Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4473

Appeal PA21-00205

Toronto Metropolitan University

January 8, 2024

Summary: The appellant submitted a request to the Toronto Metropolitan University (the university) under the *Freedom of Information and Protection of Privacy Act* (the Act) for records relating to an incident at the Student Resource Centre on a specified date. The university located responsive records and disclosed some of the records and information to him, but portions of some records were withheld 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), and section 49(b) (personal privacy).

The appellant appealed the university's decision and also submitted that the university had not conducted a reasonable search. In this order, the adjudicator finds that the withheld portions of the records are exempt from disclosure under section 49(a), read with sections 13(1) and 19(a), and section 49(b). She also finds that the university conducted a reasonable search. She 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), 13(1), 19, 21(1), 49(a) and (b).

Orders and Investigation Reports Considered: Order PO-3740.

OVERVIEW:

[1] The requester was involved in an incident with security at the Toronto Metropolitan University (the university). The requester made a request to the university under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records

relating to an incident at the Student Resource Centre on a specified date and a call made to the Toronto police. The university located seven responsive records (email chains and an occurrence report) and withheld information on the basis of the discretionary personal privacy exemption in section 49(b) (personal privacy).

[2] The requester clarified the request and the university issued a revised decision where access in full was granted to certain records and information was withheld under section 49(b), and sections 13(1) (advice or recommendation) and 19 (solicitor-client privilege) read with section 49(a).

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

[4] During mediation, the appellant indicated that he believed that a video and phone call recording should have been located for the incident and so the issue of reasonable search was added to the scope of the appeal.

[5] The appeal was not resolved during mediation and was moved to adjudication where I decided to conduct an inquiry. I sought and received representations from the university and the appellant, and representations were shared in accordance with the IPC's *Code of Procedure*.

[6] In this order, I uphold the university's decision to withhold the remaining information in the records at issue and find that the university conducted a reasonable search for records. I dismiss the appeal.

RECORDS:

[7] The records at issue consist of the withheld information in multiple email chains (records 1, 4, 9, and 11) and an occurrence report (record 7).

ISSUES:

A. Do the records contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

B. Does the discretionary exemption at section 49(a), allowing an institution to refuse access to a requester's own personal information, read with the section 13(1) (advice or recommendations) exemption, apply to the information at issue?

C. Does the discretionary exemption at section 49(a), read with section 19 (solicitor-client privilege), apply to the information at issue?

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

E. Did the institution exercise its discretion under sections 49(a) and (b)? If so, should the IPC uphold the exercise of discretion?

F. Did the institution conduct a reasonable search for records?

DISCUSSION:

A. Do the records contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

[8] Before I consider the exemptions claimed by the university, I must first determine whether the records contain "personal information." If they do, I must determine whether the personal information belongs to the appellant, other identifiable individuals, or both. "Personal information" is defined in section 2(1) of the *Act* as "recorded information about an identifiable individual."

[9] Information is "about" the individual when it refers to them in their personal capacity, which means that it reveals something of a personal nature about the individual. Generally, information about an individual in their professional, official or business capacity is not considered to be "about" the individual.[1] In some situations, even if information relates to an individual in a professional, official or business capacity, it may still be "personal information" if it reveals something of a personal nature about the individual.[2] 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.[3]

[10] The university submits that the content of the records relates to the personal information of the appellant, and the appellant's name where it appears with other personal information may reveal other personal information about the appellant. They submit that all records containing personal information provided directly by the appellant were released to the appellant.

[11] They further state that some of the records also contain personal information about other identifiable individuals: records 1, 4, and 7 contain names, phone numbers, email addresses, and in some cases additional descriptions are included in the security-related reports.

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

[12] As such, the university submits that the records at issue are mixed records containing both the appellant's personal information and the personal information of other identifiable individuals.

[13] I have reviewed the entirety of the appellant's representations but will only address what is relevant to the issues on appeal. The appellant does not dispute the university's representations and notes that the records contain his information, along with the information of others. Based on my review of the records at issue and the representations of each party, I find that the records at issue contain both the appellant's personal information and the personal information of other individuals.

[14] I will now consider the application of the exemptions claimed to withhold the information in the records.

B. Does the discretionary exemption at section 49(a), allowing an institution to refuse access to a requester's own personal information, read with the section 13(1) (advice or recommendations) exemption, apply to the information at issue?

[15] 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.

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

> A head may refuse to disclose to the individual to whom the information relates personal information,
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> 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.

