, 53, 54, 69, 73, 79, 80, 81, 82, 83, 84, and 86	s. 49(a)/19(a)&(c)
3	89, 90 and 95	s. 49(a)/19(a)&(c)
n/a	Student names and contact information	s. 49(b)/21(1)

PRELIMINARY ISSUE

Have the appellant's rights under sections 2, 7, 11, 12 and 15 of the Charter been infringed upon by the application of the Act?

[20] As set out above in the background to this order, with his representations the appellant filed an NCQ with this office that he also served on the Attorneys General of Canada and Ontario.[5] The appellant contends that his rights under sections 2(a), (b), (c) and (d), 7, 11(a), (d) and (g), 12, and 15 of the *Charter* have been infringed upon. He seeks relief under section 24(1) of the *Charter*.

[21] In his NCQ, the appellant provides a narrative of events which he describes as "the material facts giving rise to the constitutional question." In it, he describes the university's response to a number of incidents that occurred during the period of time that he attended the university. The appellant's NCQ does not specifically set out how he believes that his *Charter* rights have been violated in the context of his access request or by the application of the *Act*. The appellant does not make any additional *Charter* arguments in his representations.

[22] The university submits that the *Charter* does not apply to the appellant's request. It submits that it is "well-settled law that Ontario universities are not 'government' for *Charter* purposes" based on the Supreme Court of Canada's decision in *McKinney v. University of Guelph*.[6] The university also submits that courts have found in other contexts that being subject to privacy legislation is not sufficient to bring a private actor under *Charter* scrutiny.[7]

Analysis and findings

[23] The IPC has the jurisdiction to decide questions of law.[8] Further, the Supreme Court of Canada has held that administrative decision-makers must consider relevant *Charter* values within the scope of their expertise.[9] Therefore, regardless of whether the university is itself subject to the *Charter*, it is within my jurisdiction to determine whether the appellant's *Charter* rights have been infringed upon as a result of the application of the *Act*. For the reasons that follow, I find that the appellant has not

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[5] As noted above, neither of the Attorneys General of Ontario and Canada responded to the NCQ.
[6] *McKinney v University of Guelph*, [1990] 3 SCR 229, 1990 CanLII 60 (SCC) (*McKinney*) where at p. 275 Justice La Forest, writing for the majority, concluded "universities do not form part of the government apparatus, so their actions, as such do not fall within the ambit of the *Charter.*"
[7] *Moghadam, supra, Royal Bank v. Welton*, 2008 CanLII 6648 (ON SC), *Hynes v. Western Regional Health Authority*, 2014 NLTD(G) 137, 2014 CanLII 67125 (NL SCTD).
[8] The Commissioner's powers at sections 50 through 54 of the *Act* clearly include the power to decide questions of law including, for example, the interpretation and application of the exemptions at sections 12-22 and section 49, and the interpretation of exclusions such as section 65(6)(3).
[9] *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395.

established that the *Charter* rights that he identifies in his NCQ have been infringed upon.

[24] As indicated above, the appellant contends that his rights under sections 2(a), (b), (c) and (d), 7, 11(a), (d) and (g), 12, and 15 of the *Charter* have been infringed upon. However, his NCQ, which he states contains the "material facts" in support of his constitutional challenge, does not provide sufficient evidence to establish that any of these *Charter* rights or freedoms might apply or have been infringed upon in the context of his access request.

[25] The evidence provided by the appellant to support his argument that his *Charter* rights have been violated does not relate to his access request or the denial of access to information under the *Act*. Rather, it describes what he perceives as the university's unfair treatment of him in its response to a number of incidents that occurred during the time that he was a student at the institution.

[26] Accordingly, from my consideration of the appellant's NCQ, his representations and the information at issue in the records, I find that I have insufficient evidence before me to conclude that the appellant's *Charter* rights have been infringed upon by the application of the *Act*. As a result, I find that none of the sections of the *Charter* enumerated by the appellant apply to the matter before me.

ISSUES:

A. Do the university's decision letters and corresponding indices comply with the requirements of the *Act*?

B. Is the portion of record 8 that has been withheld by the university responsive to the appellant's request?

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

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

E. Does the discretionary exemption at section 49(a), read in conjunction with the solicitor-client privilege exemption at section 19, apply to the information withheld under those provisions?

F. Does the discretionary personal privacy exemption at section 49(b) apply to the withheld personal information?

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

DISCUSSION:

A. Do the university's decision letters and corresponding indices comply with the requirements of the *Act*?

[27] The appellant contests the adequacy of the university's decision letters and indices of records. He takes the position that they do not meet the requirements of the *Act* as they do not contain sufficient information about the records. For the reasons set out below, I disagree.

[28] The requirements for a decision letter denying access to records are set out in section 29(1)(b) of the *Act:*

> Notice of refusal to give access to a record or part of thereof under section 26 shall set out,
>
> (b) where there is such record,
>
> (i) the specific provision of this *Act* under which access is refused,
>
> (ii) the reason the provision applies to the record,
>
> (iii) the name and position of the person responsible for making the decision, and
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> (iv) that the person who made the request may appeal to the Commissioner for a review of the decision.

[29] Previous orders have considered what should be contained in a decision letter denying access to records.[10] These considerations flow from the provisions of section 29(1)(b). As noted by Adjudicator Anita Fineburg in Order P-537, the "key requirement is that the requester must be put in a position to make a reasonably informed decision on whether to seek a review of the head's decision."[11]

[30] The university takes the position that its multiple decision letters all comply with the requirements of section 29(1)(b). In its representations, it identified each decision letter and explained which portions of the request they relate to. Copies of all of the university's decision letters also form part of the appeal file.

[31] Although the appellant raised the issues of the adequacy of the university's

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[10] See for example Orders 158, P-235, P-324 P-537, P-553, P-717.
[11] See also Orders 158, P-235 and P-324.

decision letters and indices during mediation, in his representations he does not make any specific submissions on this issue.

[32] As noted above, past orders have indicated that the aim of section 29(1)(b) is to ensure that decision letters allow requesters to make a reasonably informed decision on whether to seek a review of the institution's decision. I agree with those decisions. In the circumstances of this appeal, I find that the university's decision letters and indices meet the requirements of section 29(1)(b). The decisions explain generally why the exemptions are applicable to the records while the indices indicate very clearly what the responsive records are and which exemptions have been claimed for them. In my view, the letters and indices contain sufficient information to enable the appellant to make a reasonably informed decision about whether to seek a review of the university's decisions. Accordingly, I find that the university's decision letters and indices are adequate, and have been prepared in accordance with the requirements of the *Act*.

[33] Additionally, previous orders have not required an institution to issue a new or revised decision letter to replace an inadequate one if there would be "no useful purpose" in requiring an institution to do so.[12] In the current appeal, the appellant has asserted his right of appeal, extensive mediation has occurred, and the records and issues on appeal have been clearly identified. The appellant has had the opportunity to make representations on the records and issues. In these circumstances, even if I had found that the university's decision letters and indices had not been prepared in accordance with the *Act*, there would be "no useful purpose" in requiring the university to issue a new decision letter in the circumstances of this appeal. Accordingly, I will not order the university to issue any new decisions.

