Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4333

Appeal PA20-00198

McMaster University

December 23, 2022

Summary: The appellant submitted a 13-part access request to McMaster University (the university) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for specific records about him. In response, the university located 431 records and disclosed a substantial number of them to him. However, it decided to deny access to 151 records, mostly in full and some in part, under the discretionary exemption in section 49(a) (discretion to refuse requester's own information), read with sections 13(1) (advice and recommendations) and 19 (solicitor-client privilege) of the *Act*. The appellant appealed the university's decision to deny him access to those records and parts of records and also claimed that the public interest override in section 23 of the *Act* applied. In this order, the adjudicator finds that the records and parts of records that the university withheld from the appellant are exempt from disclosure under section 49(a), read with sections 13(1) and 19(a). In addition, he finds that the public interest override in section 23 does not apply. He upholds the university's access decision and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (definition of "personal information"), 13(1), 13(3), 19(a), 23, and 49(a).

Orders Considered: Orders PO-3686, PO-4013, PO-4323 and PO-4332.

OVERVIEW:

[1] The appellant was a student at McMaster University (the university) who sought accommodation for various matters from the university's Student Accessibility Services

(SAS), which provides academic accommodation assistance and related supports to students with disabilities. In March 2019, SAS denied the appellant's request for reassessment of an Accommodation Plan.[1]

[2] The university subsequently claimed that the appellant's behavior in response to this denial led it to impose an "involuntary withdrawal on compassionate grounds" on him under its *Code of Student Rights and Responsibilities*, and to declare him a "*persona non grata*."[2] The appellant filed a complaint against the university with the Human Rights Tribunal of Ontario (HRTO), alleging that it had discriminated against him on the basis of prohibited grounds in the *Ontario Human Rights Code*.[3]

[3] The appellant submitted a 13-part access request to the university under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for all emails, memos, voice mails, personal opinions, personal correspondence and personal notes of a number of university staff, regarding various matters relating to him. He noted a general date range for the responsive records, of April 1, 2019 to January 11, 2020.

[4] In response, the university located records that were responsive to his 13-part access request and issued an access decision to him. The decision stated that the university had located 431 records, totaling 1,498 pages. It decided to grant him access to 277 records in full, totaling 854 pages and three records in part, totaling 14 pages.

[5] The university denied access to the remaining records, mostly in full and some in part, under section 49(a) (discretion to refuse requester's own information), read with sections 19(a) and (c) (solicitor-client privilege) of the *Act*. In addition, it denied access to parts of five records under section 49(a), read with section 13(1) (advice and recommendations), and parts of three records under the discretionary exemption in section 49(b) (personal privacy) that contain the personal information of individuals other than the appellant. Finally, it denied access to information relating to several third parties in parts of three records under the mandatory exemption in section 17(1) (third party information).

[6] The appellant appealed the university's decision to the Information and Privacy Commissioner of Ontario (IPC), which assigned a mediator to assist the parties in resolving the issues in dispute.

[7] The appellant advised the mediator that he wished to pursue access to the records and parts of records withheld by the university, except for the information that the university had withheld under section 17(1). Consequently, the section 17(1) exemption and the three records containing the information of third parties are no longer at issue in this appeal. The appellant also claimed that the public interest override in section 23 of the *Act* applied to the records and parts of records withheld by

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[1] As summarized in Order PO-4013.
[2] *Ibid*.
[3] R.S.O. 1990, c. H.19.

the university.

[8] The appellant also claimed that a number of pages of the records that the university disclosed to him contain handwriting that is illegible. In response, the university reviewed the pages identified by the appellant as illegible and disclosed new copies of five pages.

[9] This appeal was not resolved during mediation and was moved to adjudication, where an adjudicator may conduct an inquiry to review an institution's access decision.[4] The adjudicator initially assigned to this appeal sought and received representations on the issues to be resolved from both the university and the appellant.

[10] This appeal was subsequently transferred to me to continue the inquiry. I invited the university to respond to the appellant's representations. In response, I received reply representations from the university.

[11] In its representations, the university states that it was withdrawing its reliance on section 49(a), read with section 13(1) to withhold records, except for record 73. It further stated that it was withdrawing its reliance on section 49(a), read with section 19 for record 73. Consequently, the only exemption claim at issue for record 73 is section 49(a), read with section 13(1).

[12] In this order, I find that:

- the records contain the appellant's "personal information," as that term is defined in section 2(1) of the *Act*,
- the records that the university withheld in full and in part are exempt from disclosure under section 49(a), read with section 19(a) of the *Act*,
- one record (record 73) is exempt from disclosure under section 49(a), read with section 13(1),
- the university exercised its discretion under section 49(a) and did so properly in deciding to withhold the records and parts of records from the appellant, and
- the public interest override in section 23 of the *Act* does not apply.

