Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4224

Appeal PA17-78

Wilfrid Laurier University

December 23, 2021

Summary: The appellant submitted a request to Wilfred Laurier University (the university) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to her personal information and all general records, including emails, that referenced or directly referred to her for a specified period. The university located responsive records and after disclosing some information to the appellant, ultimately took the position that the remaining information was contained in records that were excluded from the *Act* by the labour relations exclusions in section 65(6). In the alternative, the university also claimed that some of the withheld information was exempt under the personal privacy exemptions in section 21(1) or 49(b). In addition, the university claimed that some information it located was not responsive to the appellant's request and access to this information was added to the appeal. The university also claimed that some information located was not within its custody or control. During mediation, the appellant indicated that further responsive records should exist and therefore whether the university conducted a reasonable search was also added to the appeal. In this order, the adjudicator finds that the most of the withheld information in the records is excluded by section 65(6)3. He upholds the university's decision that certain records are not within its custody or control and that certain records are not within the scope of the request. The adjudicator finds that the section 49(b) exemption applies but that some information should be disclosed under the absurd result principle. Finally, the adjudicator finds that the university's search was reasonable.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 10(1), 21(1), 24, 49(b) and 65(6)3.

Orders and Investigation Reports Considered: Orders MO-2880, P-239, PO-2157, PO-3009- F and PO-3819.

Cases Considered: *Ontario (Ministry of Correctional Services) v. Goodis* (2008), CanLII 2603 (ON SCDC); *City of Ottawa v. Ontario,* 2010 ONSC 6835, [2010] 328 D.L.R. (4th) 171 (Div. Ct.).

OVERVIEW:

[1] The appellant, a professor, submitted a request to Wilfred Laurier University (the university) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to her personal information and all general records, including emails, that referenced or directly referred to her, from July 1, 2010 to January 29, 2016. The appellant subsequently narrowed the date range of her request to June 1, 2014 to February 29, 2016.

[2] The university located hundreds of pages of records responsive to the appellant's request and issued access decisions in four phases. In its four decisions, the university granted the appellant partial access to the records and withheld the remaining records in full and in part. Initially, the university claimed that information was exempt under section 13(1) (advice or recommendations), section 19 (solicitor-client privilege), section 21(1), and 49(b) (personal privacy). The university also claimed that the exclusions at section 65(6)(1) and/or 65(6)(3) for labour relations or employment-relation records applied to exclude a number of responsive records from the application of the *Act*. However, in its representations, the university claimed that all records are excluded by section 65(6)3 and/or 65(6)1.

[3] The appellant was not satisfied with the university's decision and appealed it to the Office of the Information and Privacy Commissioner (IPC). The IPC attempted to mediate the appeal. During mediation, the appellant questioned the reasonableness of the university's search for records and this issue was added to the scope of the appeal. A mediated resolution was not possible and it was moved to the adjudication stage of the appeals process where an adjudicator may conduct a written inquiry under the *Act.*

[4] The assigned adjudicator decided to conduct an inquiry and sought representations from the university. The university provided representations which were shared with the appellant, who provided representations in response. At this point, I was assigned carriage of the appeal and I provided the appellant's representations to the university who provided further representations in reply. The appellant was provided with the university's reply representations and invited to provide a sur-reply. The appellant indicated that she would not provide sur-reply representations and, instead, referred to her initial representations.

[5] In this order, I find that most of the records are excluded by sections 65(6)3 except for a few (listed below) where the university also claimed section 21(1) and/or 49(b). I uphold the university's decision that certain records are not within its custody or control and that certain other records are not within the scope of the request. I also uphold the section 49(b) personal privacy exemption claim, but find that some

information should be disclosed under the absurd result principle. Finally, I find that the university's search was reasonable.

RECORDS:

[6] As a result of its search, the university located records that it withheld in whole, or in part, which consist of emails, handwritten notes, letters, draft letters and typed notes. The university claims that the exclusion at section 65(6) applies to all of the information. Initially, it had claimed that only some of the withheld information was excluded under section 65(6) and that remaining information was exempt by sections 13(1), 19, 21(1) and 49(b). The university now makes the listed exemption claims as alternative arguments to its claim that all the records are excluded from the *Act* under section 65(6).

[7] As noted, at the request stage, the university issued its decision in four phases, releasing records in each phase as they were located. The university provided full disclosure of records located during the first phase, so no records from this phase are in dispute.

[8] The records at issue are those that have been partially or fully withheld under the exclusion and exemptions specified below:

Sections 65(6)1 and 65(6)3

> Phase 2: Dispute Resolution & Support pages 1-20, 23-35, 48-50, 58, 62, 69, 70 and 73; Office of the Vice-president: Academic pages 3-16; Faculty Relations pages 1-5, 8-10, 15-19, 22-30, 34-38, 40-43, 45-52, 54-62, 64-71, 73, 74, 77, 80, 81, 83-94, 98, 99, 106, 109, 110, 127, 129, 133, 138-140, 142, 143, 154, 155, 157 and 158; Faculty of Arts: Group 1 pages 1, 2, 5-7, 8-11, 18, 20, 21, 24-27, 31, 32, 35, 36, 41, 43, 52-55, 58-65, 75, 83, 86, 92, 93, 97-102, 114-118, 124, 125, 128, 129, 133, 135, 136, 140-142, 145 and 147-158; Group 2 pages 4-8, 12, 13, 51-54 and 69-88; Group 6 pages 1-26; Group 12 pages 123-126, 205-212, 219, 220, 385 and 386; Group 13 pages 1-3, 14, 16, 18-20, 25, 26, 28-31, 33-40 and 42-45; Phase 4: pages 3, 4 and 13-24.

Section 10(1) (custody or control)

[9] The university claims the following records are not within its custody or control:

> Phase 2, Faculty of Arts, Email Records, Group 13 pages 2, 25 and 31 and 33-38.

Section 24 (responsiveness of the record/scope of the request)

[10] The university claims the following records are not responsive to the appellant's request:

> Phase 2: Office of the Registrar page 18; Faculty of Arts: Group 1 pages 52-55 and 137; Group 2 pages 1, 30, 44 and 45; Group 12 pages 403-417; Group 13 pages 2, 25, 31 and 33-38.

[11] As noted, the university claimed the following exemptions for certain information but now claims this information is also excluded from the *Act* by section 65(6):

Section 13(1) (advice or recommendations)[1]

> Phase 2: Faculty Relations/HR page 99; Faculty of Arts: Group 1 pages 157 and 158; Group 2 pages 15-19, 28-30, 42, 43, 84 and 85.