B: Is the portion of record 8 that has been withheld by the university responsive to the appellant's request?

[34] Record 8 is the only remaining record at issue that contains information that the university identified as not responsive to the request. The university explains that record 8 is an exchange between the university's Records and Information & Privacy Officer, and the individual who was, at the time of the email, the Acting University Secretary, Legal Affairs, and Special Advisor to the President.

[35] The university submits that the severed portion of record 8 relates to a third party notice received by the university on a completely unrelated freedom of information matter. It submits that the email does not address the appellant or his dealings with the university and clearly falls outside of the scope of the appellant's request.

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[12] Order M-913, upheld on judicial review, *Duncanson v. Ontario* (Information and Privacy Commissioner), 1999 CanLII 18726 (ON SCDC). See also Orders PO-2913 and PO-3691.

[36] The appellant does not specifically address the issue of responsiveness in his submissions, but states, generally, that it is now up to this office to ensure the integrity of the university's claims under the *Act*.

[37] To be considered responsive to the request, records must "reasonably relate" to the request.[13] Having reviewed record 8, it is clear that, as submitted by the university, the withheld portion relates to an entirely different freedom of information matter and does not relate to the appellant or his request for information. I find that it has been properly withheld as not responsive to the request.

C: Did the university conduct a reasonable search for records responsive to the request?

[38] During mediation, the appellant claimed that additional records responsive to his request exist.

[39] 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.[14] If the adjudicator is satisfied that the search carried out was reasonable in the circumstances, they will uphold the institution's decision. If the adjudicator is not satisfied, they may order further searches.

[40] 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.[15] To be responsive, a record must be "reasonably related" to the request.[16]

[41] 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.[17] 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.[18]

[42] 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.[19]

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[13] Orders P-880 and PO-2661.
[14] Orders P-85, P-221 and PO-1954-I.
[15] Orders P-624 and PO-2559.
[16] Order PO-2554.
[17] Orders M-909, PO-2469 and PO-2592.
[18] Order MO-2185.
[19] Order MO-2246.

The university's search for responsive records

[43] The university takes the position that it conducted a reasonable search for records responsive to the request. In support of its position, it enclosed with its representations an affidavit of the university's Records and Information & Privacy Officer which outlines the steps that were taken to locate responsive records.

[44] In the affidavit, the Records and Information & Privacy Officer (the affiant) explains that they identified five different categories of responsive records based on the items set out in the appellant's multi-part request. She explains that emails were sent to individuals in 17 different departments of the university, specifying what records were being sought over what time period and, where necessary, an explanatory note was included to assist those individuals in conducting their search. She also explains that the individuals who were requested to conduct searches were asked to complete and return forms detailing their search and to record the time they spent. Copies of the emails and forms were provided to this office.

[45] A detailed chart entitled "Timeline for Searches" was attached to the affidavit. The chart identifies all of the individuals who were requested to conduct a search, by name, title and department; it identifies when they were asked to conduct a search; and, it identifies whether a response was received from the individuals and if so, whether responsive records were located.

[46] The affiant notes that the chart reveals that searches for records responsive to item 4 of the appellant's request occurred slightly later than those for the other items. They explain that this is because clarification was sought from the appellant about the records he sought in item 4 and a search for the records responsive to that item was conducted only following receipt of the appellant's clarification.

[47] The university submits that the affidavit confirms that it has undertaken "a wide-ranging, thorough search for records responsive to each of the items set out in the [r]equest," and that "[i]t has located and produced hundreds of pages to the appellant." The university submits that its search efforts were reasonable and have satisfied the requirements of the *Act*.

The appellant's position

[48] In his representations, the appellant does not specifically argue that additional responsive records exist. However, he submits that because the university's indices do not identify the records using the descriptions he used in his request, he is unable to determine whether or not the documents that the university identified as responsive correspond to those he seeks. He states that, as a result, he is sceptical as to whether they have provided him with all of the documents that he is requesting and would like this office to determine the issue. The appellant says he has identified records about which he is not certain that he has been provided access, describing them in his own terms, the terms he submits he used when making and clarifying his request.

[49] The appellant identifies 20 records or types of records that remain a "matter of concern" to him and to which he seeks access. He states that he needed the HRTO to order the university to produce these records as they were critical to his case, but it did not. He submits that he is uncertain as to whether the university ever did produce these records to him in the course of responding to his access requests. In particular, he identifies the following records as still being withheld by the university and he seeks access to them:[20]

> 1. Incident Report dated 23-3-2012.
>
> 2. Any police report associated with the incident report identified in 1.
>
> 3. Police Incident Report #SU-120242-962.
>
> 4. The attachment to an email dated January 12, 2013 between two named individuals at 4:44pm.
>
> 5. The details that have been redacted from emails sent on July 17, 2014 by in-house counsel for the university.
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> [Under item 5, the appellant listed eight emails from July 17, 2014, that the university redacted, in part.]
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> 9. "Task Force" Notes in which they describe the methods they intend to apply against students such as the appellant "himself."
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> 10. Letters sent to a named individual by two other named individuals that amount to a "report" about the appellant and the allegations made against him, if any exist, in addition to a letter dated January 23, 2013.
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> 11. The attachment entitled, "Rep. Fwed: URGENT Securite; URGENT Securite" that was attached to a letter between two identified individuals, dated January 22, 2013.
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> 14(o). Attachment from named individual's June 22, 2014 email to named individual at 10:27p.m.[21]
>
> 17. Pages 2 and 3 of the 3-page email from named individual to other named individual sent on June 22, 2014 at 10:27p.m. and its attachment

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[20] Note the appellant has given his own numbering to these records. I have reproduced it here.
[21] Note the appellant had previously referenced a number emails under item 14. In his representations he specifically identifies that of those listed records, the record described in item 14(o) is a record that is "still being withheld" by the university.

> and any emails sent in response to this email, namely any response sent by the recipient of the identified email.

[50] The appellant submits that although the university claims to have given some of these records to him, many were copies of records he already had, so he is uncertain as to which records were provided to him by the university and which ones he may have obtained by other means.

Analysis and finding

[51] Having considered the evidence before me, I am satisfied that the university has conducted a reasonable search for records responsive to the appellant's request. Specifically, I am satisfied that the university's representations demonstrate that experienced employees, knowledgeable in records related to the subject matter of the request, made a reasonable efforts to locate all responsive records. Also, I am not persuaded that the appellant has advanced a reasonable basis for his belief that additional responsive records exist.

[52] Based on my review of the university's representations, as well as the affidavit sworn by the Records and Information & Privacy Officer and the attachments to that affidavit, I find that the university conducted a well-organized, detailed and thorough search for records responsive to all parts of the appellant's request. The chart that was attached to the affidavit demonstrates that the individuals who participated in the search are experienced employees knowledgeable in the subject matter of the parts of the request for which they were required to search. Based on my review of the chart and the other attachments to the affidavit, I am satisfied that these individuals made a reasonable effort to locate records responsive to the appellant's request.