[17] The discretionary nature of section 49(a) ("may" refuse to disclose) 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.[4] Where access is denied under section 49(a), an institution must demonstrate that, in exercising its discretion, it considered whether it should release the record(s) to the requester because the record(s) contain his or her personal information.

[18] In this case, the university applied the exemption in section 49(a), read with section 13(1) to withhold record 11.

[19] Section 13(1) of the *Act* 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

[4] Order M-352.

are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.[5]

[20] 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.

[21] "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.

[22] "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.[6]

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

[24] 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.[7]

[25] The relevant time for assessing the application of section 13(1) is the point when the public servant or consultant prepared the advice or recommendations. The institution does not have to prove that the public servant or consultant actually communicated the advice or recommendations. Section 13(1) can also apply if there is no evidence of an intention to communicate, since that intention is inherent to the job of policy development, whether by a public servant or consultant.[8]

[26] 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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[5] *John Doe v. Ontario* (*Finance*), 2014 SCC 36, at para. 43.
[6] See above at paras. 26 and 47.
[7] 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.
[8] *John Doe v. Ontario* (*Finance*), cited above, at para. 51.

Representations, analysis and finding

[27] The university submits that record 11 is subject to section 13(1) of the *Act*. They state that the record contains email correspondence between units and employees of the university concerning allegations made by the appellant, and that this correspondence contains advice and recommendations by university employees on matters that fall within the scope of their employment-related duties. They submit that the university employees are consulting and advising each other, and discussing recommendations on possible approaches and actions to resolve the appellant's concerns.

[28] The university submits that the disclosure of the record would interfere with the university employees' ability to offer an effective and neutral public service as they would not be able to freely and frankly give advice or recommendations to the university and make polices. They state that they considered the appellant's interest in the withheld information, and determined that there is no indication that the appellant has a more compelling need to receive the information than the preservation of the effective and neutral operation of the university.

[29] The appellant submits that the section 13(1) exemption does not apply to the record because any advice or recommendations contained in the records do not relate to the underlying incident at the time it occurred, and as such do not have a connection to the records at issue.

[30] I have considered the parties' representations and reviewed record 11. 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) apply.

[31] Record 11 consists of email correspondence between university employees. Throughout the email chain, it is clear that they are providing suggested courses of action for dealing with the appellant's concerns. These suggested courses of action all qualify as "recommendations" for the purposes of section 13(1).

[32] Additionally, the appellant has not suggested, and there is no evidence before me to suggest, that any of section 13(2) or 13(3) exceptions to the exemption apply. Based on my review of the appellant's representations, he is claiming that the fact that the recommendations were created after the incident that he is concerned about occurred, they are not exempt under section 13(1). However, the appellant has not cited any, and I am not aware of any, requirement that this be the case. Here, the record consists of correspondence between university employees where they discuss an issue and provide recommendations on how to deal with it. Accordingly, I find that the section 49(a) exemption, read with section 13(1) applies to record 11.

C. Does the discretionary exemption at section 49(a) read with the section 19 (solicitor-client privilege), apply to the information at issue?

[33] The university applied section 49(a), read with section 19, to withhold record 9 in its entirety.

[34] 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.

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

[36] As set out in the Notice of Inquiry sent to the university, solicitor-client communication 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.[9] 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.[10] The privilege may also apply to the lawyer's working papers directly related to seeking, formulating or giving legal advice.[11]

[37] 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.[12]

[38] Under the common law, a client may waive solicitor-client privilege. An express

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[9] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[10] *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.
[11] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[12] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

waiver of privilege happens where the client knows of the existence of the privilege, and voluntarily demonstrates an intention to waive the privilege.[13]

[39] 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.[14]

[40] Generally, disclosure to outsiders of privileged information is a waiver of privilege.[15] However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.[16]

The parties' representations

[41] The university submits that record 9 is subject to solicitor-client privilege under both sections 19(a) and (c). They provided an overview of the background and caselaw related to the exemptions in their representations.

[42] They submit that the records were prepared for the purpose of conveying legal advice and are part of the "continuum of communications" that sustain the solicitor-client relationship, and that record 9 contains explicit requests for legal advice from a senior administrator to the university's legal counsel in connection with a human rights complaint filed by the appellant against the university. They highlight the importance of the records remaining confidential for clients to fully and frankly communicate with their legal counsel. They reference previous IPC orders where email threads containing a response from a solicitor or created so that legal advice may be sought were found to fall within the scope of section 19(1).[17]

[43] The university submits that the burden of establishing a waiver rests on the appellant, and that there has been no waiver of solicitor-client privilege in this instance.

[44] The appellant submits that record 9 should not be exempt under section 19 because the event underlying the access request cannot have constituted a request for legal advice.