Section 19(a) (solicitor-client privilege)[2]

> Phase 2, Faculty of Arts, Group 13 pages 16, 18, 19, 26, 28 and 29.

Section 49(b) and/or 21(1) (personal privacy)[3]

> Phase 2: Dispute Resolution & Support pages 37-41; Faculty Relations/HR pages 28-31, 47-50 and 84-94; Office of the Registrar pages 10, 11, 13-15 and 18-20; Faculty of Arts Group 1 pages 35, 36, 41, 43, 52-55, 66-74, 76-80, 84, 85, 108-115, 157 and 158; Group 2 pages 67 and 68; Group 4 pages 11-18; Group 6 pages 1-3 and 23-26 Group 8 pages 1, 2 and 24-26; Group 9 pages 32-39 and 51-79; Group 10 pages 1-5; Group 11 pages 1-3; Group 12 pages 1-15, 29, 34, 35, 40, 41, 54, 129-131, 163-171, 193-199, 218, 240, 330, 335, 338, 342-348, 351, 365 and 418; Electronic File 2015 Faculty List page 1; Phase 3: Communications Group 1 Email Records pages 14-16 and 39-67; Communications Group 2 Electronic Files pages 225-228 and 239-253.
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> Phase 4: pages 11, 12, 25, 29, 35, 36 and 38.

[12] Prior to submitting its representations, the university confirmed that it has disclosed the following pages of the records to the appellant, in full, even though these pages were listed as being at issue in the Mediator's Report:

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[1] As noted, the university now relies on section 65(6)3 and/or 65(6)1 to exclude all records initially claimed exempt under section 13(1) from the *Act* and claims the exemption in the alternative.

[2] As noted, the university now relies on section 65(6)3 and/or 65(6)1 to exclude all records initially claimed exempt under section 19 from the *Act* and claims the exemption in the alternative.

[3] As noted, the university now relies on section 65(6)3 and/or 65(6)1 to exclude all records initially claimed exempt under section 21(1) and 49(b) from the *Act* and claims the exemption in the alternative.

> Dispute Resolution & Support pages 21 and 61; Faculty Relations/HR pages 6, 7, 20, 21, 39, 44, 53, 63, 72, 75, 76, 78, 79, 82, 100-105, 107, 108, 111-118, 128, 130, 132, 134, 141, 144, 156, 159 and 160; Faculty of Arts: Group 1 pages 3, 19, 28-30, 37-40, 42, 44-51, 87-91, 119-123, 126, 127, 130, 131, 134 and 146; Group 2 page 14; Group 12 pages 127, 128, 213 and 221; Group 13 pages 4-13, 15, 17, 24, 27, 32 and 41.

As these pages of the records have been disclosed to the appellant, they are no longer at issue in this appeal and I will not address them further.

[13] Also, the original adjudicator noted that although pages 20, 21, 22 and 23 (Phase 2, Faculty of Arts, Group 2) are listed as being at issue in the Mediator's Report, these records appear in the appeal file as having been disclosed to the appellant. On this basis, I determined that I will not consider access to these records in this order.

[14] Finally, in my review of the records provided, I identified pages where the university indicated they were either not at issue (on the page itself) or no severances appeared on the page, in the following records:

> Office of the Registrar pages 11, 13 and 14; Faculty of Arts: Group 1 pages 76-80, 84, 109 and 112; Group 2 pages 68; Group 8 page 24 and 26; Group 9 pages 32-35, 37 and 38; Group 10 pages 2; Group 12 pages 29, 35, 54, 129-131, 164-171, 193-199 and 335; Communications Group 2 Electronic Files pages 242-245, 249 and 253; Phase 4, page 24.

[15] Since the university confirmed that pages without severances were provided to the appellant, I will not be considering access to these pages in the discussion below.

ISSUES:

A. Does section 65(6) apply to exclude the records at issue from the application of the *Act*?

B. Are the records at pages 2, 25, 31, and 33-38 of Group 13, Faculty of Arts (phase two) "in the custody" or "under the control" of the institution under section 10(1)?

C. What is the scope of 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(b) and/or the mandatory exemption at section 21(1) apply to the withheld information in the following pages?

F. Did the institution exercise its discretion under section 49(b)? If so, should the IPC uphold the exercise of discretion?

G. Did the university conduct a reasonable search for records?

DISCUSSION:

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

[16] As stated above, the university initially took the view that the exclusion only applied to certain records. However, during the inquiry, the university decided to claim the exclusion over all the records at issue.[4]

[17] In its representations, the university submits that following a further review of the withheld information at issue, its position is that sections 65(6)1 and/or 65(6)3 apply to exclude all of the records at issue in this appeal, and that none of the exceptions in section 65(7) applies. It explains that the records are documents related to matters in which it is acting as an employer, and address the relationship between an employer and employees. The university submits that the terms and conditions of employment or human resources questions are at issue in the records.

[18] Sections 65(6)1 and 65(6)3 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.

[19] If either section 65(6)1 or 65(6)3 applies to the records, and none of the exceptions found in section 65(7) applies, the records are excluded from the scope of the *Act*. If section 65(6) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.[5]

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[4] The originally assigned adjudicator invited the parties to consider the application of the exclusion to all of the records.

[5] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.

[20] The IPC and the courts have confirmed that 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.[6]

[21] 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 restricted to employer-employee relationships.[7]

[22] 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.[8]

[23] The type of records excluded from the *Act* by section 65(6) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.[9]

[24] I will address section 65(6)3 first. For that section to apply, the university must establish that:

1. the records were collected, prepared, maintained or used by the university or on its behalf

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

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

[25] Although the university has disclosed some information from the records that it argues are excluded from the *Act*, it submits that it did this in order provide the appellant with access to her own personal information, outside of the scheme of the *Act*. In summary, it disclosed partial information even though its position was that the entire records would be excluded by section 65(6)3. The IPC has consistently taken the position that the exclusions at section 65(6) of the *Act* are record-specific and fact-specific. This means that in order to qualify for an exclusion, a record is examined as a whole. Accordingly, I will consider the university's application of the exclusion to each of

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[6] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).
[7] *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.
[8] Order PO-2157.
[9] *Ontario (Ministry of Correctional Services) v. Goodis* (2008), CanLII 2603 (ON SCDC).

the records as a whole and not just the information withheld by the university.