[13] In addition, I decide to exercise my discretion not to consider the constitutional question raised by the appellant after the applicable 35-day time limit set out in section 3 of *Practice Direction Number 9*.

[14] I uphold the university's access decision and dismiss the appeal.

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[4] Neither the section 49(b) exemption nor the appellant's claim that the handwriting in some records was illegible were identified as issues remaining in dispute in the mediator's report. Consequently, it appears these issues were taken off the table during mediation and will not be addressed further in this appeal.

RECORDS:

[15] There are 151 records (640 pages) remaining at issue in this appeal, which are mostly emails between university staff about the appellant, but these emails also include notes and draft correspondence. They are summarized in the index of records that the university provided to the appellant and the IPC.[5]

ISSUES:

A. Do the records contain the appellant's "personal information" as defined in section 2(1) of the *Act*?

B. Does the discretionary exemption at section 49(a) of the *Act*, allowing an institution to refuse access to a requester's own personal information, read with the sections 19(a) and (c) exemptions for solicitor-client privilege, apply to the information at issue?

C. Does the discretionary exemption at section 49(a), read with the section 13(1) exemption (advice or recommendations), apply to the information at issue?

D. Did the university exercise its discretion under section 49(a)? If so, should the IPC uphold the university's exercise of discretion?

E. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 49(a) exemption, read with section 13(1)?

DISCUSSION:

A. Do the records contain the appellant's "personal information" as defined in section 2(1) of the *Act*?

[16] The discretionary exemption at section 49(a) of the *Act* can only apply if the records at issue contain the requester's (appellant's) personal information.[6]

[17] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual."

[18] "Recorded information" is information recorded in any format, such as paper records, electronic records, digital photographs, videos, or maps.[7]

[19] Section 2(1) of the *Act* gives a list of examples of personal information:

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[5] Minus the records that were taken off the table during mediation.
[6] The relevant exemptions to consider for general access requests are found at sections 12-22.
[7] See the definition of "record" in section 2(1).

> "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.

[20] The list of examples of personal information under section 2(1) is not a complete list. This means that other kinds of information could also be "personal information."[8]

[21] Information is about an "identifiable individual" if it is reasonable to expect that an individual can be identified from the information either by itself or if combined with other information.[9]

[22] In their representations, both the university and the appellant agree that the records at issue contain the appellant's "personal information," as that term is defined in section 2(1) of the *Act*.

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[8] Order 11.

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

[23] I have examined the records at issue, which are emails between university staff about the appellant's accommodation requests. There does not appear to be any real dispute, and I find that the information about the appellant in these emails falls within a number of paragraphs of the definition of "personal information" in section 2(1), including paragraphs (b), (c), (g) and (h).

[24] In short, I find that the records contain the appellant's "personal information," as that term is defined in section 2(1) of the Act.

B. Does the discretionary exemption at section 49(a) of the *Act*, allowing an institution to refuse access to a requester's own personal information, read with the sections 19(a) and (c) exemptions for solicitor-client privilege, apply to the information at issue?

[25] 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 general right of access to one's own personal information.

[26] Section 49(a) of the *Act* reads:

> 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.

[27] The university denied access to the records remaining at issue, most in full but some in part, under section 49(a), read with sections 19(a) and (c). These records consist of emails, notes and draft correspondence.

Solicitor-client privilege

[28] Section 19 exempts certain records from disclosure, either because they are subject to solicitor-client privilege or because they were prepared by or for legal counsel for an institution. It states:

> 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.

[29] Section 19 contains three different exemptions, which the IPC has referred in previous decisions as making up two "branches."

[30] The first branch, found in section 19(a), ("subject to solicitor-client privilege") is based on common law. The second branch, found in sections 19(b) and (c), ("prepared by or for Crown counsel" or "prepared by or for counsel employed or retained by an educational institution or hospital") contains statutory privileges created by the *Act*.

[31] The institution must establish that at least one branch applies.

[32] I will start by determining whether the records that the university withheld from the appellant under section 19 are exempt from disclosure under the solicitor-client communication privilege aspect of the first branch found in section 19(a). In the discussion that follows, I find that all of them are. As such, it is not necessary for me to consider the litigation privilege aspect of the first branch, nor any of the second branch.

Branch 1: common law privilege

[33] At common law, solicitor-client privilege encompasses two types of privilege:

- solicitor-client communication privilege, and
- litigation privilege.

