Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4069

Appeal PA19-00089

York University

September 24, 2020

Summary: An individual sought access to records about himself during a specific timeframe. York University (the university) denied access to some of the responsive records on the basis that they were excluded from the application of the *Freedom of Information and Protection of Privacy Act* (the *Act*) pursuant to section 65(6) (labour relations). The university also applied the discretionary exemptions in sections 49(a) (discretion to refuse requester's own information) and section 19 (solicitor-client privilege) of the *Act* and withheld some additional information it said was not responsive to the request. The requester appealed the university's decision. This order upholds the university's decision to withhold all of the information at issue.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1), 19, 24, 49(a) and 65(6).

OVERVIEW:

[1] York University (the university) received a request under the *Freedom of Information and Protection of Privacy Act* for access to records pertaining to the requester for the period between two specified dates including emails, memos and text messages to and from 15 named staff members at the university. At the time, the requester was a student at the university and was involved, along with a number of other students, in two proceedings. One proceeding was an unfair labour practices complaint before the Ontario Labour Relations Board, and the other proceeding was before a university tribunal that hears matters related to the university's "Code of Student Rights and Responsibilities."

[2] The university issued a decision granting partial access to the responsive records it identified. It withheld some of the records pursuant to sections 14(1) (law enforcement), 19 (solicitor-client privilege), 21(1) (personal privacy) and 65(6) (labour relations) of the *Act*. The university also specified that some of the information in the records had been removed because it was not responsive to the request. The university produced an index containing a list of responsive records, along with the exemptions and exclusion relied upon to withhold the information.

[3] The requester, now the appellant, appealed the university's decision. During the course of mediation, the mediator communicated with the appellant and the university to discuss the issues in the appeal. The appellant advised the mediator that he was seeking access to the withheld information within only some of the responsive records, which he specified.

[4] Subsequently, the university reconsidered its decision and issued a supplemental decision granting partial access to additional information in the responsive records. It continued to withhold some information pursuant to sections 19, 21(1), 49(a) (discretion to refuse requester's own information) and (b) (personal information) and 65(6) of the *Act*. The university continued to withhold some of the information in the records on the basis that it was not responsive to the request. The university also issued a revised index of records.

[5] Subsequently, the university disclosed another additional record to the appellant, accompanied by a second revised index of records. After this point, further mediation was not possible and the appeal was transferred to the adjudication stage of the appeals process, where an adjudicator may conduct a written inquiry under the *Act*.

[6] Representations were sought and received from both the university and the appellant on the issues set out in a Notice of Inquiry. For the reasons set out below, I uphold the university's access decision for each of the records at issue.

RECORDS:

[7] There are 12 records totaling 235 pages at issue in this inquiry. They are described in the chart that follows:

Record number	Number of pages	Brief Description	Section(s) applied
10	30	Emails re: Student Letters Code Violations	19, 21(1), 49(a) and (b)
11	5	Emails re: Grievance Step 4 Incorrect Application of Grievance	65(6) and 19; Non-responsive information

		Procedure	
14	17	Emails re: ULP Response – York Uni re Student Conduct ULP Draft	65(6), 19, 49(a) and (b)
15	14	Student Conduct Schedule A – Draft of Form A-34, Unfair Labour Practices	65(6), 19, 49(a) and (b)
16	39	Email re: Complaints under Student Code of Rights and Responsibilities	19, 21(1), 49(a) and (b); Non-responsive information
18	2	Emails re: Student Conduct Complaints - Strike related	19, 21(1), 49(a) and (b); Non-responsive information
19	7	Emails re: Student conduct proceedings - Chart	19, 21(1), 49(a) and (b); Page 7 is blank
20	8	Emails re: Student conduct proceedings - Chart	19, 21(1), 49(a) and (b)
21	3	Emails re: Proceedings under the Code of Student Rights and Responsibilities	19
22	6	Emails re: Proceedings under the Code of Student Rights and Responsibilities	19
23	17	Emails with attached draft mediation brief	19, 21(1), 49(a) and (b)
24	104	Emails with attached memo and draft terms of resolution	19, 21(1), 49(a) and (b)

ISSUES:

A. Does section 65(6) exclude records 11, 14 and/or 15 from the *Act*?

B. Is there information in records 11, 16 and/or 18 that is not responsive to the request?

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

D. Does the discretionary exemption at section 49(a) in conjunction with the solicitor-client exemption at section 19 apply to the records at issue?