Analysis and finding

[45] I have considered the parties' representations and reviewed the record that the university has withheld. For the reasons that follow, I find that the record is exempt from disclosure under section 49(a), read with section 19(a) of the *Act*, because it falls within

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[13] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).
[14] *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.
[15] 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.).
[16] *General Accident Assurance Co. v. Chrusz,* cited above; Orders MO-1678 and PO-3167.
[17] The university cites Orders MO-3992-F and MO-3702.

the solicitor-client communication privilege aspect of section 19(a).

[46] The record at issue consists of an email chain between university staff, including legal counsel. Throughout the chain, they discuss various matters regarding the appellant. All of the emails relate to the appellant, and contain his personal information.

[47] 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 and employees, made for the purpose of obtaining or giving legal advice. Based on my review of the emails, it is clear that they constitute direct communications of a confidential nature between university staff and university legal counsel for the purpose of seeking and giving advice related to issues raised by the appellant. This brings the emails within the common law solicitor-client communication privilege aspect of section 19(a).

[48] Additionally, there is no evidence before me that the university waived solicitor-client privilege for these emails, and the appellant has not submitted that this occurred.

[49] In summary, I find that the record falls within the solicitor-client communication privilege aspect of section 19(a). As a result, it is exempt from disclosure under section 49(a), read with section 19(a). In these circumstances, it is not necessary to determine whether it is also exempt from disclosure under section 49(a), read with section 19(c).

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

[50] The university has withheld information in records 1, 4, and 7 under the discretionary personal privacy exemption in section 49(b) of the *Act*. As such, and because I have found that these records contain the personal information of both the appellant and other individuals, I must determine whether disclosure of this withheld information would be "an unjustified invasion of personal privacy" under section 49(b). 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.

The parties' representations

[51] The university submits that the records at issue contain the personal and descriptive information of identifiable individuals other than the appellant. They state that although the appellant claims to be aware of the identity of some of these individuals, disclosing the information would be considered an unjustified invasion of their privacy, regardless of what the appellant already knows. They state that none of the individuals involved provided consent to the release of their personal information, and that this personal information was provided to the university for the purposes of investigating and

addressing security and safety concerns.

[52] The appellant did not provide specific representations for this issue, instead relying on submissions he previously provided in a related appeal[18]. In his representations for that appeal, the appellant submitted that the university did not explain why the disclosure of this combined information would be an unjustified invasion of privacy. He stated that they could disclose information that is not exempt without combining it with exempt information and notes that he wants information that is relevant to legal proceedings. He stated that the information he seeks was collected for the purpose of creating a record available to the general public and individuals who called the university's Community Safety and Security department (university security) had no expectation of privacy.

Analysis and finding

[53] Based on my review of information that was withheld under section 49(b), I find that all of the information that solely relates to the appellant has already been disclosed to him. The information withheld in records 1, 4, and 7 under section 49(b) consists of the names of individuals who had contacted university security regarding the appellant, the information that they provided to university security, and information that was collected as part of the university's response to the contacts.

[54] 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).

[55] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 49(b), this office will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties.[19]

[56] 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.[20] 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).[21]

Section 21(3) - is disclosure presumed to be an unjustified invasion of personal privacy?

[57] Sections 21(3)(a) to (h) list several situations in which disclosing personal

[18] Appeal PA21-00103 resolved by Order PO-XXXX.
[19] Order MO-2954.
[20] Order P-239.
[21] Order P-99.

information is presumed to be an unjustified invasion of personal privacy under section 49(b). For the reasons that follow, I find that section 21(3(b) applies to the withheld information.

21(3)(b): investigation into a possible violation of law

[58] Neither the appellant or the university specifically reference section 21(3)(b) in their representations, but I find that it applies to the information at issue. This presumption requires only that there be an investigation into a *possible* violation of law.[22] So, even if criminal proceedings were never started against the individual, section 21(3)(b) may still apply.[23]

[59] The presumption can apply to different types of investigations, including those relating to by-law enforcement,[24] and enforcement of environmental laws,[25] occupational health and safety laws,[26] or the Ontario *Human Rights Code*.[27]

[60] The presumption does not apply if the records were created after the completion of an investigation into a possible violation of law.[28]

[61] In Order PO-3740, it was found that a record created in the context of an investigation by a university security department was created during an investigation into a possible violation of law, and disclosure of the record was presumed to be an unjustified invasion of privacy.