Common law solicitor-client communication privilege

[34] The rationale for the common law solicitor-client communication privilege is to ensure that a client may freely confide in their lawyer on a legal matter.[10] This privilege protects direct communications of a confidential nature between lawyer and client, or their agents or employees, made for the purpose of obtaining or giving legal advice.[11] The privilege covers not only the legal advice itself and the request for advice, but also communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given.[12]

[35] The privilege may also apply to the lawyer's working papers directly related to seeking, formulating or giving legal advice.[13]

[36] Confidentiality is an essential component of solicitor-client communication privilege. The institution must demonstrate that the communication was made in confidence, either expressly or by implication.[14] The privilege does not cover

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[10] Orders PO-2441, MO-2166 and MO-1925.
[11] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[12] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.); *Canada* (*Ministry of Public Safety and Emergency Preparedness*) *v. Canada* (*Information Commissioner*), 2013 FCA 104.
[13] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[14] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

communications between a lawyer and a party on the other side of a transaction.[15]

Waiver

[37] Under the common law, a client may waive solicitor-client privilege. An express waiver of privilege happens where the client knows of the existence of the privilege, and voluntarily demonstrates an intention to waive the privilege.[16]

[38] There may also be an implied waiver of solicitor-client privilege where fairness requires it, and where some form of voluntary conduct by the client supports a finding of an implied or objective intention to waive it.[17]

[39] Generally, disclosure to outsiders of privileged information is a waiver of privilege.[18] However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.[19]

Summary of university's representations

[40] The university groups the records at issue as follows:

- emails including legal counsel, which are solicitor-client privileged on the basis that they relate to the seeking and giving of legal advice,
- notes from meeting or in anticipation of meeting with counsel, which are solicitor-client privileged on the basis that they relate to the seeking and giving of legal advice,
- drafts of documentation/correspondence, which constitute work product and are solicitor-client privileged on the basis that they relate to the seeking and giving of legal advice,
- emails prepared with a view to seeking advice of or being delivered to counsel, which are solicitor-client privileged on the basis that they relate to the seeking and giving of legal advice, and
- emails internally conveying legal advice of counsel, which are solicitor-client privileged on the basis that they relate to the seeking and giving of legal advice.

[41] It further submits that all of the records form part of the confidential continuum of communications between the university and its legal counsel (both internal and

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[15] *Kitcener* (*City*) *v. Ontario* (*Information and Privacy Commissioner*), 2012 ONSC 3496 (Div. Ct.)
[16] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).
[17] *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.
[18] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario* (*Attorney General*) *v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).
[19] *General Accident Assurance Co. v. Chrusz,* cited above; Orders MO-1678 and PO-3167.

external) in relation to matters involving the appellant, and at no time has privilege been waived with respect to any record.

Summary of appellant's representations

[42] The appellant states that "legal advice" is a solicitor giving a legal opinion about an issue, and a recommended course of action based on legal considerations. He submits that it does not include information that was provided about a matter having legal implications where no legal opinion was expressed or where no course of action based on legal considerations was recommended. The fact that a lawyer was copied in an email or reviewed a record does not of itself mean that the record falls within the exemption.

[43] He submits that four criteria must be met:

- there must be written or oral communication,
- the communication must be of confidential nature,
- the communication must be between an institution and legal counsel, and
- the communication must be directly related to seeking, formulating, or giving legal advice.

[44] He further asserts that privilege does not attach to every communication between the lawyer and the university. He submits that just because a lawyer or lawyers participated in the discussion or were copied in an email is not sufficient to cover the communication under solicitor-client privilege. The communication must involve the provision of legal advice.

[45] He also states that while it is difficult for him to comment on the records because he has not seen them, he believes that not every record falls within solicitor-client privilege because it is unlikely that the university communicated and sought legal advice in every email. He submits that when the university's legal counsel advises on non-legal issues, it is not considered legal advice, and the exemption at section 19 does not apply.

[46] On the issue of waiver of solicitor-client privilege, the appellant claims that loss of privilege (waiver) occurred in respect of these records. He states that privilege can be lost through carelessness, which results in loss of confidentiality through disclosure of the information, and there does not have to be a clear intent to waive privilege before it can be lost. He submits that the wider dissemination of information and legal advice from lawyers would often cause such information to lose its confidential character.

[47] He further submits that when the university communicates legal advice provided

by its lawyers to other employees, they must have an interest in obtaining the information. If the distribution is to persons with no apparent need to know, then the IPC and a court are more likely to find that the necessary confidentiality was not maintained and that privilege has been waived.