DISCUSSION:

A. Does section 65(6) exclude Records 11, 14 and/or 15 from the Act?

[8] The university submits that paragraphs 1 and 3 of section 65(6) apply to records 11, 14 and 15 and that as such, they are excluded from the *Act*. The relevant portions of section 65(6) state:

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

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

[10] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 1 or 3 of this section, it must be reasonable to conclude that there is "some connection" between them.[1]

[11] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not

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

restricted to employer-employee relationships.[2]

[12] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.[3]

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

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

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

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

[14] The word "proceedings" means a dispute or complaint resolution process conducted by a court, tribunal or other entity which has the power, by law, binding agreement or mutual consent, to decide the matters at issue.[4]

[15] For proceedings to be "anticipated", they must be more than a vague or theoretical possibility. There must be a reasonable prospect of such proceedings at the time the record was collected, prepared, maintained or used.[5]

[16] The word "court" means a judicial body presided over by a judge.[6] A "tribunal" is a body that has a statutory mandate to adjudicate and resolve conflicts between parties and render a decision that affects the parties' legal rights or obligations.[7]

[17] "Other entity" means a body or person that presides over proceedings distinct from, but in the same class as, those before a court or tribunal. To qualify as an "other entity", the body or person must have the authority to conduct proceedings and the power, by law, binding agreement or mutual consent, to decide the matters at issue.[8]

[18] The proceedings to which the paragraph appears to refer are proceedings related to employment or labour relations per se – that is, to litigation relating to terms and

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[2] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.); see also Order PO-2157.
[3] Order PO-2157.
[4] Orders P-1223 and PO-2105-F.
[5] Orders P-1223 and PO-2105-F.
[6] Order M-815.
[7] Order M-815.
[8] Order M-815.

conditions of employment, such as disciplinary action against an employee or grievance proceedings. In other words, it excludes records relating to matters in which the institution has an interest as an employer. It does not exclude records where the institution is sued by a third party in relation to actions taken by government employees.[9]

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

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

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

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

[20] Previous orders have established that the phrase "labour relations or employment- related matters" applies in the context of a grievance under a collective agreement.[10]

Representations

[21] The university submits that paragraphs 1 and 3 of section 65(6) apply to records 11, 14 and 15 and that as a result, they are excluded from the *Act*.

[22] The university says that record 11 is an email communication between its legal counsel and other university executives and/or employees that relates to the preparation of a response to a grievance filed against the university by the Canadian Union of Public Employees (CUPE) in relation to alleged unfair labour practices. It says that CUPE represents the university's contract faculty, teaching assistants, and graduate assistants, including the appellant.

[23] The university says that records 14 and 15 are emails between its legal counsel and executives and/or employees that discuss drafts of a document prepared by legal counsel in anticipation of a hearing before the Ontario Labour Relations Board in relation to the CUPE grievance.

[24] The university submits that records 11, 14 and 15 are excluded from the *Act* because they were "collected, prepared, maintained, or used" in relation to "proceedings or anticipated proceedings before a court, tribunal or other entity". It

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[9] *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 2008 CanLII 2603 (ON SCDC), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).
[10] Orders M-832, PO-1769 and PO-3004.

stated in its representations that the Ontario Court of Appeal granted it leave to appeal a decision of the Divisional Court regarding the CUPE grievance and that as a result, section 65(6)1 applies to all three records. The university submits that because the records deal specifically with its labour relations, section 65(6)3 also applies.

[25] The university submits that none of the exceptions found in section 65(7) apply to records 11, 14 or 15 and that they are therefore excluded from the scope of the *Act*.

[26] The appellant questions whether an institution can rely on section 65(6) to exclude records that relate to an "internal tribunal proceeding that was later quashed." The appellant asserts that because the tribunal proceeding was "ruled to be improper" by the court, it would also be improper "to shield information regarding this tribunal from public scrutiny."