[53] I acknowledge that in his representations, the appellant provided a list of records that he believes should have been provided to him in response to his request. However, he acknowledges uncertainty as to whether he has been provided with copies of these records. From my review of the records, it is clear that the records in the list provided by the appellant have either been provided to him by the university, in full or in part, or are records which the university has already identified as not responsive or as not having been located during their search.

[54] I note that the appellant's list of records in his representations corresponds closely to a list of records that he identified during the mediation process as being records that he wanted the university to provide to him. During mediation, the university provided him with a letter on February 23, 2015: "Re: Final Access Decision and Response to Questions Submitted through the IPC Mediator." As an appendix to that letter, the university included a table of its responses setting out whether the identified records had already been provided to him and if not, why they had not been. This table addresses most of the records identified by the appellant in his representations, including those set out above, and provides the university's response. For some of the records, the university indicates that it has already provided them to

him, while for other records, it indicates that it does not have a responsive record that meets his description. For the remaining records (including some email attachments the appellant identifies in item 14 of his representations), the university specifies that it had previously identified the information in those records as not responsive to the request. From my review of this table, together with the responsive records and the indices provided during the course of this appeal, I accept the university's responses as reasonable.

[55] Additionally, from my review of the records I can confirm that the eight emails identified under item 5 in the appellant's representations (most of which are not included in the table) are all records to which the appellant was granted partial access and which remain at issue in this appeal. For these records, in his representations he requests that he be provided with "the details that have been severed and redacted" from these emails. However, as the university has severed this information under section 49(a), read in conjunction with section 19, the appellant's access to it is contingent on whether I find that the exemption applies. Even though the university has not provided him access to these emails in their entirety, it has clearly already identified them as responsive to the appellant's request. As they were clearly located during the university's search, I do not accept them as evidence that the university's search was not reasonable.

[56] 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.[22] In the circumstances of this appeal, I find that the appellant has not established a reasonable basis for his assertion that additional records responsive to the request exist or that the university's search for responsive records was not reasonable.

[57] Moreover, as noted above, the *Act* does not require the institution to prove with absolute certainty that further records do not exist. The institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[23] Given my conclusion that the university expended a reasonable effort to locate records responsive to the appellant's request, and in the absence of a reasonable basis to conclude that additional responsive records exist, I find that the university conducted a reasonable search for records, as required by section 24 of the *Act*.

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[22] Order MO-2246.
[23] Orders P-624 and PO-2559.

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

[58] Under the *Act*, different exemptions may apply depending on whether a record contains or does not contain the personal information of the requester. Where the records contain the requester's own personal information, access to the records is considered under Part III of the *Act* and the discretionary exemptions at section 49 may apply. Where the records contain the personal information of individuals other than the requester but do not contain the personal information of the requester, access to the records is considered under Part II of the *Act* and the mandatory exemption at section 21(1) may apply.

[59] Therefore, in order to determine which exemptions may apply, including if any of the personal privacy exemptions apply, it is first necessary to decide whether each record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) of the *Act*, 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,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of other individuals about the individual, and

> (h) the individual's name where 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.

[60] 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.[24]

[61] 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.[25]Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[26]

[62] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[27]

The university's representations

[63] The university's representations on the types of personal information in the records focus only on the records responsive to the portion of the appellant's request that seeks the names and contact information of individuals in a number of specified classes.

[64] The university submits that the names and contact information of the students enrolled in the identified classes is the personal information of individuals other than the appellant. It submits that to disclose the information to the appellant would not only identify students by name but would also disclose the following information:

- that the individuals were students at Laurentian;
- that the individuals were enrolled in a particular class in a particular school year; and
- the individuals' contact information.

[65] The university submits that since the information is about the individuals as students, it clearly relates to those individuals in their personal capacity; and, since

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[24] Order 11.
[25] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[26] Orders P-1409, R-980015, PO-2225 and MO-2344.
[27] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

there is no question that they can be identified by it, it is personal information. The university submits that this is precisely why the appellant seeks it as, by his own admission, he wished to contact some of these individuals as potential witnesses in the claim he had against the university that was before the HRTO.

[66] The university submits that for the reasons explained in its representations, the names and contact information of the students in the classes identified by the appellant fall squarely within the definition of "personal information" set out in the *Act*. The university submits that it is "recorded information about an identifiable individual," that would reveal the types of information described in paragraphs (b), (d), and (h) of the definition in section 2(1).

The appellant's representations

[67] In his representations, the appellant does not specifically address whether the responsive records contain personal information as that term is defined in section 2(1) of the *Act*. However, he repeatedly states that he seeks access to all records that "name and discuss him."

[68] Additionally, addressing the portion of his request that pertains to the names and contact information of other students, he acknowledges that this information is "protected" under the *Act* and that it is not normally disclosed except under "exceptional circumstances."

Analysis and finding

[69] It is clear from the appellant's request that the records to which he seeks access relate to interactions between himself and the university. From my review, I find that all of the responsive records contain the personal information of the appellant, including information relating to his education (paragraph (b)) and his name where it appears with other personal information about him (paragraph (h)). Some of the records also contain other types of personal information about the appellant that falls within paragraphs (b), (c), (d), (e) and (g) of the definition of "personal information."

[70] Some of the records also contain the personal information of other identifiable individuals. In particular, I find that there is personal information of other individuals in the records that are responsive to the portion of the appellant's request seeking access to the names and contact information of students enrolled in some of the classes that he attended. These records contain the names of the students, together with other personal information about them, such as their contact information (paragraph (d)), and disclosure would reveal other personal information about them (paragraph (h)), including information relating to their education (paragraph (b)). As the appellant was also a student in the classes he has identified, these records also contain the same types of his own personal information.

[71] As all of the records contain the personal information of the appellant and some

of them also contain the personal information of other identifiable individuals, the relevant exemptions that I must consider are those set out in Part III the *Act*. In the circumstances, I will be considering whether the exemptions found in section 49(a), read in conjunction with the solicitor-client privilege exemption at section 19, and/or section 49(b) apply to the information for which they have been claimed.

E: Does the discretionary exemption at section 49(a), read in conjunction with the solicitor-client privilege exemption at section 19, apply to the information withheld under those provisions?

[72] The university submits that 24 records are exempt from disclosure under section 49(a), read in conjunction with the solicitor-client privilege exemption at section 19(a) and (c). They are records 22, 23, 24, 29, 32, 33, 37, 38, 42, 52, 53, 54, 69, 73, 79, 80, 81, 82, 83, 84, 86, 89, 90 and 95.

[73] Section 47(1) gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

[74] Section 49(a) states:

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

[75] Section 49(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.[28]

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

[77] As noted, the university relies on section 49(a), in conjunction with sections 19(a) and (c), which state:

> A head may refuse to disclose a record,
>
> > (a) that is subject to solicitor-client privilege;

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[28] Order M-352.

> …
>
> (c) that was prepared by or for counsel employed or retained by an educational institution or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

[78] Section 19 contains two branches. Branch 1 ("subject to solicitor-client privilege") set out in paragraph (a) is based on the common law. Branch 2 ("prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital") set out in paragraphs (b) and (c) is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

[79] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege. In the circumstances of this appeal, it is only necessary for me to address solicitor-client communication privilege.