Summary of university's reply representations

[48] In response to the appellant's representations, the university submits that there is no question that the records that it has identified and categorized in detail in its initial submissions are solicitor-client privileged. It submits that all of them arose within the context, continuum or framework of a solicitor-client relationship, and they cannot be severed without undermining the purposes and principles the privilege exists to serve.

[49] It further asserts that the courts have also confirmed that records are protected by solicitor-client privilege where they describe, comment on, share, discuss, or allow the reader to make accurate inferences about legal advice received or intended to be received, and that these principles are clearly engaged by the records at issue.

[50] On the issue of waiver, the university submits that it is a single institution, and that unity is not derogated from when its various employees, offices, faculties, members, research divisions, etc., must communicate and coordinate in order to (among other things) obtain legal advice. It submits that no waiver of privilege has occurred with respect to the records and parts of records at issue.

Analysis and findings

[51] I have considered the parties' representations and reviewed the records that the university has withheld in full and in part. For the reasons that follow, I find that these records and parts of records are exempt from disclosure under section 49(a), read with section 19(a) of the *Act*, because they fall within the solicitor-client communication privilege aspect of section 19(a).

[52] The records and parts of records withheld by the university are mostly emails between university staff, including legal counsel, that discuss various matters regarding the appellant, including his accommodation request, the university's decision to declare him a "*persona non grata*," complaints that he filed internally at the university, and his complaint to the HRTO. In some of these emails, university staff seek the advice of legal counsel, and in others, that legal counsel provides their legal advice. The university's legal counsel is the sender or recipient on some of these emails and is copied on others.

[53] All of these emails contain the appellant's personal information. Under section 49(a) of the *Act*, the university has the discretion to refuse to disclose the appellant's personal information in these records to him where section 19 would apply to the disclosure of that personal information.

[54] As noted above, the common law solicitor-client communication privilege aspect of section 19(a) protects direct communications of a confidential nature between lawyer and client, or their agents or employees, made for the purpose of obtaining or giving legal advice.[20] Many of the emails at issue constitute direct communications of a confidential nature between the university's legal counsel and their clients, made for the purpose of obtaining or giving legal advice. Others do not; for example, some of the emails are between university staff where the university's counsel is copied.

[55] However, I disagree with the appellant's argument that in the circumstances of this appeal, not every record falls within solicitor-client privilege because it is unlikely that the university communicated and sought legal advice in every email. Common law solicitor-client communication privilege covers not only the legal advice itself and the request for advice, but also communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given.[21]

[56] In the particular circumstances of this appeal, I find, based on the specific contents of the records, that the fact that the university's legal counsel was copied on certain emails that discuss the appellant's accommodation requests constitutes communications between that legal counsel and their clients aimed at keeping both informed so that advice could be sought and given. This brings these emails within the common law solicitor-client communication privilege aspect of section 19(a).

[57] There is also no evidence before me to show that the university waived solicitor-client privilege for these emails. I do not accept that the university may have waived solicitor-client privilege by distributing them to employees not involved in discussions about how to address the appellant's accommodation requests. I agree with the university's submission that the university is a single institution for the purposes of solicitor-client privilege, and that unity is not derogated from when its various employees, offices, faculties, members or research divisions must communicate and coordinate with each other in order to obtain legal advice.

[58] In summary, I find that the records and parts of records containing the appellant's personal information that have been withheld from him by the university fall within the solicitor-client communication privilege aspect of section 19(a). As a result, they are all exempt from disclosure under section 49(a), read with section 19(a). In these circumstances, it is not necessary to determine whether they are also exempt from disclosure under section 49(a), read with section 19(c).

C. Does the discretionary exemption at section 49(a), read with the section 13(1) exemption (advice or recommendations), apply to the information at issue?

[59] The university has withheld record 73 under section 49(a), read with section

[20] *Supra* note 15.
[21] *Supra* note 16.

13(1).

[60] Section 13(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

[61] Section 13(1) exempts certain records containing advice or recommendations given to an institution. This exemption aims to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.[22]

[62] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to a suggested course of action that will ultimately be accepted or rejected by the person being advised. Recommendations can be express or inferred.

[63] "Advice" has a broader meaning than "recommendations." It includes "policy options," which are the public servant or consultant's identification of alternative possible courses of action. "Advice" includes the views or opinions of a public servant or consultant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.[23]

[64] "Advice" involves an evaluative analysis of information. Neither "advice" nor "recommendations" include "objective information" or factual material.