[26] For the following reasons, I find that most, but not all of the records at issue are excluded from the *Act* by reason of section 65(6)3. I begin by explaining why most of the records fall within the exclusion.

Part 1: collected, prepared, maintained or used

[27] The university submits that the records in issue were all created internally by its own employees addressing labour relations or employment related matters involving the appellant. It further submits that these employees collected, prepared, maintained, or used the records within the scope of their employment and were acting on behalf of the university.

[28] In her representations, the appellant submits that the individuals who collected, prepared, maintained or used the records in question are also employees like herself and are not in a supervisory role over her. She also submits that these individuals are not representatives of human resources and have no capacity to determine the status of her employment at the university. The appellant disputes the university's exclusion claim on this basis that her colleagues are not part of the HR department responsible for her employment.

[29] In reply, the university disputes the appellant's assertion that the individuals who collected, prepared, maintained, or used the records, were solely her colleagues in her own department who did not have a role related to employment-related matters. It submits that the responsive records include those created by the Dean of Arts who had a direct supervisory role over the appellant, as well as employees in human resources, faculty relations, and the office of dispute resolution and support. Also, the university submits that the responsive records also include those from the department chair who was in a position to have a direct administrative impact on issues relating to the operation of the department of which the appellant was a member.

[30] The appellant was provided with the university's reply representations and declined to make further representations.

[31] I have reviewed the records and find that bulk of them either originate with, or were sent to, university employees who were in a supervisory role to the appellant, including employees in the office of human resources, faculty relations and the office of dispute resolution and support, as confirmed by the university. I find that the records were collected, maintained and created by the university or on its behalf and the first part of the test has been met.

Part 2: in relation to meetings, consultations, discussions or communications

[32] To satisfy part 2 of the section 65(6)3 test, the university must establish that its collection, preparation, maintenance or use of the records was in relation to meetings,

consultations, discussions or communications.

[33] The university submits that the records in question are communications about employment and labour relations matters, many of which resulted, or stemmed from meetings, consultations or discussions.

[34] The appellant submits that from the records that have been released to her it is evident that that the majority originate from the university department where she works. She submits that the communications were not "in relation to meetings, consultations, discussions, or communications," rather they appear to have been the cause of the subsequent meetings, consultations, discussions or communications. The appellant repeats her submission that the individuals who collected, prepared, maintained or used the records in question are also employees like herself and are not in a supervisory role over her. She also submits that these individuals are not representatives of human resources and have no capacity to determine the status of her employment at the university.

[35] After reviewing the records, I find that the university's collection, preparation, maintenance or use of the records was in relation to meetings, consultations, discussions and communications about employment related matters involving the appellant. The records were all created internally by employees of the university and addressed labour relations and employment matters involving the appellant.[10] I accept that because of the issues raised in the emails, the university held meetings, discussions and consultations.

[36] The appellant argues that the communications are not among individuals in supervisory roles. While there is no requirement in the *Act* that the communications be among supervisory staff, there is a requirement that the communications are about employment or labour relations matters in which the institution has an interest as employer. I discuss this further under Part 3, below.

Part 3: labour relations or employment-related matters in which the university has an interest

[37] To satisfy part 3 of the section 65(6)3 test, the university must establish that the meetings, consultations, discussions or communications that took place were about labour relations or employment-related matters in which it has an interest.

[38] 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

[10] While the university did not indicate the nature of the labour issues involving the appellant in its representations, from the content of the records it is evident that a number of labour relations or employment-related matters arose involving the appellant, including issues with her colleagues, students and ongoing relationship with university administration.

restricted to employer-employee relationships.[11]

[39] 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.[12]

[40] The phrase "labour relations or employment-related matters" in section 65(6)3 has been found to apply in the context of:

- a job competition;[13]
- an employee's dismissal;[14]
- a grievance under a collective agreement;[15]
- disciplinary proceedings under the *Police Services Act;*[16]
- a "voluntary exit program";[17]
- a review of "workload and working relationships";[18] and
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act*.[19]

[41] The phrase "labour relations or employment-related matters" has been found *not* to apply in the context of:

- an organizational or operational review;[20] and
- litigation in which the institution may be found vicariously liable for the actions of its employee.[21]

[42] Previous orders of the IPC and court decisions, including the decision in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*

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[11] *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.
[12] Order PO-2157.
[13] Orders M-830 and PO-2123.
[14] Order MO-1654-I.
[15] Orders M-832 and PO-1769.
[16] Order MO-1433-F.
[17] Order M-1074.
[18] Order PO-2057.
[19] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.
[20] Orders M-941 and P-1369.
[21] Orders PO-1722, PO-1905 and *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

(2001),[22] have found that an institution's disciplinary actions involving an employee are employment-related matters. In addition, a number of previous orders have established that grievances initiated pursuant to the procedures contained in the collective agreement are, by their very nature, about labour relations.

[43] With respect to the scope of the exclusionary provision, Swinton J., for a unanimous Divisional Court, wrote in *Ontario (Ministry of Correctional Services) v. Goodis* (2008),[23] that:

> In *Reynolds v. Ontario (Information and Privacy Commissioner)*, [2006] O.J. No. 4356, this Court applied the equivalent to s. 65(6) found in municipal freedom of information legislation to documents compiled by the Honourable Coulter Osborne while inquiring into the conduct of the City of Toronto in selecting a proposal to develop Union Station. The records he compiled in interviewing Ms. Reynolds, a former employee, were excluded from the *Act*, as Ms. Osborne was carrying out a kind of performance review, which was an employment-related exercise that led to her dismissal (at para. 66). At para 60, Lane J. stated,
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> > It seems probable that the intention of the amendment was to protect the interests of institutions by removing public right of access to certain records relating to their relations with their own workforce.

[44] Cautioning that there is no general proposition that all records pertaining to employee conduct are excluded from the *Act*, even if they are in files pertaining to civil litigation or complaints by a third party, Swinton J. also pointed out that "[w]hether or not a particular record is 'employment related' will turn on an examination of the particular document."

[45] I agree with the analysis set out above and adopt it for the purpose of making my determinations in this appeal.

Representations

[46] The university refers to the definitions of labour relations and employment-related matters set out in Orders PO-2157 and MO-2880 that: "employment-related matters refer to human resources or staff relations issues arising from the relationship between an employee and employees that do not arise out of a collective bargaining relationship" and "labour relations matters are distinct from 'employment-related' matters, which may cover human resources or staff relationship issues that do not arise out of a collective bargaining relationship." The university submits that the adjudicator in Order PO-2157 found that section 65(6)3 applies in the context of a review of

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[22] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.