Common law solicitor-client communication privilege

[80] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[29] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[30] The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.[31]

[81] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.[32] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[33]

Branch 2: statutory privileges

[82] Branch 2 is a statutory privilege that applies where the records were prepared by or for Crown counsel or counsel employed or retained by an educational institution or

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[29] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[30] Orders PO-2441, MO-1925 and MO-2166.
[31] *Balabel v. Air India,* [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[32] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[33] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).

hospital "for use in giving legal advice or in contemplation of or for use in litigation." The statutory exemption and common law privileges, although not identical, exist for similar reasons. Again, in the circumstances, it is only necessary for me to consider statutory solicitor-client communication privilege and not statutory litigation privilege.

Statutory solicitor-client communication privilege

[83] Like solicitor-client communication privilege at common law, statutory solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.

Loss of privilege

Waiver

[84] Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege:

- knows of the existence of the privilege, and
- voluntarily demonstrates an intention to waive the privilege.[34]

[85] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.[35]

[86] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[36] However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.[37]

[87] As with common law privilege, discussed above, statutory privilege in section 19 can be lost through waiver.[38]

Representations, analysis and findings

[88] The appellant did not make submissions that specifically address whether any of

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[34] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).
[35] *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.
[36] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).
[37] *General Accident Assurance Co. v. Chrusz*, cited above; Orders MO-1678 and PO-3167.
[38] See discussion above under Branch 1, "Loss of Privilege." Also, see Order PO-3627 and *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.).

the records remaining at issue might be subject to solicitor-client privilege and exempt on that basis.

[89] The university grouped the records withheld under section 49(a), in conjunction with section 19(a) and (c), according to shared characteristics it says support the privilege: (1) communications with outside counsel, (2) communications with in-house counsel, and (3) communications between university personnel that contain solicitor-client privileged information.

Communications with outside counsel

Records 32, 33, 37, 38 and 84

[90] First, the university addresses records which it submits are communications with outside counsel. The university submits that records 32, 33, 37 and 38 are email communications between employees of the university and outside counsel and they are records for which all three of the requirements for solicitor-client privilege are met: (1) they are communications between the university and its solicitor; (2) the intention of the communications is to facilitate the giving of legal advice (records 32, 37 and 38) or actually provide legal advice (record 33); and (3) it is clear that the parties intended the communications to be confidential from the reference to the communications as "Privileged & Confidential" and from the fact that the communications are only shared with the specific university employees who are seeking the legal advice.

[91] The university submits that record 84 contains the handwritten notes of an employee of the university regarding a telephone call with the university's outside counsel in which the employee sought legal advice on a number of matters related to the appellant's "Code of Conduct Appeal." The university submits that because the notes disclose both the legal advice sought and the legal advice provided, they were created in the context of a communication between a solicitor and her client in which legal advice was sought and given. It further submits that the communication is confidential, and there is no evidence to suggest otherwise.

[92] The university submits that records 32, 33, 37, 38 and 84 would also fit within the second branch of privilege, as set out in section 19(c) of the *Act*. It explains that each of those records was prepared either for or by outside counsel retained by the university, an "educational institution" under the *Act*, for the purposes of giving legal advice as well as in contemplation of the litigation between itself and the appellant that was then ongoing.

[93] I find that records 32, 33, 37, 38 and 84 are communications to which the common law solicitor-client communication privilege at section 19(a) applies, as well as the statutory solicitor-client communication privilege at section 19(c). These records contain communications of a confidential nature between a solicitor and client, made for the purpose of obtaining or giving legal advice. Having reviewed these records, I find they reveal confidential communications between the university's outside counsel and

university employees, created for the purpose of giving legal advice, and that they were either explicitly (in the case of records 32, 33, 37, 38) or implicitly (in the case of record 84) intended to be communicated in confidence. There is no evidence before me to suggest that the university waived its privilege with respect to these records.

[94] As I have found that these records are subject to both common law and statutory solicitor-client communication privilege, it is not necessary for me to consider whether these records also fall under either of the common law or the statutory litigation privilege components of the exemption.

Record 95

[95] The university describes record 95 as an email, with an attachment, that was circulated by the Office of the President of the University to senior members of university management. The attachment is a legal opinion sought by the Council of Ontario Universities (COU) from its outside counsel (which is the same law firm as the university's outside counsel), and then forwarded to its member universities, including Laurentian. The university submits that both the email, which discusses the legal advice given in the opinion, and the attachment, the legal opinion itself, reveal legal advice provided by their outside law firm. It further submits that although the legal opinion was prepared for the COU, it was intended to be shared with each of COU's member universities, and therefore maintained its privileged status notwithstanding this wider disclosure to the member organizations. Therefore, the university submits that record 95 is a communication protected by solicitor-client communication privilege as it would reveal advice from counsel.

[96] In Order MO-3253-I, Senior Adjudicator Gillian Shaw found that a record that consisted of a legal opinion prepared for the Ontario Public School Boards' Association (the OPSBA) and forwarded to its member school boards with an email summarizing it was solicitor-client privileged communication between the OPSBA's counsel and the OPSBA. She found, based on the common interest exception to waiver of privilege, that privilege in the legal opinion was not waived by OPSBA forwarding it to its member school boards.

[97] In my view, the email and attachment that make up record 95 are analogous to the records that were before Senior Adjudicator Shaw in Order MO-3253-I. For the following reasons, therefore, I accept that record 95 is subject to solicitor-client privilege under section 19(a) of the *Act*, and that the privilege has not been waived by the COU.

[98] In Order PO-3154, Adjudicator Steven Faughnan reviewed the case law relating

to the common interest exception to waiver of solicitor-client privilege[39] and articulated the following test to determine the existence of a common interest:

> …[T]he determination of the existence of a common interest to resist waiver of a solicitor-client privilege under Branch 1, including the sharing of a legal opinion, requires the following conditions:
>
> > (a) the information at issue must be inherently privileged in that it must have arisen in such a way that it meets the definition of solicitor-client privilege under Branch 1 of section 19(a) of the *Act*, and
> >
> > (b) the parties who share that information must have a "common interest", but not necessarily [an] identical interest.

[99] The determination of the existence of a common interest is highly fact-dependent.[40]

[100] In Order MO-3253-I, Senior Adjudicator Shaw applied to the two-step approach articulated by Adjudicator Faughnan in Order PO-3154. She found the legal opinion in her case (an opinion provided to the OPSBA by its counsel) to be subject to solicitor-client communication privilege under Branch 1 thereby meeting part 1 of the test. She then determined that given the role of the OPSBA, it shares a common interest with its member school boards in having a common understanding of the state of the law on the particular matter discussed in the legal opinion. She stated:

> The only reason that the opinion was shared with the member school boards was because of their common interest with the OPSBA in the subject matter of the legal opinion. The opinion expressly contemplates that it might be shared with the school boards to further their understanding of the subject matter explored in the opinion. To borrow the language of *Pitney Bowes*, the opinion was for the benefit of multiple parties, even though it was prepared for a single client.