[65] Section 13(1) applies if disclosure would "reveal" advice or recommendations, either because the information itself consists of advice or recommendations or the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.[24]

[66] Sections 13(2) and (3) create a list of mandatory exceptions to the section 13(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 13(1).

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[22] *John Doe v. Ontario* (*Finance*), 2014 SCC 36, at para. 43.
[23] See above at paras. 26 and 47.
[24] Orders PO-2084, PO-2028, upheld on judicial review in *Ontario* (*Ministry of Northern Development and Mines*) *v. Ontario* (*Assistant Information and Privacy Commissioner*), [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario* (*Ministry of Transportation*) *v. Ontario* (*Information and Privacy Commissioner*), [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

Summary of university's representations

[67] The university submits that record 73 contains recommendations from a person employed in the service of the university and, as such, is exempt from disclosure under section 49(a), read with section 13(1).

[68] It states that record 73 consists of emails exchanged between a case manager and the director of its Student Support and Case Management Department, relating to the appellant. It submits that the email chain includes a recommended substantive response from the case manager to the director, to be delivered to the appellant, relating to his potential return to the University following his involuntarily withdrawal. The chain also includes the director's response thereto, accepting the recommended response subject only to a few comments.

[69] It further submits that the exceptions in section 13(2) and (3) have no reasonable application to these parts of the records.

Summary of appellant's representations

[70] The appellant has reproduced his representations from appeal PA20-00196 and states that the redacted information regarding the communications approach to be taken with him was neither "advice" nor "recommendations," as required by section 13(1). He submits that it was instead an explicit direction to the case manager to conduct an investigation into him under the *Student Code of Conduct*, which later resulted in the involuntary withdrawal decision, the *persona non grata* order, and a no contact order that the case manager pressured him to accept.

[71] Alternatively, the appellant submits that the exception in section 13(3) applies to the redacted information in the record. He submits that this exception applies because the case manager and the director, along with the dean of students, used the investigation to impose a decision against him by involuntary withdrawing him. He further submits that because the university used the "advice" or "recommendations" in the record as a means to make a decision (the involuntary withdrawal from the university imposed on him), the exception to the section 13(1) exemption in section 13(3) applies to the redacted information.

Analysis and findings

[72] I have considered the parties' representations and reviewed record 73. For the reasons that follow, I find that this record is exempt from disclosure under section 49(a), read with section 13(1), because disclosing it would reveal the recommendations of persons employed in the service of the university, and none of the exceptions in sections 13(2) or (3) apply.

[73] Record 73 contains the appellant's personal information. Under section 49(a) of the *Act*, the university has the discretion to refuse to disclose the appellant's personal

information in this record to him where section 13(1) would apply to the disclosure of that personal information.

[74] Record 73 contains two emails:

1. an email from a case manager in Student Affairs to the Director, Student Support and Case Management, and

2. a response from the Director to the case manager.

[75] In the first email, the case manager provides the Director, Student Support and Case Management with suggested courses of actions for responding to an email from the appellant. In her response email, the Director provides the case manager with her own suggested courses of action for responding to the appellant's email. These suggested courses of action all qualify as "recommendations" for the purposes of section 13(1).

[76] I find, therefore, that subject to my analysis of the exceptions in sections 13(2) and (3), record 73 is exempt from disclosure under section 49(a), read with section 13(1), because disclosing it would reveal the recommendations of persons employed in the service of the university.

Exceptions to section 13(1)

[77] There is no evidence before me to suggest that any of the section 13(2) exceptions to the section 13(1) exemption apply to record 73.

[78] I am not persuaded by the appellant's argument that because the university used the "advice" or "recommendations" in the record as a means to make a decision (imposing an involuntary withdrawal from the university on him), the exception to the section 13(1) exemption in section 13(3) applies to the redacted information. Section 13(3) states:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where the record is more than twenty years old or where the head has publicly cited the record as the basis for making a decision or formulating a policy.

[79] The appellant appears to be relying on the latter exceptions in section 13(3), not the 20-year exception. However, there is no evidence to show that the university "publicly cited" record 73 as the basis for making a decision, such as imposing an involuntary withdrawal on the appellant or that it "publicly cited" record 73 as the basis for formulating a policy. In these circumstances, I find that the section 13(3) exception does not apply to record 73.

[80] In summary, I find that record 73 is exempt from disclosure under section 49(a),

read with section 13(1), because disclosing it would reveal the recommendations of persons employed in the service of the university, and none of the exceptions in sections 13(2) or (3) apply.

D. Did the university exercise its discretion under section 49(a)? If so, should the IPC uphold the university's exercise of discretion?