[23] *Ontario (Ministry of Correctional Services) v. Goodis* (2008), cited above.

workload and working relationships, which qualify as "labour relations" and "employment related matters." It also submits that Orders PO-2658 and PO-2982 found that records relating to an investigation of complaints filed and a review of decisions made fall within section 65(6)3.

[47] The appellant submits that the university's response that all the records relate to employment is unsatisfactory. She submits that while the university claims to have excluded records related to a complaints investigation, there have been no formal complaint or grievance filed against her by any party at the university since the start of her employment in 2006. She submits that excluding records on the basis that they relate to investigating complaints that never formally materialized is a wholly unsatisfactory explanation.

[48] The appellant submits[24] that there is no obvious involvement of individuals from human resources or her faculty association to clearly indicate that these issues are related to labour relations or employment.

[49] In reply, the university submits that there is no requirement for a "formal" process as suggested by the appellant. It submits that previous IPC orders define "employment-related" as "human resources or staff relations issues arising from the relationship between an employee and employees that do not arise out of a collective bargaining relationship." The university submits that this accepted definition is broader that the one submitted by the appellant. The university submits that all of the records relate to human resources and staff relations issues and were created by employees of the institution who were acting on behalf of the university within the scope of their employment.

Analysis and finding

[50] After reviewing the records at issue, I find that the bulk of them relate to the university's own employees and involve employment-related matters in which the university has an interest.

[51] The records at issue consist of email communications, hand written notes, typed notes and letters, including draft letters involving university employees, students, the dean, the department chair, human resources personnel and, in some circumstances, university legal counsel. The subject matter of all of them relates to matters concerned with the appellant's employment with the university.

[52] As stated, the terms "labour relations" and "employment-related" have different meanings. "Labour relations" specifically refers to matters arising from the collective bargaining relationship between an institution and its employees, as governed by

[24] This submission appears where the appellant addresses the university's claim that section 13(1) (advice or recommendations) applies to exempt certain information (for which it also claims the exclusion in section 65(6)).

collective bargaining legislation or analogous relationships. Although the appellant was, at the time of the creation of these records, a WLUFA member, I have not been provided with any specific evidence to confirm that these records relate to any formal grievances filed under the collective agreement between the university and the WLUFA. However, even if it can be argued that the subject matter of these records does not arise out of the collective bargaining relationship, and therefore cannot be said to relate to "labour relations" within the meaning of section 65(6), in that case the information at issue can clearly be described as relating to "employment-related matters" as it addresses human resources and staff relations matters arising from the relationship between an employee and employer. Accordingly, I am satisfied that the type of information at issue can, depending on the context, be described as either relating to labour relations or employment-related matters and therefore would fall squarely within one of the two terms contemplated in the exclusion at section 65(6)3.

[53] For the third component of section 65(6)3 to be met, the university must "have an interest", as employer, in these labour relations or employment-related records. The phrase "in which the institution has an interest" means more than a "mere curiosity or concern", and refers to matters involving the institution's own workforce.[25]

[54] Based on my review of the withheld information in the relevant records, I find that they clearly relate to the university's management of its own workforce. I find that the records at issue relate to a targeted period of time when it appears that various employment related matters of concern to the university regarding the appellant were occurring. These matters of concern are documented in the records and include issues regarding the workload, working relationships and work responsibilities of the appellant.

[55] I accept that the university has more than a mere curiosity or concern with respect to these matters. The university's interest in these matters was as the appellant's employer. Accordingly, I am satisfied that the university has an interest in these records as contemplated by the third part of the test for the application of section 65(6)3.

[56] I find that all three parts of the test for the application of section 65(6)3 has been met for most of the records claimed to be excluded. It is clear that all of these records were collected, prepared, maintained or used by the university in relation to meetings, consultations, discussions or communications about employment-related matters in which it has an interest as employer. Additionally, I find that none of the exceptions to the exclusion set out in section 65(7) are relevant in the circumstances of this appeal. Accordingly, as the records are excluded under section 65(6)3, I have no jurisdiction to make an order for their disclosure, although the university may, as it has in part, choose to disclose the records outside of the scheme of the *Act*.

[57] For the remainder of the records, I find that they do not relate to an employment

[25] *Ontario (Solicitor General),* cited above.

related matter in which the university has an interest. These records include emails to and from the appellant concerning a number of seemingly routine professorial matters and appear unrelated to any employment-related matters in which the university has an interest. Accordingly, I find that these records not excluded under section 65(6).

[58] For the remaining information I have found not excluded under section 65(6)3, I also find that these records are also not excluded under section 65(6)1 for similar reasons. I find that the university has not established that the records relate to the appellant's employment. As I noted, they are routine records about the university's mandate as a teaching institution, and they do not relate to 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.

[59] As the university has claimed the personal privacy exemptions in sections 21(1) or 49(b) for this information as well, I will consider the appellant's access to them below under Issues D and E. Before doing so, there are other claims the university made to withhold information, which I address under Issues B and C.

Issue B: Are the records at pages 1, 2, 25, 31, and 33-38 of Group 13, Faculty of Arts (Phase Two) "in the custody" or "under the control" of the institution under section 10(1)?

[60] The university withheld some records located during its searches, on the basis that those records are not in its custody or control. Section 10(1) reads, in part:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,[26]

[61] Under section 10(1), the *Act* applies only to records that are in the custody or under the control of an institution.

[62] A record will be subject to the *Act* if it is in the custody or under the control of an institution; it need not be both.[27]

[63] A finding that a record is in the custody or under the control of an institution does not necessarily mean that a requester will be provided access to it.[28] A record within an institution's custody or control may be excluded from the application of the *Act* under one of the provisions in section 65, or may be subject to a mandatory or discretionary exemption (found at sections 12 through 22 and section 49).

[64] The courts and the IPC have applied a broad and liberal approach to the custody

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[26] Section 10 then sets out the exceptions to the right of access. I address the personal privacy exemption later in this order.
[27] Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).
[28] Order PO-2836.

or control question.[29]

[65] Based on the above approach, the IPC has developed a list of factors to consider in determining whether or not a record is in the custody or control of an institution, as follows.[30] The list is not intended to be exhaustive. Some of the listed factors may not apply in a specific case, while other unlisted factors may apply.