[27] The appellant submits that the university is a public institution and, for the public to continue supporting it, the university must actively earn the public's confidence. He says that improperly seeking to punish students for labour-related actions undertaken as legally striking workers is an abuse of power, and he submits that the details of what led to this abuse should be transparently offered to the public.

Findings and analysis

[28] For the reasons that follow, I find that records 11, 14 and 15 are excluded from the *Act* by paragraph 1 of section 65(6).

[29] As set out above, for section 65(6)1 to apply, the institution must establish that:

1. the record was collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or use was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; and
3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.

Part 1: collected, prepared, maintained or used

[30] Based on my review of records 11, 14 and 15, I confirm that the descriptions provided by the university are accurate. Each of these three records relates to a grievance filed by CUPE that alleges the university violated its collective agreement with its employees.

[31] Records 11 and 14 are email communications. While I cannot reveal the content of these communications, it is clear to me that the information in these records was

prepared, maintained and/or used by the university. Furthermore, I find that the attachments to an email in Record 14 were collected and used by the university.

[32] Record 15 is a working draft of the university's response to the CUPE grievance filed by the union and I am satisfied that this record was prepared and used by the university.

Part 2: proceedings before a court or tribunal

[33] Based on the university's representations and my review of records 11, 14 and 15, and considering the purposes for which they were created and/or used, I find that these three records were collected, prepared, maintained or used for the hearing related to the CUPE grievance, and are therefore, "in relation to" that proceeding.

[34] Given that the grievance was delivered to the university and it was preparing for a hearing before the Ontario Labour Relations Board, I am satisfied that there was a "proceeding" of the nature contemplated by section 65(6)1.

Part 3: labour relations or employment

[35] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships.[11]

[36] I have already determined that the records were collected, prepared or maintained for a grievance proceeding under a collective agreement before the Ontario Labour Relations Board. In my view, this is clearly a labour relations matter.[12]

[37] I have considered the appellant's assertion that the records relate to an internal tribunal proceeding that the Ontario Superior Court "ruled to be improper" and that it would therefore also be improper "to shield information regarding this tribunal from public scrutiny." I find that while there may have been an internal tribunal proceeding, Records 11, 14 and 15 relate specifically to the CUPE grievance and the university's preparation for the proceeding before the Ontario Labour Relations Board.

[38] I also note the appellant's representation that the university abused its power by seeking to punish students for "labour-related actions." However, the issue before me is not whether the university acted inappropriately, but whether the records at issue relate to proceedings, or anticipated proceedings before a court, tribunal or other entity relating to labour relations. I find that they do.

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[11] Order PO-2157, *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, 2003 CanLII 16894 (ON CA), [2003] O.J. No. 4123 (C.A.)].
[12] Orders M-832, P-1223, PO-1769, and PO-2626.

[39] I have also considered the appellant's assertion that the university should not be permitted rely on the section 65(6) exclusion for a proceeding that was later quashed. The appellant appears to be referring to a different proceeding than the hearing before the Ontario Labour Relations Board. However, even if the proceeding that the records were prepared in relation to was quashed by a court, section 65(6) would not automatically cease to apply. As the Ontario Court of Appeal has explained,

> The *Act* "does not apply" to particular records if the criteria set out in any of subclauses 1 to 3 are present when the relevant action described in the preamble takes place, i.e. when the records are collected, prepared, maintained or used. Once effectively excluded from the operation of the *Act*, the records remain excluded. The subsection makes no provision for the *Act* to become applicable at some later point in time in the event the criteria set out in any of subclauses 1 to 3 cease to apply.[13]

[40] As I have concluded that all of the requirements section 65(6)1 of the *Act* have been established by the university, and where none of the exceptions contained in section 65(7) are applicable, I find that records 11, 14 and 15 are excluded from the *Act* and I will not consider them further. Given my findings with regard to the application of 65(6)1, it is not necessary for me to also consider section 65(6)3.

B. Is there information in records 16 and/or 18 that is not responsive to the request?

[41] The university withheld portions of records 16 and 18 on the basis that the information was not responsive to the appellant's request.