[81] The section 49(a) exemption is discretionary (the institution "may" refuse to disclose), meaning that the university can decide to disclose information even if the information qualifies for exemption. The discretionary nature of section 49(a) 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 own personal information.[25] If the institution refuses to give an individual access to their own personal information under section 49(a), the institution must show that it considered whether a record should be released to the requester because the record contains their personal information.

[82] An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[83] In addition, the IPC 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, or
- it fails to take into account relevant considerations.

[84] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.[26] The IPC cannot, however, substitute its own discretion for that of the institution.[27]

[85] Some examples of relevant considerations are listed below. However, not all of these will necessarily be relevant, and additional considerations may be relevant:[28]

- 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,

[25] Order M-352.
[26] Order MO-1573.
[27] Section 54(2).
[28] Orders P-344 and MO-1573.

    - exemptions from the right of access should be limited and specific, and
    - 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, and
- the historic practice of the institution with respect to similar information.

Summary of university's representations

[86] The university submits that it only took relevant considerations into account in deciding to withhold information under section 49(a).

[87] It states that above all else, its decision was informed by the fact that there are various ongoing disputes and proceedings of an adversarial nature involving itself and the appellant, and to which the records relate. It submits that unless or until such time as all proceedings and disputes between the parties are determinatively concluded, it is reasonable for it to exercise its discretion to withhold access to the records under section 49(a).

[88] It also cites Order PO-3715 and submits that the importance of protecting the sanctity of the solicitor-client relationship is demonstrated in this situation, given the need to seek legal advice and the fact that the appellant has taken legal action against the university. It submits that the *Act* is not intended to offer a litigant or adversary a means by which to gain access to privileged information relating to an ongoing proceeding or dispute.

[89] It submits, therefore, that it properly exercised its discretion under section 49(a) to withhold the records.

Summary of appellant's representations

[90] The appellant submits that the university did not reasonably and properly exercise its discretion in applying section 49(a) of the *Act*. He states that the primary principles that the university should have considered in exercising its discretion are that he has a right to access his own personal information, that he is seeking his own personal information and no one else's personal information, that he has a sympathetic and compelling need to receive the information, and that the information would increase public confidence in the operations of the university.

[91] The appellant also provides detailed evidence of the university's conduct towards him, which he alleges shows a reasonable apprehension of bias. He claims that this bias led the university to exercise its discretion under section 49(a) in bad faith. He further submits that the university took irrelevant considerations into account, including the fact that it believes that he would use these documents in court or a tribunal, even though he has no intention of doing so.

Summary of university's reply representations

[92] The university submits that the appellant's submissions on the subject of reasonable apprehension of bias are irrelevant, having no application to this matter. It further submits that no basis for a finding of reasonable apprehension of bias exists.

Analysis and findings

[93] I have considered the parties' representations and for the reasons that follow, find that the university exercised its discretion and did so properly in deciding to withhold the appellant's personal information in a number of records and parts of records under section 49(a), read with sections 13(1) and 19(a).

[94] I am satisfied that the university took into account relevant considerations and no irrelevant considerations in exercising its discretion under section 49(a) to withhold the appellant's personal information in these records and parts of records. I am not persuaded by the appellant's argument that the university took irrelevant considerations into account, including the fact that it believes that he would use these records in litigation before a court or a tribunal, even though he has no intention of doing so.

[95] In my view, the fact that the appellant has brought legal proceedings against the university, particularly a complaint against it with the HRTO, is a relevant factor for the university to consider in exercising its discretion under section 49(a), particularly since disclosing most of the records and parts of records at issue would reveal information subject to solicitor-client privilege under section 19(a). Even though the appellant claims that he would have no intention of using such solicitor-client privileged information in other legal proceedings, the fact remains that he is the opposing party in litigation in such proceedings, and it is not unreasonable for the university to exercise its discretion to protect information subject to solicitor-client privilege under section

19(a).

[96] On the issue of bias, I am not satisfied that there was any bias on the university's part that led the university to exercise its discretion under section 49(a) in bad faith. The university disclosed to the appellant the majority of the records that it located in response to his 13-part access request. Out of the 431 records it found, it disclosed 277 records to him in full and three records in part. In my view, this undermines any suggestion of bias on the university's part.

[97] I find, therefore, that the university exercised its discretion and did so properly in deciding to withhold the appellant's personal information in a number of records and parts of records under section 49(a), read with section 13(1) and 19(a).

E. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 49(a) exemption, read with section 13(1)?