- Was the record created by an officer or employee of the institution?[31]
- What use did the creator intend to make of the record?[32]
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?[33]
- Is the activity in question a "core", "central" or "basic" function of the institution?[34]
- Does the content of the record relate to the institution's mandate and functions?[35]
- Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?[36]
- If the institution does have possession of the record, is it more than "bare possession"?[37]
- If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?[38]
- Does the institution have a right to possession of the record?[39]

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[29] *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072; *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.); and Order MO-1251.
[30] Orders 120, MO-1251, PO-2306 and PO-2683.
[31] Order 120.
[32] Orders 120 and P-239.
[33] Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above.
[34] Order P-912.
[35] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above; *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.); and Orders 120 and P-239.
[36] Orders 120 and P-239.
[37] Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.
[38] Orders 120 and P-239.

- Does the institution have the authority to regulate the record's content, use and disposal?[40]
- Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?[41]
- To what extent has the institution relied upon the record?[42]
- How closely is the record integrated with other records held by the institution?[43]
- What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances?[44]

[66] In determining whether records are in the "custody or control" of an institution, the above factors must be considered contextually in light of the purpose of the legislation.[45]

[67] In *Canada (Information Commissioner) v. Canada (Minister of National Defence)*,[46] the Supreme Court of Canada adopted the following two-part test on the question of whether an institution has control of records that are not in its physical possession:

1. Do the contents of the document relate to a departmental matter?
2. Could the government institution reasonably expect to obtain a copy of the document upon request?

Representations

[68] The university submits that it carefully considered the issue of custody or control in providing instructions to its employees involved in the search for records relating the appellant's request. It submits that this was particularly important for the search for responsive records by faculty members who may have records that are of a personal or purely academic nature. The university pointed to the following three factors that were communicated to its faculty and staff regarding their search:

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[39] Orders 120 and P-239.
[40] Orders 120 and P-239.
[41] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.
[42] *ibid*; Orders 120 and P-239.
[43] Orders 120 and P-239.
[44] Order MO-1251.
[45] *City of Ottawa v. Ontario*, cited above.
[46] 2011 SCC 25, [2011] 2 SCR 306.

1. records or portions of records in the possession of [a faculty] member that relate to personal matters or activities that are wholly unrelated to the university's mandate, are not in the university's custody or control;

2. records relating to teaching or research are likely to be impacted by academic freedom, and would only be in the university's custody and/or control if they would be accessible to it by custom or practice, taking academic freedom into account;

3. administrative records are prima facie in the university's custody and control, but would not be if they are unavailable to the university by custom or practice, taking academic freedom into account.

[69] The university submits that its employees were also referred to their union for further support and assistance on this matter.

[70] The university refers to Order PO-3009-F where the adjudicator finds that "records held by professors that relate to their status as members of the APUO [the University of Ottawa's faculty association], or relating to the business and affairs of the APUO, would generally be outside the university's custody and control for the reasons articulated in the *City of Ottawa.*"[47]

[71] The university submits that after it received the records from its employees, it determined that the records at pages 2, 25, 31, and 33-38 of group 13 were not within its custody or control under the *Act*.

[72] The appellant submits that she is a member of the same university department as the individuals who have created the records in question. The appellant submits that she is mentioned in the records in question, and has been mentioned subsequently with respect to these matters, which have been items for discussion at department meetings. The appellant submits that she did not receive minutes from the department meeting where these discussions were held, despite that the appellant was an obvious topic of discussion. The appellant submits that her access to information request has been an item on the agenda of a department meeting as well as the annual general meeting, held in August 2017. The appellant submits that the university did not provide the records from these meetings and she had to specifically request them from the department through the dean.

[73] The appellant submits that the records in question were matters discussed in department meetings and hence, are in the custody and control of the university.

[74] In its reply, the university repeats that it considered Order PO-3009-F for matters of custody or control in relation to its faculty association. The university submits that it is unsure why the appellant believes that the subject of these records were discussed in

[47] *City of Ottawa v. Ontario*, cited above.

a department meeting in August 2017, given that the request and its response to it all occurred on or before May 2017.

[75] As noted, the appellant did not respond to the university's reply representations although she was provided with an opportunity to do so.

Analysis and finding

[76] Having reviewed the records along with the parties' representations, I accept that the records are not within the university's custody or control, for the following reasons.

[77] As noted, the IPC has developed a non-exhaustive list of factors to consider in determining whether or not a record is in the custody or control of an institution. I am to consider these factors contextually in light of the purpose of the legislation.

[78] Records 2, 25, 31, and 33-38 of group 13 are all emails between professors at the university.

[79] The university's representations, and the records themselves, establish that it has bare possession of the records and nothing more. Absent some right to deal with the records and some responsibility for their care and protection, the university's possession of these records amounts to bare possession only.[48] I accept that the university has no authority over the creation, content, use and disposal of these records, as the records consist of a string of emails between university employees concerning union business that does not relate to the university's mandate and functions. The IPC and the courts have repeatedly found that private communications about matters unrelated to an employee's work for an institution do not become records within the custody or under the control of that institution simply because the communications went through a work email address.[49]

[80] Further, after reviewing Order PO-3009-F referenced in the university's representations, I agree with the finding that records held by professors that relate to their status as members of a professional union, or relating to the business and affairs of that union, would generally be outside the university's custody and control for the reasons articulated in *City of Ottawa v. Ontario*. There is no evidence before me that the records at issue are held by professors who represent university administration in connection with union matters which, as noted in Order PO-3009-F, would be an exception to this finding. After reviewing the records, I find that they relate to professors' status as members of a union and relate to business of the union.

[81] In her representations, the appellant appears to submit that since she is mentioned or is the topic of the records in question she should be entitled to access

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[48] Order P-239.

[49] *City of Ottawa v. Ontario,* cited above.

them. In my view, she does not properly address why the university has custody or control over these records. She does not address the university's main submission that these records concern issues not related to the university's mandate or functions, and its reliance on Order PO-3009-F.

[82] For these reasons, I find that the records are not in the custody or under the control of the university and are, therefore, not subject to the *Act*. For this reason, I will uphold the university's decision to withhold these records and will not be considering them further in this decision.

Issue C: What is the scope of the request?

[83] The university claims that certain records located are not within the scope of the request including page 18 at Phase 2, Office of the Registrar; pages 52-55 and 137 at Faculty of Arts, Group 1; pages 1, 30, 44 and 45 at Faculty of Arts, Group 2; pages 403-417 of Faculty of Arts, Group 12; and, pages 2, 25, 31 and 33-38 of Faculty of Arts, Group 13.