[42] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

1. A person seeking access to a record shall,

    a. make a request in writing to the institution that the person believes has custody or control of the record;

    b. provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; […]

2. If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

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[13] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* 2001 CanLII ONCA, leave to appeal refused [2001] S.C.C.A. No. 507; See also: Order PO-2520.

[43] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[14]

[44] To be considered responsive to the request, records must "reasonably relate" to the request.[15]

[45] The university says that portions of records 16 and 18 are not responsive to the request. It says that both records contain short excerpts that deal with administrative details unrelated to the appellant.

[46] The appellant submits that the university's language regarding "administrative details" is vague and asks that I "investigate whether there is a more specific justification" for finding the information does not reasonably relate to his request.

[47] I have reviewed records 16 and 18 and note that only one line in each of these records has been marked as non-responsive by the university. I have had the benefit of reviewing the two lines of information the university has withheld and I confirm that neither reasonably relates to the appellant's request. The two withheld lines of information are, as the university specified, purely administrative details or notes of professional courtesy. As such, I uphold the university's decision that the two lines of information are not responsive to the request.

C. Do records 10, 16, 18-20 and/or 23-24 contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[48] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) 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,

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[14] Orders P-134 and P-880.
[15] Orders P-880 and PO-2661.

> (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 another individual 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; …

[49] 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.[16]

[50] Sections 2(3) also relates to the definition of personal information. That section states:

> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[51] 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.[17]

[52] 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.[18]

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[16] Order 11.
[17] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[18] Orders P-1409, R-980015, PO-2225 and MO-2344.

[53] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[19]

The university's representations

[54] The university submits that records 10, 16, 18 to 20, 23 and 24 contain personal information as described in section 2(1) of the *Act*. It says that the information in these records is about the individuals in a personal capacity and that if the information was disclosed, the individuals could easily be identified and highly sensitive information about them would be made public.

[55] The university says that the records noted above are comprised of email correspondence between its legal counsel and executives and/or employees regarding mediation hearings related to a student conduct proceeding. The university explains that the student conduct proceeding was being held before a university tribunal designated to handle alleged violations of the university's "Code of Student Rights and Responsibilities." The university submits that hearings before the tribunal provide an opportunity for a "balanced airing of facts and are held in private." It submits that the information discussed in these proceedings is not intended to be made public.

[56] The university says that records 10, 16, 18 to 20, 23 and 24 contain the names of individuals involved in the mediation process and include other sensitive personal information relating to those individuals. It submits that because the mediation process was combined for multiple students, the records noted above contain the mixed personal information of the appellant and other identifiable individuals.

[57] The university says that the records noted above also include its employees' views and opinions that are explicitly of a private or confidential nature and it argues that the disclosure of the names would reveal other detailed personal information about the individuals involved and the issues discussed. The university says this type of information is personal information as set out in paragraphs (e), (f), (g), and (h) of section 2(1) of the *Act*.

The appellant's representations

[58] The majority of the appellant's representations for this issue focus on the extent of the university's redactions to the records at issue. The appellant says that, in general, the only information released to him was his messages with university faculty and staff, and documents he, or his union or legal representatives, filed.

[59] Specifically with regard to whether the records at issue contain personal information, the appellant asserts that the university "moved to have his tribunal

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[19] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

proceedings consolidated into a single process with four other individuals" and then released the details of the complaints against each student to all of them during that process. He says that this is evidence that the university's "broad use of exemptions regarding personal information" is an act of bad faith.

Findings and analysis

[60] Based on my review of the records and the parties' representations, I find that records 10, 16, 18 to 20, 23 and 24 are generally about the appellant and the other students involved in the mediation of the student conduct proceedings.

[61] I accept the university's submission that because the mediation process was combined for the students, the records contain the mixed personal information of the appellant, and other identifiable individuals, namely the other students involved.

[62] Having reviewed the records at issue, I accept that some of them also contain university employees' views and opinions. While these employees were acting in an official capacity, I find that, in these circumstances, there is information that, if disclosed, would reveal something of a personal nature about the employees.