[98] Section 23 of the *Act*, the "public interest override," provides for the disclosure of records that would otherwise be exempt under another section of the *Act*. It states:

> An exemption from disclosure of a record under sections 13, 15, 15.1, 17, 18, 20, 21 and 21.1 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[99] I have found that the records and parts of records at issue are exempt from disclosure under section 49(a), read with sections 13(1) and 19(a). Section 19 is not listed in section 23 as one of the exemptions that can be subject to the public interest override. Consequently, the public interest override in section 23 cannot apply to the records and parts of records that the university has withheld under section 49(a), read with section 19(a).

[100] However, section 13 is listed in section 23 as one of the exemptions that can be subject to the public interest override. I have found that record 73 is exempt from disclosure under section 49(a), read with section 13(1). It must be determined, therefore, whether there is a compelling public interest in disclosing record 73 that clearly outweighs the purpose of the section 13(1) exemption.

Summary of university's representations

[101] The university submits that there is absolutely no public interest in disclosing record 73, which is personal to the appellant and relate to specific proceedings involving only the university and him.

Summary of appellant's representations

[102] The appellant submits that even though he is seeking access to his own personal

information in the records withheld by the university, the IPC has found if a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[29]

[103] He further submits that there is a compelling public interest in disclosing the records withheld by the university, which clearly outweighs the purpose of the claimed exemptions.

[104] Finally, he links the public interest override in section 23 of the *Act* to the *Ontario Human Rights Code* (the *Code*).[30] He states that students with disabilities at the university should have the ability to seek their own personal information and records that document how the university interacts with them. He submits that the anti-discrimination provisions in the *Code* create a public interest in disclosure, which clearly outweigh any exemption claimed by the university with respect to records containing his personal information.

Analysis and findings

[105] For section 23 to apply, two requirements must be met:

- there must be a compelling public interest in disclosure of the records, and
- this interest must clearly outweigh the purpose of the exemption.

[106] The *Act* does not state who bears the onus to show that section 23 applies. The IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure that clearly outweighs the purpose of the exemption.[31]

[107] I have found that record 73 is exempt from disclosure under section 49(a), read with section 13(1). It must be determined, therefore, whether there is a compelling public interest in disclosing this record that clearly outweighs the purpose of the section 13(1) exemption.

[108] I will start by assessing whether there is a "public interest" in disclosing those parts of the records at issue. If no "public interest" exists, section 23 of the *Act* cannot apply. The IPC has found that a "public interest" does not exist where the interests being advanced are essentially private in nature.[32] However, if a private interest raises issues of more general application, the IPC may find that there is a public interest in disclosure.[33]

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[29] Order MO-1564.
[30] *Supra* note 3.
[31] Order P-244.
[32] Orders P-12, P-347 and P-1439.
[33] *Supra* note 35.

[109] Record 73 has two emails that contain recommendations from university staff about how to respond to an email from the appellant. These recommendations relate to a dispute between the university and the appellant about the appellant's accommodation requests. Consequently, the contents of the withheld emails are essentially private in nature, which means that there is no "public interest" in disclosing them.

[110] I agree with the appellant that the anti-discrimination purposes of the *Code* may raise "public interest" considerations in disclosing records, particularly if they involve students with disabilities as a group and systemic issues are at play. However, I cannot see how this principle could apply to record 73, which contain recommendations from university staff about how to respond to emails from a single individual (the appellant).

[111] In these circumstances, I find that there is no "public interest" in disclosing record 73, which I have found is exempt from disclosure under section 49(a), read with section 13(1). I find, therefore, that the public interest override in section 23 of the *Act* does not apply to record 73.

OTHER ISSUES:

[112] During the adjudication stage of this appeal, the appellant raised a constitutional issue for the first time during the processing of the appeal. He submits that the university breached his rights under sections 7 (life, liberty and security of the person), 12 (treatment or punishment) and 15 (equality before and under law and equal protection and benefit of law) of the *Charter* and seeks a remedy under section 24. The appellant raised this same issue in two other appeals[34] and I intend to address it in the same manner here.

[113] To support his argument that the university breached his *Charter* rights, the appellant provides a chronological account of how the university processed his access request under the *Act*. He submits that the university exercised its statutory authority under the *Act* in an unlawful way and discriminatory manner, and that it infringed on his life, liberty, and security of the person. With respect to a remedy under section 24, he asks that the IPC issue one "that is appropriate."

[114] It is clear that the IPC has the authority to decide constitutional issues, including those arising under the *Charter*.[35] The rules governing the raising of constitutional

[34] See Orders PO-4323 and PO-4332.