[84] Since I have found that the records at pages 2, 25, 31 and 33-38 of Faculty of Arts, Group 13 are not within the custody or control of the university, I will not consider whether these records are within the scope of the request.

[85] 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).

[86] 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.[50]

[87] To be considered responsive to the request, records must "reasonably relate" to the request.[51]

Representations

[88] The university submits that employees most familiar with the area and account where the records were held were asked to perform a search for responsive records. It notes that these individuals were provided with the wording of the appellant's request and were instructed to direct any questions about the search to the privacy office. It submits that for email records, there were instances of "mixed records" which contained information completely unrelated to the appellant's request, either in the same email, or as part of the email chain. The university states that where the information was not responsive but could provide clarity and context in the email chains, it was disclosed to the appellant. The university submits that the unresponsive information that it deemed confidential was also withheld as not responsive to the request.

[89] The university believed that the wording of the appellant's request, which requested all records referencing or directly referring to the appellant, was sufficiently clear for a determination of the responsiveness of a record.

[90] The appellant did not address this issue in her representations.

Finding

[91] I have reviewed the various severances in the records which the university claims are not responsive to the appellant's request. This consists of parts of an email and entire emails severed from a chain. I agree with the university that there are instances where information completely unrelated to the access request was either mixed into the same email or appear as an entire email as part of an email chain. In reviewing this information, I find that it is not reasonably related to the request and as a result is not within the scope of the appellant's request. I will therefore uphold the university's decision to withhold this information and will not consider it further.

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

[92] Under the *Act,* different exemptions may apply depending on whether a record at issue contains or does not contain the personal information of the requester.[52] Where the records contain the requester's own personal information, access to the records is addressed under Part II of the *Act* and the discretionary exemptions at section 49 may

[50] Orders P-134 and P-880.
[51] Orders P-880 and PO-2661.
[52] Order M-352.

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 addressed under Part I of the *Act* and the mandatory exemption at section 21(1) may apply.

[93] Accordingly, 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,
>
> (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 if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[94] 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.[53]

[95] Section 2(2) also relates to the definition of personal information. These sections state:

> (2.1) 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.
>
> (2.2) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[96] 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.[54]

[97] 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.[55]

[98] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[56]

[99] As a result of my finding that section 65(6)3 applies to exclude much of the information at issue, the remaining relevant records at issue where the university has claimed the personal privacy exclusion are the following:

- Office of the Registrar pages 10, 15 (worksheet), 19 and 20
- Faculty of Arts
    - Group 1 page 113
    - Group 4 pages 11-18
    - Group 8 pages 1, 2 and 25
    - Group 9 pages 36, 39 and 51-79

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

  - Group 10 pages 1 and 3-5
  - Group 11 pages 1-3
  - Group 12 pages 1-15, 34, 40, 41, 163, 218, 240, 330, 338, 342-348, 351, 365 and 418;
  - Electronic File 2015 Faculty List page 1
- Communications Group 1 Email Records pages 14-16
- Phase 4, pages 11, 12, 25, 29, 35, 36 and 38.

[100] 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.[57]

[101] 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.[58]

[102] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[59]

[103] In its representations, the university submits that previous orders have found a range of student correspondence with university faculty and officials to be of an explicitly private and confidential nature and containing students' personal information within the meaning of paragraphs (f) and (h) of the definition of personal information section 2(1).[60] The university submits that this personal information was appropriately severed.

[104] In my review of the records that the university claims contain the personal information of third parties, I find that they contain information that qualifies as the personal information of these individuals including student and professor identification numbers, student names, education level, grades, gender and other personal information that is not employment related. I also find that some of the records are emails about the appellant written by students and constitutes their personal information mixed with the personal information of the appellant. I find this information qualifies as personal information under paragraphs (a), (b), (d) and (h) of the definition of that term in section 2(1) of the *Act*. Certain records, emails from professors, includes information relating to them that is not professional information. This includes

[57] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[58] Orders P-1409, R-980015, PO-2225 and MO-2344.
[59] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, cited above.
[60] PO-3103-F and PO-3628.

information about their families. I find that this information is personal information for the purposes of section 2(1).

[105] Finally, I find that all the remaining records contain the appellant's personal information and, therefore, I will next address whether this information is exempt under section 49(b).

Issue E: Does the discretionary exemption at section 49(b) apply to the withheld information?

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

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

[108] Sections 21(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy. If the information fits within any of exceptions in sections 21(1)(a) to (e), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b).

[109] Sections 21(2) and (3) also help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 49(b). Also, section 21(4) lists situations that would not be an unjustified invasion of personal privacy. If any of paragraphs (a) to (d) of section 21(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b).

[110] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 49(b), the IPC will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties.[61]

[111] If any of sections 21(3)(a) to (h) 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.[62] The list of factors under section 21(2) is not exhaustive. The institution must also consider any

[61] Order MO-2954.
[62] Order P-239.

circumstances that are relevant, even if they are not listed under section 21(2).[63]

Representations

[112] The university submits that it considered the factors in section 21(2) and presumptions in section 21(3) in determining whether disclosure of the personal information would constitute an unjustified invasion of privacy.

[113] The university submits that students have a reasonable expectation that the university will not release their personal information except in accordance with the *Act*. It submits that student communication with university officials has been supplied in confidence and to release the records, or parts thereof, would result in an invasion of personal privacy of these individuals. Accordingly, the university submits that the factor in section 21(2)(h) should apply to this personal information.

[114] The university submits that disclosure of some of the personal information would reveal something of a personal nature about an individual including their medical history and/or employment or educational history. It therefore submits that the presumptions at section 21(3)(a) (medical history) and 21(3)(d) (employment or educational history) are relevant.

[115] In addition, the university submits that it considered the factors against disclosure in section 21(2) and determined that 21(2)(f) (highly sensitive), 21(2)(h) (supplied in confidence) and 21(2)(i) (unfairly damage reputation) were applicable and that disclosure of the personal information would constitute an unjustified invasion of personal privacy.

[116] The appellant does not address the presumptions in section 21(3) or the factors favouring disclosure in section 21(2). She submits the she returned to work at the university after medical leave and requested medical accommodations from the university. She submits that prior to her return, an accommodation plan was created in co-operation with the university, her medical experts, and respective legal representatives. She submits given those circumstances she wanted to be fully informed about the workplace itself, including the climate in the workplace and possible threats to workplace safety. The appellant further submits that she would like to know about the concerns about her that were raised in the records that she has already received access to.