[63] Additionally, while the university has not identified records 21 and 22 as records that contain personal information, I have reviewed these records and confirm that, for the same reasons outlined above, some portions contain the personal information of both the appellant and the other students involved in the student conduct proceedings.

[64] I note the appellant's concern that the information that has been withheld is about him, and also that he is already aware of some of the personal information of the other individuals since the university combined the student conduct proceedings and the mediations took place together for all of the students. Below I will determine whether or not the appellant is entitled to access to that information under the *Act*.

D. Does the discretionary exemption at section 49(a), in conjunction with the section 19 exemption, apply to the information at issue in records 10, 16, and/or 18-24?

[65] Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49(a) provides a number of exemptions from this right. Section 49(a) reads as follows:

> 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, 15.1, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information

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

[67] Section 19 of the *Act* states as follows:

> A head may refuse to disclose a record,
>
> > (a) that is subject to solicitor-client privilege;
> >
> > (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or
> >
> > (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.

[68] Section 19 contains two branches. Branch 1 ("subject to solicitor-client privilege") 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) is a statutory privilege. The institution must establish that one or the other (or both) branches apply. Here, the university submits that both the Branch 1 common law solicitor-client communication privilege and the Branch 2 statutory communication privilege apply. It also relies on the statutory litigation privilege for record 24.

Branch 1: common law privilege

[69] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege. The university relies on the solicitor-client communication privilege.

Solicitor-client communication privilege

[70] 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.[20] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[21] 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

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[20] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[21] Orders PO-2441, MO-2166 and MO-1925.

keeping both informed so that advice can be sought and given.[22]

[71] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[23]

[72] 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.[24] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[25]

Branch 2: statutory privileges

[73] Branch 2 (here, section 19(c)) 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 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.

The university's representations

[74] The university submits that section 19 of the *Act* applies to records 10, 16, 18 to 20, 23 and 24 in conjunction with section 49(a) and that they are exempt from disclosure on that basis. The university also submits that section 19 applies to records 21 and 22. Earlier in this decision, I concluded that records 21 and 22 also contain the personal information of the appellant. As a result, the application of section 19 to records 21 and 22 must also be considered in conjunction with section 49(a).

[75] The university submits that all of the records are direct communications of a confidential nature between the university's internal or external legal counsel and its executives and/or employees, made for the purpose of obtaining or giving professional legal advice in preparation for the student conduct proceedings, or to address the grievance before the Ontario Labour Relations Board. It says that the records contain either legal advice, the request for advice, or information passed between legal counsel and university employees aimed at keeping both informed so that legal advice could be sought and obtained.

[76] The university says that the Branch 2 statutory solicitor-client privilege also applies to the records at issue because the legal counsel involved were employed or retained by the university for use in giving legal advice. It submits that the communications involve complex legal issues and information that was shared was

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[22] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)
[23] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[24] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[25] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

solely on a need-to-know basis. The university says that the records are either marked explicitly as privileged or are a part of the continuum of communications between lawyer and client, necessary in order to permit advice to be sought and obtained.

[77] Finally, the university says that it applied section 19(c) to some of the information at issue because the records were prepared by or for counsel employed or retained by an educational institution to provide legal advice in matters related to the student conduct proceedings and the grievance before the Ontario Relations Board.

[78] The university denies that it has waived its right to assert privilege over these communications.

[79] The university provided the following descriptions and explanations of the records at issue, which are outlined in the chart below:

Record Number	**University's description of the information at issue**
10	Email correspondence between legal counsel, executives and/or employees that discusses confidential legal advice and information related to drafts of the "Letters of Complaint Allegations" under the university's Code of Student Rights and Responsibilities, marked explicitly by legal counsel as being subject to solicitor-client privileged.
16	Email correspondence marked as privileged and containing confidential information exchanged between internal legal counsel, executives and/or employees for the purpose of keeping all informed so that advice could be sought and obtained.
18	Email correspondence between the Director of Legal Services and other executives and/or employees marked 'Privileged' by legal counsel and containing confidential information passed between legal counsel and client, aimed at keeping both informed so that advice can be sought and given.
19	Emails between the Director of Legal Services, external legal counsel, and executives and/or employees, and a working draft of a document related to evidence compiled for student conduct hearings containing legal advice and confidential information.
20	Emails between the Director of Legal Services, external legal counsel, and executives and/or employees, and a revised working draft of the attachment prepared by counsel found in record 19 containing legal advice and confidential information.