[35] See Order PO-3686. In *Nova Scotia* (*Workers' Compensation Board*) *v. Martin*, 2003 SCC 54 at para. 3, the Supreme Court of Canada stated, in part: "Administrative tribunals which have jurisdiction — whether explicit or implied — to decide questions of law arising under a legislative provision are presumed to have concomitant jurisdiction to decide the constitutional validity of that provision. This presumption may only be rebutted by showing that the legislature clearly intended to exclude Charter issues from the tribunal's authority over questions of law." The IPC's powers at sections 50 through 56 of the *Act* clearly include the power to decide questions of law including, for example, the interpretation and application of the

questions in appeals are set out in section 12 of the IPC's *Code of Procedure* and *Practice Direction Number 9*. The latter practice direction states, in part:

> **Circumstances where notice required/to whom notice must be given**
>
> 2. Where a party intends,
>
> (a) to raise a question about the constitutional validity or applicability of legislation, a regulation or a by-law made under legislation, or a rule of common law, or
>
> (b) to claim a remedy under the *Canadian Charter of Rights and Freedoms*, notice of a constitutional question shall be served on the IPC.
>
> **Time limits**
>
> 3. An appellant will be permitted to raise a constitutional question at first instance or an additional constitutional question only within a 35-day period after giving the IPC notice of his or her appeal.
>
> 4. Any other party will be permitted to raise a constitutional question only within a 35-day period after receiving notice of the appeal.
>
> 5. The Adjudicator has the discretion not to consider a constitutional question raised after the applicable time limit if the appeal proceeds to inquiry.
>
> **Form of notice**
>
> 6. A notice of constitutional question shall be in the form attached to this *Practice Direction*, or in a similar form that contains the same information.
>
> 7. The party raising the constitutional question shall serve notice of the constitutional question on the IPC, leaving blank the dates when the constitutional question will be argued and when the Attorneys General of Canada and Ontario should notify the IPC of their intention to participate.

[115] In addition, section 12.02 of the IPC's *Code of Procedure* states that a party raising a constitutional question shall notify the IPC and the Attorneys General of Canada and Ontario of the question within the applicable 35-day time period.

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exemptions at sections 12-22 and section 49, and the interpretation and application of the exclusions in section 65. There is no evidence that the legislature intended to exclude *Charter* considerations from the IPC's mandate.

[116] Based on my review of the file, it does not appear that the appellant raised this constitutional issue within a 35-day period after giving the IPC notice of his appeal, as required by section 3 of *Practice Direction Number 9*. There is no reference to this constitutional issue in the appeal form that he filed with the IPC. In addition, the mediator issued a report to the parties at the end of mediation that identified the following issues in the *Act* as remaining at issue: sections 13(1), 19, 23 and 49(a). There is no reference in the mediator's report to a constitutional issue raised by the appellant as one of the issues remaining at issue.

[117] There is also no evidence in the file to show that the appellant provided the IPC with a notice of constitutional question in the form required by section 6 of *Practice Direction Number 9*, or in a similar form that contains the same information. Nor is there any evidence that he provided the Attorney Generals of Canada or Ontario with a Notice of Constitutional Question, as required by section 12.02 of the *Code*.

[118] Section 5 of *Practice Direction Number 9* provides me with the discretion not to consider a constitutional question raised after the applicable 35-day time limit. In my view, important factors to consider in exercising my discretion in such a manner is whether the constitutional question raised by a party has a reasonable prospect of success, and whether the IPC has the jurisdiction to grant the remedy sought.

[119] Although I appreciate that the appellant believes that the university has mistreated and discriminated against him in processing his access request under the *Act*, it appears to me, without deciding the issue, that it is unlikely that the university's conduct would reach the threshold of constituting breaches of his rights under sections 7, 12 and 15 of the *Charter*. In addition, I find that the appellant's request that the IPC issue an "appropriate" remedy under section 24 of the *Charter* is vague and lacks sufficient detail.[36]

[120] In these circumstances, I have decided to exercise my discretion not to consider the constitutional question raised by the appellant after the applicable 35-day time limit set out in section 3 of *Practice Direction Number 9.*

ORDER:

I uphold the university's decision to withhold the records at issue under section 49(a), read with sections 13(1) and 19(a) of the *Act*. The appeal is dismissed.

Original Signed by: December 23, 2022
Colin Bhattacharjee
Adjudicator

[36] My comments here are limited to this particular appeal and should not be construed as constituting an opinion or view on any other legal actions that the appellant has brought against the university, such as the discrimination complaint that he filed with the HRTO.