Analysis and finding

The section 21(3) presumptions

[117] The university has claimed that sections 21(3)(a) and (d) apply to the withheld personal information. These sections state:

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[63] Order P-99.

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
>
> (d) relates to employment or educational history;

[118] The university submits that the presumption at section 21(3)(a) applies because the withheld information would reveal the physical and/or medical conditions of individuals other than the appellant.

[119] The only information I find section 21(3)(a) applies to the personal information in the email partially withheld at Office of the Registrar, page 19 and 20. I find that disclosure of the severed personal information would reveal the physical and/or medical conditions of the employees to whom it relates. As a result, section 21(3)(a) applies to the email located Office of the Registrar, pages 19 and 20.

[120] The university also submits that the presumption at section 21(3)(d) applies to records but does not provide specific representations addressing this presumption.

[121] Past orders of the IPC have addressed the application of the presumption against disclosure in section 21(3)(d) and have determined that, to qualify as "employment or educational history," the information must contain some significant part of the history of the person's employment or education. What is or is not significant must be determined based on the facts of each case.[64]

[122] More specifically, past orders have considered records held by institutions that contain information about students. In Order PO-3819, for example, the adjudicator found that the records before her qualified as students' educational history because they included information about, among other things, the students' course enrolment and academic performance. In Order MO-2467, the adjudicator found that attendance registers of students attending a particular school within a particular timeframe qualified as educational history falling within the section 14(3)(d) (the municipal equivalent of section 21(3)(d)) presumption because they included the students' grade, as well as their marks and attendance records.

[123] Having reviewed the remaining records that the university has claimed exempt under section 49(b), I agree that the presumption at section 21(3)(d) applies to much of the withheld personal information. I find that disclosure of the withheld personal information in these records would reveal the employment or educational history of an affected party and that their disclosure would be a presumed unjustified invasion of personal privacy under section 21(3)(d).

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[64] Order M-609, MO-1343.

[124] I will now turn to the section 21(2) factors weighing for and against disclosure.

The section 21(2) factors

[125] 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.[65] Some of the factors listed in section 21(2), if present, weigh in favour of disclosure, while others weigh in favour of non-disclosure. The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2).[66]

[126] The university identified the factors in sections 21(2)(f), (h) and (i) that might apply to favour non-disclosure of the personal information. The appellant does not refer to any of the listed factors but she refers to her desire to ensure that her workplace is safe which I will consider as an unlisted factor to support disclosure.

[127] Sections 21(2)(f), (h) and (i) state:

> (2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (f) the personal information is highly sensitive;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
>
> (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

Unlisted factor that weighs in favour of disclosure

[128] As noted, the appellant submits that as a person who requires medical accommodation at her workplace, she is requesting access to the personal information to assure herself that the workplace is safe and accessible. In my review of the remaining personal information at issue, I do not give this factor any weight. In my view, the personal information at issue would not assist the appellant in ensuring that her workplace is safe and accessible.

Factors that weigh in favour of non-disclosure

[129] In its representations, the university that section 21(2)(f),(h) and (i) applied in the circumstances of this appeal.

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[65] Order P-239.
[66] Order P-99.

[130] In my review of the remaining personal information in dispute, I do not find that the factors at section 21(2)(f) and (i) apply because the personal information is neither highly sensitive nor would disclosure unfairly damage the reputation of any person referred to in the record. However, I agree that section 21(2)(h) is relevant in this appeal because the information would have been provided to the institution in confidence. Based on the nature of the information, I agree that the individual who supplied their personal information would have supplied it with the understanding that the university would not disclose their information. As a result, I give this factor significant weight.

[131] I have found that the presumption in section 21(3)(d) and the factor in section 21(2)(h) are relevant to my determination of whether disclosure of the personal information in the records at issue would be an unjustified invasion of personal privacy. Before I make a finding on section 49(b), I will consider whether the personal information would still be exempt given the absurd result principle.

Absurd result

[132] I must also consider whether the absurd result principle applies in the circumstances of this appeal. According to the principle, whether or not the factors or circumstances in section 21(2) or the presumptions in section 21(3) apply, where the appellant originally supplied the information, or the appellant is otherwise aware of it, the information may be found not exempt under section 21(1), because to find otherwise would be absurd and inconsistent with the purpose of the exemption.[67] One of the grounds upon which the absurd result principle has been applied in previous orders is where the information is clearly within the appellant's knowledge.[68]

[133] The university does not address this principle in is representations, nor does the appellant.

[134] In my review of some of the severed personal information, I am of the view that the absurd result principle applies because the personal information was originally supplied by or to the appellant. In particular, the personal information is contained in emails that the appellant herself wrote or received. In my view, withholding this information which the appellant is already aware of would be absurd and inconsistent with the purpose of the exemption. In addition, the university has not provided a reasonable explanation as to why the appellant's own emails including this personal information should be withheld from her. I find that the absurd result principle applies to the personal information found in the following records:

- Office of the Registrar, page 10, which is an email from the appellant
- Faculty of Arts, Group 1, page 113, which is an email from the appellant

[67] Orders M-444 and MO-1323.
[68] Orders MO-1196, PO-1679, MO-1755 and PO-2679.

- Faculty of Arts, Group 4, page 14 is a recommendation written by the appellant
- Faculty of Arts, Group 8, pages 1 and 2 is an email exchange between the appellant and another professor; and page 25 which is an email from the appellant
- Faculty of Arts, Group 9, page 36, list of international student names sent to the appellant
- Faculty of Arts, Group 9, pages 51-79 which is severed information in a number of emails from and to the appellant
- Faculty of Arts, Group 10, page 1, 3-5, emails from and to the appellant
- Faculty of Arts, Group 11, pages 1-3, information in emails sent to the appellant
- Faculty of Arts, Group 12, pages 1-15, 34 any email from and to the appellant
- Faculty of Arts, Group 12, page 330, 338, 342-348, any email where the appellant is copied or the email is sent to or from the appellant
- Communications Group 1, page 14, 15, duplicated information of emails to the appellant
- Phase 4, pages 11, 12, 29, 35 and 36, emails to and from the appellant.

[135] I will order the university to disclose this information to the appellant.