[101] I agree with the two-part test articulated by Adjudicator Faughnan in Order PO-3154 and also with Senior Adjudicator Shaw's application of it in Order MO-3253-I. In applying the reasoning expressed in both of those orders to the record before me, I find, first, that the legal opinion of COU's counsel is subject to solicitor-client

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[39] In Order PO-3154, Adjudicator Faughnan considered *Pritchard v. Ontario (Human Rights Commission)* [2004] 1 SCR 809. 2004 SCC 31; *Canadian Pacific Ltd. v. CNADA (Competition Act, Director of Investigation and Research)*, [1995] O.J> No. 4148 (Gen. Div.); *Pitney Bowes of Canada Ltd. v. Canada,* [2003] F.C.J. No. 311 (T.D.); and Order MO-1678.

[40] *Pitney Bowes of Canada Ltd. v. Canada, ibid*.

communication privilege under section 19(a) because it is a confidential communication between the COU and its counsel for the purpose of providing legal advice.

[102] Second, I find that the privilege was not waived when the COU shared the opinion with its member universities, including Laurentian. I find that the COU, who was the original recipient of the legal opinion, shares a common interest which its member universities, in having a common understanding of the state of the law on the particular issue discussed in the legal opinion. It is clear that the legal advice was shared because of their common interest in the subject matter of the opinion. While the legal advice may have been solicited by the COU it was clearly for the benefit of all of its member universities. As a result, I find that part 2 of the test articulated in Order PO-3154 has been met with respect to the legal opinion and that privilege in the opinion was not waived when the COU forwarded it to Laurentian, one of its member universities, as a result of the common interest in the subject matter that existed between them.

[103] Further, since the covering email describes the legal advice in the attached legal opinion provided to the COU by outside legal counsel, it too is subject to solicitor-client communication privilege under Branch 1, thereby meeting part 1 of the test articulated in Order PO-3154.

Communications with in-house counsel

[104] In support of its position that records that are communications with its in-house counsel are exempt under section 49(a), read with section 19(a) or (c), the university relies on *Pritchard v. Ontario (Human Rights Commission)*,[41] where the Supreme Court of Canada established that solicitor-client privilege applies to legal opinions provided by in-house counsel acting in their legal role within the organization.

Records 82, 83 and 89

[105] The university submits that records 82, 83 and 89 are legal opinions provided by the university's in-house counsel to various senior members of the university, including the Vice-President, Academic and Provost and the Associate Vice-President, Student Affairs. It submits that records 82, 83, and 89 meet all three of the requirements for solicitor-client privilege because: (1) they are communications between the university and its in-house counsel; (2) the communications provide legal advice from in-house counsel to senior members of the university: and (3) an examination of the emails makes it clear that the parties intended that the communications be kept confidential and, further, that they are clearly marked "Privileged & Confidential."

[106] The university further submits that records 82, 83 and 89 would also fall within

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[41] *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 SCR 809, 2004 SCC 31 (CanLII).

the second branch of privilege as set out in section 19(c) of the *Act*, because each of them was prepared by counsel employed by the university, an "educational institution" under the *Act*, for the purposes of giving legal advice.

[107] I find that, as legal opinions, records 82, 83 and 89 are communications to which the common law solicitor-client communication privilege at section 19(a) applies, as well as the statutory solicitor-client communication privilege at section 19(c). These records contain communications of a confidential nature from the university's in-house counsel to employees of the university that were clearly created for the purpose of giving legal advice. Having reviewed these records, in light of their content, I accept that they were intended to be communicated in confidence and were kept in confidence. There is no evidence that the university waived its privilege with respect to any of these records.

Record 42

[108] As for record 42, the university submits that it is an email in which the university's in-house counsel requests that a university employee provide her with a document so that she may consider it for the purposes of providing him with legal advice. The university explains the origin of the document that she requests in that email and submits that the email makes it clear that she requires the document to assist her in providing the university with legal advice in her role as legal counsel. As a result, it submits that record 42 meets the criteria for common law solicitor-client communication privilege under branch 1, section 19(a) of the *Act*.

[109] The university submits that record 42 would also fall within statutory solicitor-client communication privilege set out in section 19(c) of the *Act* because it was prepared by counsel employed by the university, "an educational institution" under the *Act*, for the purposes of giving legal advice.

[110] I find that record 42 falls within the solicitor-client communication privilege at common law under section 19(a), and also the statutory solicitor-client communication privilege under section 19(c). It is a communication from the university's in-house counsel to a university employee requesting information required in order for her to give legal advice. This information can be described as information that is being passed between solicitor and client aimed at keeping both informed so that advice can be sought and given. Given the nature of the information, I accept that this communication was intended to be kept in confidence. Also, there is no evidence that privilege was waived for this information.

Communications between university personnel

[111] The university explains that shortly before the appellant filed the access request that is at issue in this appeal, he filed a human rights claim again the university, naming specific employees as respondents.

Records 80, 81 and 90

[112] The university explains that records 80, 81 and 90 are communications from two of the employees that were named in the appellant's human rights claim to administrative staff discussing the university's defence of these claims. In particular, the university points to record 90 which describes the nature and substance of the legal advice provided to them by in-house counsel.

[113] The university submits that records 80, 81 and 90 are protected by Branch 1 of solicitor-client communication privilege as they form part of a continuum of communications in which employees of the university are seeking the university's assistance; specifically, they are seeking legal advice from the university's in-house counsel in defending themselves against the appellant's HRTO claim in which they were named as co-respondents with the university.

[114] The university submits that records 80, 81 and 90 are also protected by Branch 2 of the privilege as they were prepared by individuals employed by the university for the purposes of seeking legal advice from the university's in-house counsel. It also submits that the records were clearly created in contemplation of litigation, because the claim had already been commenced against the employees at the time.

[115] From my review of records 80, 81, and 90, based on their contents, I find that their disclosure would reveal legal advice that was sought from university in-house counsel by those employees in the context of the HRTO claim against them. As such, I accept that records 80, 81 and 90 fall within solicitor-client communication privilege under both the common law and statutory branches in sections 19(a) and (c) of the *Act*.

[116] I reach this finding based on reasoning similar to that applied by Adjudicator Laurel Cropley in Order PO-2087-I, where she found that if disclosure of records prepared by non-legal staff of an institution would reveal legal advice that was provided to the institution, the records are properly exempt as a result of solicitor-client communication privilege.

Record 86

[117] Record 86, according to the university, is an email communication between the then-Associate Vice-President, Student Affairs, and the Dean, Faculty of Professional Schools. The email reveals legal advice that was provided by university legal counsel in records 82 and 89, discussed above. The university submits that because record 86 reveals substantive legal advice provided by the university's in-house counsel and, further, was communicated as part of the implementation of that advice, it is protected by solicitor-client privilege in the same manner as the original advice.

[118] For the same reasons given respecting records 80, 81 and 90, applying the reasoning set out in Order PO-2087-I mentioned above, I accept that although record

86 is a communication between two university employees and does not include legal counsel, its disclosure would reveal legal advice that was given by university in-house counsel to employees of the university. As a result, I find that record 86 is subject to solicitor-client communication privilege under both sections 19(a) and (c). Further, there is no evidence that this privilege has been waived.