21	Email correspondence between external counsel, the Director of Legal Services, independent counsel for the university's Office of Student Community Relations and university executives and/or employees containing confidential information passed between counsel and client, aimed at keeping both informed so that advice could be sought and given.
22	Email correspondence between external legal counsel, the Director of Legal Services, the independent counsel for the university's Office of Student Community Relations, and other executives and/or employees containing confidential information passed between counsel and client to keep both informed so that advice could be sought and given in relation to an email from counsel representing the students involved in the student conduct proceedings.
23	A working draft of evidence compiled for student conduct hearings, the finalized version of which was supplied to counsel representing the appellant at a later date.
24	Email correspondence between external legal counsel, the Director of Legal Services, and other executives and/or employees containing confidential information passed between counsel and client aimed at keeping both informed so that advice can be sought and given, a working draft of the 'Proposed Terms of Resolution' for one of the students containing legal advice and confidential information related the student conduct hearings, and a copy of a mediation brief.

The appellant's representations

[80] The appellant did not make any specific representations about whether section 19 applies to the records at issue. Instead, he asked that I consider a series of questions, including the following:

1. Can solicitor-client privilege be used to shield a public institution from transparency?

2. If the university copies internal legal counsel on all messages sent between administrators and uses this perfunctory inclusion to seek exemptions, what transparency is there to speak of?

3. How is the public to confide in a public institution – one that is entrusted with public resources and charged to manage them in good faith – if the decisions of these administrators are all shrouded in secrecy via the bad faith application of solicitor-client privilege?

4. To what extent can solicitor-client privilege be invoked to limit transparency?

[81] The appellant also says that the university brought a tribunal proceeding against him that "has been ruled to be illegal." He submits that the details about "how and why this illegality was committed" should be open to public scrutiny and suggests that the university's application of solicitor-client privilege is "overly-expansive."

Findings and analysis

[82] Having reviewed the parties' representations and the records at issue, and for the reasons that follow, I find that the section 19 exemption for solicitor-client privilege applies to all of the remaining records at issue in conjunction with section 49(a).

Record 10

[83] This record is comprised of a two-page email chain marked "solicitor-client privileged" and a 28-page attachment. One of the emails in the chain, which is from the university's legal counsel, provides an overview and some explanatory notes about the information in the attachment. The final email is a question from another university employee to its legal counsel about the information in the attachment.

[84] I am satisfied that both the emails and the attachment were exchanged for the purposes of seeking and/or obtaining legal advice. I note that the email is marked as confidential and the parties to the communication are the university's employees and its counsel. There is no indication that this information was shared beyond the parties to the email chain. As such, I am satisfied that the common law solicitor-client communication privilege applies to record 10.

Record 16

[85] This record is comprised of a one-page email from the university's internal legal counsel to an executive at the university and is marked "privileged." While I cannot reveal the content of the email or the attachments, I confirm that in my view, they are clearly being exchanged for the purpose of providing legal advice and obtaining further instructions.

[86] I note that the university specified that a number of pages in the attachment that relate specifically to the appellant have been disclosed to him. There is no evidence before me that indicates that any of the remaining information has been disclosed or that the email was disclosed. As a result, I am satisfied that there has been no waiver of privilege with respect to the undisclosed portions and they are therefore subject to the common law solicitor-client communication privilege exemption in section 19 of the *Act*.

Record 18

[87] Record 18 is an email chain between the university's internal legal counsel and other university executives and/or employees. A portion of the email from the legal counsel has been severed and withheld. I have reviewed the severed information and confirm the university's decision that it is a confidential communication that was made for the purpose of providing legal advice. As a result, I am satisfied that the common law solicitor-client communication privilege exemption in section 19 of the *Act* applies to the severed portion of record 18.