[136] For the remaining withheld personal information, given my findings above on the application of section 21(3)(d) and 21(2)(h) and the fact that there are no factors favouring disclosure of the personal information, I find that the information is exempt under section 49(b) subject to my finding on the institution's exercise of discretion.

Issue F: Did the institution exercise its discretion under section 49(b)? if so should the IPC uphold the exercise of discretion?

[137] The section 49(b) exemption is discretionary and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[138] 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
- it takes into account irrelevant considerations

- it fails to take into account relevant considerations.

[139] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.[69] The IPC may not, however, substitute its own discretion for that of the institution.[70]

[140] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[71]

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

Representations

[141] The university submits that it took into consideration the right of an individual to

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[69] Order MO-1573.
[70] Section 54(2).
[71] Orders P-344 and MO-1573.

access their own records with the need for the protection of other individuals' personal information, and for the institution to maintain certain confidential information needed to conduct the business of the university. The university submits that it has, in good faith, released as many of the records, or portions of the records, that it believes is possible while balancing these competing needs. The university submits that it determined that disclosure of the information would constitute an unjustified invasion of the personal privacy of other individuals in exercising its discretion to exempt the records.

[142] The university submits that it disclosed extensive records to the appellant. It submits that it applied its discretion under section 49(b) carefully and in good faith and in accordance with the *Act* and case law interpreting these sections of the *Act*.

[143] The university submits that it took into consideration the purpose of the *Act*, that the requester was seeking her own personal information, whether the requester had a sympathetic or compelling need to receive the information and whether disclosure would increase public confidence in the operation of the university. The university submits that it is not in the practice of disclosing personal information about an individual to someone other than the individual to whom the personal information relates without consent. It submits that there is no sympathetic or compelling need for the appellant to receive the personal information of students or employees at issue in the records.

[144] The appellant did not specifically address the university's exercise of discretion in her representations. The appellant submits that the university may claim that it has acted in good faith by releasing a number of records, but she queries what content is in the numerous records that the university excluded and/or exempted. She submits that as a person who requires medical accommodation at her workplace, she is requesting access to the information required to assure her that her workplace is safe and accessible.

Finding

[145] I have considered the circumstances surrounding this appeal and the university's representations and I am satisfied that it has properly exercised it discretion with respect to section 49(b). I am satisfied that it did not exercise its discretion in bad faith or for an improper purpose. The university considered the purposes of the *Act* and has given due regard to the nature and sensitivity of the information in the specific circumstances of this appeal. Accordingly, I find that the university took relevant factors into account and I uphold its exercise of discretion in this appeal.

Issue G: Did the university conduct a reasonable search for records?

[146] 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.[72] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[147] 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.[73] To be responsive, a record must be "reasonably related" to the request.[74]

[148] 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.[75]

[149] 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.[76]

Representations

[150] The university provided an affidavit sworn by its coordinator: records management and privacy office (the coordinator), who was the university employee responsible for coordinating the search. The coordinator submits that after reviewing the request she considered the scope clear and that a reasonable search for all responsive records could be completed.

[151] The coordinator submits that a staggered release of the records was proposed in order to provide the appellant with records in a timely way without having to wait until all searches had been completed.

[152] The coordinator notes that upon receipt of the fee deposit, she contacted university employees who were specifically named in the request or who worked in departments and units subject to the request and notified them about the request and their need to search for responsive records. The coordinator notes that she contacted faculty and staff by email in which she provided the wording of the request and in an attachment provided detailed instructions on how to perform the search. The coordinator notes that the communication included technical information about performing a search in the university's email archive system.

[153] The coordinator submits that she and the university's general counsel also met with several faculty members to answer questions about the search. The coordinator

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[72] Orders P-85, P-221 and PO-1954-I.
[73] Orders P-624 and PO-2559.
[74] Order PO-2554.
[75] Orders M-909, PO-2469 and PO-2592.
[76] Order MO-2185.

notes that in some cases clarification was sought from the record holders as to the nature of the records to confirm that the record was a responsive record in the university's custody or control, or to request the attachment associated with an email if it was not provided.

[154] The coordinator submits that staff and faculty who completed a search provided confirmation by completing the search form provided to them or through an email that confirmed that they had completed a search for responsive records in accordance the with coordinator's request. The coordinator affirms that from her review of these communications, university staff and faculty understood their responsibilities and made reasonable efforts to complete a search for responsive records.

[155] The coordinator submits that the records provided by faculty and staff were consistent with what she expected following a review of records for the fee estimate. Given the nature of an employee's position, she submits that she expected that some employees would have no responsive records as they would have had no interactions with the appellant in the course of their job during the responsive time period.

[156] The coordinator submits that all records were reviewed and consideration was given as to whether it was possible that any responsive records were not provided. For example, she submits that email communications were reviewed to consider if attachments were missing. The coordinator submits that based on the search that was completed, and feedback received from the numerous employees who searched for records, the university is not aware of any responsive records found during the search that were not in its possession.

[157] The coordinator affirms that based on the instructions provided and the range of records located through the search, she believes a reasonable search was completed to locate responsive records within the university's custody or control.

[158] The appellant did not address the university's search in her representations and did not provide the basis for her belief that additional responsive records should exist.

Finding

[159] I find that the university has provided sufficient evidence to show that it made a reasonable effort to identify and locate responsive records. The university's searches were coordinated by an experienced employee, the coordinator of records management and privacy office. The searches were conducted by staff members who had detailed instructions as to the searches to be conducted. Given that records were located and the coordinator reviewed the responsive records identified in order to determine if records were missed, I am satisfied that the university's search for responsive records was reasonable in the circumstances. As noted, the university is not required to prove with absolute certainty that further records do not exist.

[160] 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.[77] As the appellant did not address this issue in her representations, it is my view that she has not provided a reasonable basis for me to conclude that further responsive records exist. As a result, I find that the university's search was reasonable.

ORDER:

1. I find that section 65(6)3 applies to exclude most of the information from the *Act*.
2. I uphold the university's decision regarding the records that are not within its custody or control.
3. I uphold the university's decision regarding the scope of the appeal.
4. I uphold the university's decision regarding section 49(b), in part, and order it to disclose to the appellant the information in the records that are attached to this order by January 27, 2022. To be clear, only the information that is not highlighted should be disclosed.
5. I find that the university's search was reasonable.
6. I reserve the right to require the university to provide me with a copy of the information disclosed in Order provision 4.

Original Signed by: December 23, 2021

Alec Fadel
Adjudicator

[77] Order MO-2246.