Records 22, 23, 24, 29 and 69

[119] The university explains that records 22, 23, 24, 29 and 69 are a series of email communications between the then-Associate Vice-President, Student Affairs, and two university employees. It submits that the discussion in these emails relates to the implementation of legal advice previously sought and received from outside counsel, as reflected in records 33 and 84, discussed above. The university submits that as these records between university employees reveal substantive legal advice received by outside legal counsel, they are subject to solicitor-client communication privilege.

[120] From my review, I accept that disclosure of records 22, 23, 24, 29 and 69 would reveal legal advice sought and provided by outside legal counsel. As a result, applying the reasoning in Order PO-2087-I and for the reasons I have set out above with respect to other communications circulated by specific university employees, I find that records 22, 23, 24, 29 and 69 are subject to solicitor-client communication privilege under both sections 19(a) and (c). There is no evidence that privilege has been waived with respect to these records.

Records 52 and 79

[121] Records 52 and 79 are described by the university as communications between the then-Associate Vice-President, Student Affairs, and a university employee. The university submits that both records relate to communications between the university and the appellant in the context of his Code of Conduct appearance and address questions of the appropriate procedure for that appeal. The university submits that these records reflect and reveal substantive legal advice sought earlier by the university employee, on behalf of the university, from outside counsel retained by the university. As a result, the university submits that records 52 and 79 are subject to the same solicitor-client communication privilege as applies to the records that document the original advice.

[122] From my review of records 52 and 79, I accept that they contain and would reveal legal advice provided to the university by its in- house legal counsel. As a result, I accept that records 52 and 79 are subject to solicitor-client communication privilege under both section 19(a) and (c). I have no evidence before me to suggest that the university has waived its privilege with respect to this information.

Records 53, 54 and 73

[123] Finally, the university submits that records 53, 54 and 73 are email

communications between two university employees. It submits that the communications relate to discussions about matters regarding which the university employee had previously sought legal advice from outside legal counsel. The university submits that as with the previous records these records reflect and reveal substantive legal advice sought on behalf of the university and the implementation of that advice and are therefore subject to the same solicitor-client communication privilege that attached to the original advice.

[124] From my review, it is clear that disclosure of records 53, 54 and 73 would reveal legal advice sought from and provided by outside legal counsel. As a result, applying the reasoning set out in Order PO-2087-I and the reasoning I have set out above with respect to other communications circulated between specific university employees, I find that records 53, 54 and 73 are subject to solicitor-client communication privilege under both sections 19(a) and (c). There is no evidence that privilege has been waived with respect to records 52, 54 and 73.

Summary of findings on section 49(a), read in conjunction with section 19

[125] Based on my review of the records for which the university has claimed section 49(a), read in conjunction with section 19, I accept the university's claim that all of them are subject to solicitor-client communications privilege. They are either direct communications of a confidential nature between counsel retained by the university (both in-house and outside counsel) and university employees that were prepared for the purpose of giving or receiving legal advice, or are communications that would, if disclosed, reveal legal advice sought by or provided to the university by counsel in those confidential communications. I also find that there is no evidence to suggest that the university has either explicitly or implicitly waived its privilege with respect to any of these records. Therefore, subject to my review of the university's exercise of discretion, which I will discuss below, I find that section 49(a), read in conjunction with sections 19(a) and (c), applies to all of the records for which it has been claimed.

F: Does the discretionary personal privacy exemption at section 49(b) apply?

[126] The university claims that the mandatory personal privacy exemption at section 21(1) applies to records responsive to the part of the appellant's request for the names and contact information of students in certain identified classes in which he was also enrolled. The university's position is that the language of this portion of the appellant's request clearly indicates he is not seeking access to his own information and that section 21(1) is the appropriate exemption under which to consider this information. The university argues that, regardless of whether I find the mandatory or discretionary personal privacy exemption applicable, disclosure of the information would be an unjustified invasion of another individual's personal privacy and it should not be

disclosed.

[127] In determining whether a requester's personal information is contained in responsive records, this office applies a record-by-record approach.[42] If a record contains the requester's personal information, section 47(1) applies and the potentially applicable exemptions from the right of access in section 47(1) are those found in Part III of the *Act*, and not Part II. This is true even if the portions of the record that remain at issue do not themselves contain the requester's personal information.

[128] This record-by-record approach determines under which part of the *Act* the information will be reviewed. When a record contains the personal information of both the requester and another individual, Part III of the *Act* applies and the relevant exemption to consider is the discretionary personal privacy exemption in section 49(b), not the mandatory exemption at section 21(1) in Part II of the *Act*.

[129] The requester was also a student in the classes for which he seeks the names and contact information of the students. From my review of the records responsive to that portion of his request, I found above that they contain the appellant's own personal information together with that of other identifiable individuals. Applying the record-by-record approach, Part III of the *Act* applies and the relevant exemption for me to consider is section 49(b).

[130] Section 49(b) states:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where the disclosure would constitute an unjustified invasion of another individual's personal privacy.

[131] When determining whether section 49(b) applies, section 21 of the *Act* provides guidance in determining whether the unjustified invasion of personal privacy threshold is met. To make this determination, this office will consider, and weigh, the factors and presumptions in sections 21(2) and 21(3) and balance the interests of the parties.[43] 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 under section 49(b). 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. The list of factors under section 21(2) is not exhaustive. The institution must also consider

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[42] See Order M-352.
[43] Order MO-2954.

any circumstances that are relevant, even if they are not listed under section 21(2).[44]

[132] If the information fits within any of the paragraphs of sections 21(1) or 21(4), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b). In the circumstances, none of the paragraphs in sections 21(1) or (4) are applicable.

The university's representation

[133] The university submits that the names and contact information of the students in the appellant's classes constitute those students' "educational history" and therefore, that disclosure is presumed to be an unjustified invasion of personal privacy under section 21(3)(d) of the *Act*.

[134] Specifically, the university submits that disclosure of the information would reveal that they were students at Laurentian in a particular school year, that they were enrolled in a particular class or classes, and their contact information. The university submits that previous orders of this office, including Order P-282, have found that the presumption against disclosure at section 21(3)(d) applies to an individual's academic background and that the student names and contact information should be considered to fall under this presumption.

[135] The university submits that a number of the factors set out in section 21(2) weigh against the disclosure of the information in the circumstances of this case. Specifically, it submits that section 21(2)(f) (highly sensitive) and section 21(2)(h) (provided in confidence) are relevant. It submits that the students' names coupled with their contact information is highly sensitive and that they should be able to expect that it would not be disclosed to strangers without their consent. It also submits that students provide their contact information to the university in confidence, to be used only for the purposes of facilitating contact between the university and the students.

[136] In support of its position, the university relies on Order P-307, in which Assistant Commissioner Tom Mitchinson found that disclosing the names and contact information of individuals who were enrolled in an apprenticeship program would constitute an unjustified invasion of personal privacy based on a weighing of the section 21(2) factors.