Record 19

[88] Record 19 is a two-page email from the university's external legal counsel to university executives and/or employees attaching a five-page chart. The email provides explanatory notes about the attachment. Based on my review of the entire record, I am satisfied that all of the information was exchanged confidentially for the purposes of seeking and/or obtaining legal advice. As a result, and for the same reasons as for the previous records noted above, section 19 applies to record 19.

Record 20

[89] Record 20 is a three-page email chain between the university's external legal counsel and other executives and/or employees discussing a version of the chart from record 19, which is attached to one of the emails in record 20. As with record 19, it is clear to me that the emails and the attachment are all communications between solicitor and client that were made for the purpose of seeking and/or obtaining legal advice. There are no outside parties included in the email chain and I am satisfied that all eight pages are subject to the common law solicitor-client communication privilege exemption in section 19 of the *Act*.

Record 21

[90] Record 21 is a two-page email chain with an attachment. The university says, and I accept, that the email contains confidential information passed between legal counsel and client, aimed at keeping both informed so that advice could be sought and given. Based on my review of the email chain I am satisfied that record 21 is part of the continuum of communications between counsel and client, that it was not shared with outside parties, and that it is subject to the common law solicitor-client communication privilege exemption in section 19 of the *Act*.

Record 22

[91] Record 22 is an email chain that includes the same parties as record 21. The final email in the chain is from the university's external legal counsel to the university's internal legal counsel, its executives and/or employees, and staff from the university's

external counsel's firm.

[92] Based on my review of the email chain, I am satisfied that record 22 is a confidential communication made for the purpose providing legal advice. I find that it is part of the continuum of communications aimed at keeping the solicitor and client informed so that legal advice can be sought and/or obtained and it is therefore subject to the common law solicitor-client communication privilege in section 19 of the *Act*.

Record 23

[93] Record 23 is comprised of an email from the university's external legal counsel attaching a "mediation brief." The university submitted that the brief was a draft prepared jointly by its internal and external legal counsel. In its representations, the university specified that there was a finalized version of the brief that was made available to the appellant's legal counsel during the student conduct proceeding.

[94] Based on my review of the email and the brief, I accept the university's submission that the version of the brief attached to the email in record 23 is a "working draft." I agree that the working draft contains legal advice and find that if it were disclosed, the draft version could be compared with the final version provided to the appellant's counsel and the content of the legal advice could be revealed.

[95] There is no evidence before me that this version of the brief was shared beyond the parties to the email on page one of record 23. As such, I find that section 19 of the Act applies to record 23 as this record is comprised of a legal advisor's working papers that are directly related to the seeking, formulating or giving or legal advice.

Record 24

[96] Record 24 is a two-page email with two attachments. The email is from university's external legal counsel to its internal legal counsel and an employee and/or executive of the university. I have reviewed this email and confirm that it contains legal advice about both of the attachments. I confirm the university's representation that the first attachment is a working draft of "Proposed Terms of Resolution" for one of the students and the second is a copy of a mediation brief.

[97] There is no evidence to indicate that that the university shared the email or the attachments with anyone other than those included in the email chain and as a result I am satisfied that the email and the attachments are confidential communications made for the purposes of obtaining or providing legal advice and are therefore subject to the common law solicitor-client communication privilege exemption in section 19 of the *Act*.

[98] I have considered the appellant's representations when making each of these findings above. While the majority of the appellant's representations are more relevant to the consideration of the university's exercise of discretion to apply section 19, I

specifically considered the appellant's concern that the university may be copying internal legal counsel on all messages sent between administrators in order to apply the solicitor-client exemption and his suggestion that the university's use of the exemption is "overly expansive." I see no evidence to substantiate either of those concerns. In each case where I have upheld the application of section 19, I am satisfied that the communications in question were part of the continuum of communications for the purpose of giving and receiving legal advice, and that the solicitors were not merely copied in an attempt to create a privilege where none exists. In my view, the university's section 19 claims are appropriate and I do not accept the appellant's assertion that it may have used the *Act* as a shield to avoid disclosure.