[137] With respect to the possible application of the factors weighing in favour of disclosure, the university submits that section 21(2)(d), which considers disclosure in the interests of ensuring a fair determination of the appellant's rights, might initially have been considered relevant. The university maintains, however, that the

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[44] Order P-99.

circumstances establish that the factor is not applicable, because although the appellant initially stated that he sought the student names and contact information for the purpose of his HRTO hearing, that claim was settled on July 8, 2015 so the underlying reason for the appellant to obtain access to this information is gone.[45] The university states that the appellant sought access to the same information in the course of the HRTO hearing, but that the HRTO found that the information was of limited probative value that did not outweigh "the prejudice to the students' privacy that would result from a forced disclosure of their contact information." Therefore, the university submits that the HRTO already determined that the disclosure was not necessary for a fair determination of the appellant's rights under the *Human Rights Code*.

[138] The university submits that considering the matter under the discretionary personal privacy exemption at section 49(b), based on the presumption at section 21(3)(d) and the considerations at sections 21(2)(f) and (h), it reached the conclusion that the disclosure of the student names and contact information would constitute an unjustified invasion of their personal privacy.

[139] The university acknowledges that in applying the discretionary exemption at section 49(b), it must consider the wider context and circumstances of the request. It submits that the wider context does not change the balance of interests in this case but further supports the protection of the privacy of the other students. This is because the HRTO claim, which is the appellant's stated purpose for obtaining the information, is resolved and the HRTO has already considered and determined that the appellant's interests in relation to that claim did not outweigh the privacy rights of the other students. The university submits that there is no additional information that would suggest that a different result should be reached in this appeal.

[140] Therefore, the university submits that the exemption applies because disclosure of the student names and contact information to the appellant would be an unjustified invasion of another individual's personal privacy.

The appellant's representations

[141] In his representations, the appellant submits that he is aware that the portion of his request that pertains to the names and contact information of other students "may be of contention and may not be ordered by the IPC." He states that he understands this information is to be protected under the *Act* and is not to be disclosed except under "exceptional circumstances" but he submits that the circumstances he finds himself in affect him in "profound ways." He states that he understands that the IPC may not wish to order the university to share this information but notes:

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[45] The university enclosed with its representations a copy of a letter sent to it by the appellant advising that he required the documents for his human rights claim against the university before the HRTO.

> [T]hese students are "witnesses to events that pertain to a current criminal investigation, they are witnesses to events that pertain to crimes that have been committed against [me] … and their contact information is needed in order to contact them for statement[s] in regards to a current criminal investigation."

[142] He further states that he understands that the IPC must protect the students' information and he does not want to gain access to that which is prohibited.

[143] With respect to the criminal matters to which he refers, he states that he has "three, possibly four litigation matters to attend to" and he does "not have the time to continue to go through such matters with the IPC in detail" but that it is "now up to the IPC to make sure that the rights set out under the *Act* are upheld."

Analysis and findings on the application of section 49(b)

[144] As indicated above, in determining whether disclosure would be an unjustified invasion of privacy under section 49(b), this office must consider and weigh the presumptions at section 21(3) and the factors at section 21(2) to balance the interests of the parties. Considering the nature of the personal information at issue and the circumstances of this case in light of the relevant presumptions and factors, for the following reasons I accept that the discretionary exemption at section 49(b) applies to the student names and contact information sought by the appellant.

[145] The university submits that the presumption against disclosure at section 21(3)(d) applies to the records responsive to the portion of the appellant's request where he seeks access names and contact information for the students enrolled in some of his classes. It submits that these records would reveal the educational history of the individuals to whom the information relates.

[146] Section 21(3)(d) states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> (d) relates to employment or educational history[.]

[147] This office has previously considered the meaning of "employment or educational history" set out in the presumption at section 21(3)(d) or, its municipal equivalent in section 14(3)(d) of the *Municipal Freedom of Information and Protection of Privacy Act*. It has been determined that to qualify as an individual's employment or educational history, the information must contain some significant part of the history of person's employment or education. What is or is not significant must be determined based on

the facts of each case.[46]

[148] More specifically, numerous past orders have considered records that contain information about students.[47] Many of these consider records that include more information which is contained in the records before me including academic performance and academic disciplinary matters. For example, In Order PO-3874, Adjudicator Hamish Flanagan considered a large number of records for which section 21(3)(d) had been claimed, many of which related to an academic disciplinary process involving the appellant. Adjudicator Flanagan found that the presumption at section 21(3)(d) applied only to "the undisclosed information in the records where it is about the core of the educational discipline matter or *reveals something about an affected party's educational history more than the mere fact that they were enrolled at the university*." [Emphasis added].

[149] Most recently, in Order MO-3900, Adjudicator Jessica Kowalski considered a "daily enrolment register" or class list for a third grade class in an elementary school. She considered and found that the presumption at section 14(3)(d), the municipal equivalent of section 21(3)(d), did not apply to the record. She determined that as the record contained only the students' names and generic attendance information not associated with any particular student the record disclosed nothing about the educational history of the individual students, other than that they attended a specified school during a brief point in time.[48]

[150] The records before me are class lists for specific university classes which reveals that each of the individuals on those lists attended the university at a particular point in time and also identifies one course (or for some individuals, more than one course) in which they were enrolled in at the time.

[151] I agree with the reasoning taken in the previous orders set out above that simply revealing that an individual attended a particular educational institution at a particular point in time is not sufficiently detailed to be considered educational "history" for the purpose of the presumption at section 21(3)(d). While I acknowledge that the information before me also identifies at least one academic course taken by the individuals identified in the records, in the absence of additional evidence to the contrary, I am not convinced that revealing one or two courses taken by an individual during their time at a university provides enough detail to be described as their

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[46] Orders MO-609 and MO-1343.
[47] See, for example, Orders PO-2711, PO-3819, PO-3874 and MO-2467.
[48] Note that despite her finding that the presumption at section 14(3)(d) did not apply, Adjudicator Kowalski went on to consider the factors weighing for and against disclosure and determined that as no considerations favouring disclosure outweighed considerations favouring privacy protection, the record was exempt from disclosure under the mandatory privacy exemption at section 14(1) (the municipal equivalent on section 21(1)).

educational history. However, the evidence before me does not provide me with sufficient information to make a conclusive determination on the matter and as a result of my findings below on the application of the relevant factors in section 21(2), it is not necessary for me to do so. As a result, I decline to make a finding with respect to the possible application of section 21(3)(d) in this case.

[152] Considering now the factors weighing for and against disclosure set out in section 21(2), in the particular circumstances of this appeal I find that the factors weighing against disclosure at sections 21(2)(f) and (h) are relevant considerations that carry some weight, but that no factors weighing in favour of the disclosure of the information are relevant in the circumstances.

[153] Sections 21(2)(f) and (h) state:

> 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,
>
> (f) the personal information is highly sensitive;
>
> ...
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence[.]

[154] For section 21(2)(f) to be considered a relevant factor weighing against disclosure, the personal information must be highly sensitive. To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.[49]

[155] In the particular circumstances of this appeal, I accept that the factor at section 21(2)(f) is relevant and carries some weight. The individuals did not provide their contact information to the university for the purpose of other students or individuals contacting them, nor would they expect that it be disclosed to other individuals, such as the appellant, on request. Accordingly, I am satisfied that it is reasonable to expect that the disclosure of this type of information by the university would result in the significant personal distress of the individuals whose names and contact information has been identified as responsive to the appellant's request.