Did the university exercise its discretion under section 49(a) in conjunction with section 19? If so, should this office uphold the exercise of discretion?

[99] After deciding that a record, or part of a record, falls within the scope of a discretionary exemption, an institution is obliged to consider whether it would be appropriate to release the record, regardless of the fact that it qualifies for exemption. The section 49(a) exemption is discretionary, which means that the university could choose to disclose information, despite the fact that it may be withheld under the *Act*.

[100] In applying the section 49(a) exemption, the university was required to exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so. In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example, it does so in bad faith or for an improper purpose; where it took into account irrelevant considerations; or where it failed to take into account relevant considerations. In either case, I may send the matter back to the university for an exercise of discretion based on proper considerations.[26] According to section 54(2) of the *Act*, however, I may not substitute my own discretion for that of the university.

[101] As I have upheld the university's decision to apply section 49(a) in conjunction with section 19, in part, I must review its exercise of discretion under those exemptions.

The university's representations

[102] The university submits that it considered the purpose of the *Act* and the principles that guide it when it exercised its discretion. Specifically, it says it claimed the discretionary exemptions at sections 49(a) and 19(a) and (c) because the records at issue were prepared for or by counsel employed or retained by an educational institution to provide legal advice in matters related to the student conduct proceedings and the complaint before the Ontario Labour Relations Board.

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[26] Order MO-1573.

[103] The university submits that it properly exercised its discretion and took into account relevant factors. It reiterates that a number of the records it withheld were working drafts prepared by its legal counsel. It says that when finalized, the "complaint allegation" for the appellant was released to him and the response to the Ontario Labour Relations Board grievance was made public.

The appellant's representations

[104] The appellant asks that I consider whether the university acted in good faith in exercising its discretion, or whether it applied the exemptions in an overly broad, bad faith manner that violates the *Act*'s commitment to public information and limited use of exemptions.

[105] I also note the appellant's earlier concerns regarding institutional transparency and the need for public scrutiny of institutional actions.

Findings and analysis

[106] Having regard to the circumstances of this appeal, I am satisfied that the university considered a number of relevant factors when exercising its discretion under sections 49(a) and 19. Furthermore, I see no evidence that it took into account irrelevant considerations or failed to take into account relevant considerations.

[107] The appellant has made a number of assertions that question whether the university was overly broad in its application of the exemptions and raises the issue of whether the university was acting in good faith. I understand the appellant is concerned about the amount of information that has been severed in the records. However, it is important to note that solicitor-client privilege is essential to the administration of justice. As the Supreme Court of Canada has emphasized, and as many courts and tribunals have reiterated,

> Much has been said in these cases, and others, regarding the origin and rationale of the solicitor-client privilege. The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a

> necessary and essential condition of the effective administration of justice.[27]

[108] I have already determined that the section 19 exemption for solicitor-client privileged information applies to records 10, 16, and 18 to 24. I am also satisfied that the university exercised its discretion to withhold those records under sections 19 and 49(a) appropriately.

[109] As for the appellant's argument that he is already aware of some of the information about other students that may be contained in the withheld information, I am satisfied that the university was aware of this and I see no error in its implicit assessment that the importance of the privilege outweighed this consideration.

[110] Based on all of the evidence before me, I find that the university considered whether further information could be released to the appellant and took relevant considerations into account when it decided to withhold the information at issue, and that it did not take into account irrelevant considerations or exercise its discretion in bad faith. As a result, I uphold the university's exercise of discretion under sections 19 and 49(a) for records 10, 16, and 18 to 24.

ORDER:

1. I uphold the university's decision that section 65(6)1 excludes records 11, 14 and 15 from the *Act*.

2. I uphold the university's decision that portions of records 16 and 18 are not responsive to the appellant's request.

3. I uphold the university's exercise of discretion to withhold records 10, 16, and 18 to 24 pursuant to sections 19 and 49(a).

4. The appeal is dismissed.

Original signed by:	September 24, 2020
Meganne Cameron Adjudicator	

[27] *Blank v. Canada (Minister of Justice)* (2006), 2006 SCC 39 (CanLII), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39). See also: Order PO-3514.