[156] For similar reasons, I also accept that the factor weighing against disclosure at section 21(2)(h) is relevant and carries some weight in the circumstances of this appeal. It is reasonable to conclude that the university is in possession of the students'

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

names and contact information because those individuals provided it to facilitate communication by the university regarding their education. It can also reasonably be assumed that those individuals expected that it would be kept in confidence and not provided to other individuals on request. Accordingly, I find that the information sought by the appellant was supplied to the university by the individuals to whom it relates in confidence within the meaning of the factor in section 21(2)(h).

[157] Although the appellant's position that he requires the student names and contact information for the purposes of advancing his human rights claim before the HRTO raises the possible application of section 21(2)(d), I find that it does not apply. Section 21(2)(d) states:

> 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,
>
> > the personal information is relevant to a fair determination of rights affecting the person who made the request[.]

[158] In order to establish if the factor at section 21(2)(d) applies, the appellant must show that:

1. the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and

2. the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and

3. the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and

4. the personal information is required in order to prepare or to ensure an impartial hearing.

[159] In order for section 21(2)(d) to apply, all four parts of the test must be established. The university submits that the appellant made it clear that he seeks the names and contact information of the students in some of the classes in which he was enrolled for the purpose of calling witnesses in his human rights claim before the HRTO. However, based on the fact that the HRTO claim has been resolved, part 2 of the test has not been met and section 21(2)(d) cannot apply.

[160] The appellant also submits that he requires the names and contact information of the other students in some of his classes for the purposes of a criminal investigation and also for "the three, or possibly four, litigation matters" in which he states he is involved. Without further information from the appellant to demonstrate that these

matters meet all four of the requirements of the test in section 21(2)(d), I find that I have insufficient evidence to support a conclusion that the student names and contact information are relevant to a fair determination of the appellant's rights. As a result, I find that section 21(2)(d), which would weigh in favour of disclosure, does not apply in the circumstances.

[161] As indicated above, since the records containing the student names and contact information contain both the personal information of the appellant and other individuals, the relevant presumptions and factors must be balanced and weighed under section 49(b) to determine whether disclosure of the information would be an unjustified invasion of the personal privacy of the individuals other than the appellant. In this appeal, I have found that sections 21(2)(f) and (h) apply and weigh against disclosure. With respect to considerations that would favour disclosure, I found that I have insufficient evidence to conclude that any of them, including section 21(2)(d), apply. I have also considered whether there are any unlisted factors favouring discourse, but non are evident to me.

[162] Therefore, subject to my review of the university's exercise of discretion, I find that disclosure of the personal information of the students whose names and contact information appear in the responsive records would constitute an unjustified invasion of their personal privacy and are therefore exempt under section 49(b).

G: Did the university exercise its discretion under section 49(a) and 49(b)? If so, should this office uphold the exercise of discretion?

[163] The exemptions at sections 49(a) and (b) are discretionary and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[164] This office may find that the institution erred in exercising its discretion where, for example,

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

[165] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper consideration.[50] This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

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[50] Order MO-1573.

The university's representations on its exercise of discretion

[166] The university submits that it properly exercised its discretion under section 49(a) and 49(b).

[167] With respect to the records that were withheld under section 49(a), read in conjunction with section 19, the university submits that in deciding to exercise its discretion to withhold them, it considered the paramount importance of solicitor-client privilege to the legal system. It submits that the privilege is a substantive right held by the client that "can be abrogated in only the rarest of circumstances" and that "once privilege is waived, it cannot be reasserted." The university submits that in the context of the appellant's access request, it determined that it was not an appropriate case in which to exercise its discretion to waive privilege because there were no compelling reasons to do so and, at the time, the appellant was engaged in litigation against the university and had filed a claim with the HRTO. The university further submits that there were no other relevant factors that would cause it to exercise its discretion in any other fashion.

[168] With respect to the information that was withheld under section 49(b), the university submits that the information is the highly sensitive personal information of other identifiable individuals, namely students of the university, and that the appellant was seeking it to contact those students for purposes related to his human rights claim against the university. The university submits that it does not disclose the personal information of its students, except in limited circumstances related to their own education, and it would have been inappropriate for it to comprise the privacy of the other students in the absence of compelling reasons to do so. The university states that as a result, it chose to exercise its discretion not to disclose the names and contact information of the other students under section 49(b).

The appellant's comments that relate to the university's exercise of discretion

[169] The appellant does not specifically address whether the university's exercise of discretion to deny access to some of the information that he seeks under section 49(a), read in conjunction with section 19, and section 49(b) is appropriate. However, comments that he makes in his representations indicate that he understands the balancing that must occur in the application of these exemptions, even though his position is that the information should be disclosed to him.

[170] Specifically, with respect to the names and contact information of the students, the appellant submits that as witnesses to incidents pertaining to violations of his rights under the Human Rights Code, he wishes to contact them to obtain their statements. With respect to the remaining information, he submits that careful consideration should be taken in evaluating the university's exemption claims.

Analysis and findings

[171] Based on my review of the records and the representations of the parties, I find that the university properly exercised its discretion to withhold the records which I have found to be exempt under sections 49(a) and (b).

[172] I find that the university properly considered the purpose of the exemptions and the interests that they seek to protect. I am satisfied that the university balanced the importance of the solicitor-client privilege exemption against the appellant's right to his own personal information, particularly in light of the existence of litigation between the university and the appellant. I also accept that the university considered the privacy rights of the students whose names and contact information the appellant sought in the context of his intention to use that information for the purposes of pursuing his human rights complaint, but exercised its discretion not to disclose that information, recognizing that there were other procedures in place that would permit the appellant to access that information if the HRTO deemed it necessary for the appellant's claim.

[173] I recognize the appellant's submission that he needs the names and contact information of other students for the purpose of obtaining their statements with respect to wrongs that he alleges were committed against him, but I accept that the university properly took this into consideration in exercising its discretion to withhold this information. More generally, I am satisfied that the university took relevant considerations into account. I am also satisfied that the university did not act in bad faith or consider irrelevant or improper factors in exercising its discretion not to disclose the records to the appellant.

[174] I am satisfied that the university properly exercised its discretion not to disclose the information that it withheld under sections 49(a) or 49(b), and I uphold its exercise of discretion.

ORDER:

1. I order the university to disclose records 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 25, 26, 27, 28, 30, 31, 34, 35, 36, 39, 40, 41, 43, 44, 45, 46, 47, 48, 49, 50, 51, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 70, 71, 72, 74, 75, 76, 77, 78, 85, 87, 88, 96 and 97 to the appellant by **October 16, 2020**.

2. I otherwise uphold the university's decisions and dismiss the appeal.

3. In order to verify compliance with this order, I reserve the right to require the university to provide me with a copy of its correspondence sent to the appellant, disclosing the pages at issue in accordance with order provision 1.

4. The timeline noted in order provision 1 may be extended if the university is unable to comply in light of the current COVID-19 situation. I remain seized of the appeal to address any such requests.

Original signed by: September 15, 2020

Catherine Corban
Adjudicator