[62] The three records are an email chain between a complainant and university security, officer notes, and a report made by university security. Based on my review of these records and the parties' representations, I find that the personal information at issue was compiled and is it identifiable as part of an investigation into a possible violation of law, relating to an incident that university security investigated. Therefore, the presumption at section 21(3)(b) applies.

21(2)(h): the personal information was supplied in confidence

[63] This section weighs against disclosure if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. This requires an

[22] Orders P-242 and MO-2235.
[23] The presumption can also apply to records created as part of a law enforcement investigation where charges were laid but subsequently withdrawn (Orders MO-2213, PO-1849 and PO-2608).
[24] Order MO-2147.
[25] Order PO-1706.
[26] Order PO-2716.
[27] Orders PO-2201, PO-2419, PO-2480, PO-2572 and PO-2638.
[28] Orders M-734, M-841, M-1086, PO-1819 and MO-2019.

objective assessment of whether the expectation of confidentiality is "reasonable."[29]

[64] The university did not raise this factor specifically, but it is clear from the records and their context that the names of the callers and other personal information was supplied in confidence. Previous decisions have found that personal information provided to the police is generally done so in confidence, and I make the same finding here.[30]

[65] I do not agree with the appellant's submission that the records are available to the general public. There is no evidence to suggest that emails to the university's security personnel regarding security incidents and officer notes would otherwise be available to the public. Additionally, the appellant has provided no evidence that security occurrence reports are generally available to the public, and the report itself is clearly marked confidential. Therefore, I find that the personal information in the records were supplied in confidence, weighing against disclosure.

21(2)(d): fair determination of rights

[66] The appellant did not specifically raise section 21(2)(d) in his representations, but he states that the information he is requesting is relevant to ongoing legal proceedings against the university. The university did not provide specific representations on section 21(2)(d). Based on my review of the records and the appellant's representations, it is not clear to me how the disclosure of the withheld information would assist him in his legal proceedings against the university. The appellant has already received all of the information related to him, and he claims to know the identity of the individuals whose information has been withheld. While I can appreciate that the appellant wants information related to how he was treated by the university in the incident, he has already received this information. As such, I do not find that this factor weighs in favour of disclosure.

[67] After considering the competing interests of the appellant's right to disclosure of information against the privacy rights of the affected parties, I conclude that the information being supplied in confidence to the university as part of an investigation into a possible violation of law means that the disclosure of the withheld information in the records to the appellant would constitute an unjustified invasion of the personal privacy of the affected parties. Therefore, I find the records at issue qualify for exemption under section 49(b), subject to the absurd result principle and my findings on the university's discretion, discussed below.

Absurd result

[68] An institution might not be able to rely on the section 49(b) exemption in cases where the requester originally supplied the information in the record or is otherwise aware of the information contained in the record. In this situation, withholding the information

[29] Order PO-1670.
[30] Order MO-3028.

might be absurd and inconsistent with the purpose of the exemption.[31]

[69] For example, the "absurd result" principle has been applied when:

- the requester sought access to their own witness statement[32];
- the requester was present when the information was provided to the institution[33]; and
- the information was or is clearly within the requester's knowledge[34].

[70] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply.[35]

[71] Although the appellant claims to already know the identity of some of the individuals in the records, I do not find that withholding this information would be inconsistent with the purpose of the exemption. Despite the knowledge that the appellant may already have, the personal information contained in the records was clearly collected as part of a security investigation and was not intended to be disclosed to the public. Furthermore, I find that the university has already disclosed non-exempt information to the appellant, including his own personal information. Accordingly, I find that the information in the records withheld by the university under section 49(b) is exempt from disclosure, subject to my review of the university's discretion below.

E. Did the institution exercise its discretion under sections 49(a) and (b)? If so, should the IPC uphold the exercise of discretion?

[72] The sections 49(a) and (b) exemptions are discretionary (the institution "may" refuse to disclose), meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[73] 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.

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[31] Orders M-444 and MO-1323.
[32] Orders M-444 and M-451.
[33] Orders M-444 and P-1414.
[34] Orders MO-1196, PO-1679 and MO-1755.
[35] Orders M-757, MO-1323 and MO-1378.

[74] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.[36] The IPC cannot, however, substitute its own discretion for that of the institution.[37]

The parties' representations

[75] The university submits that they reviewed the records in detail and weighed the appellant's right of access to his own personal information against its own interest and the public interest protected by the exemptions in sections 13(1) and 19. They state that they properly exercised their discretion pursuant to section 49(a) by deciding to withhold the records which were necessary to prevent a waiving of solicitor-client privilege and to protect internal advice and recommendations and not for any improper purposes. They state that they considered all relevant circumstances when deciding to apply sections 13(1) and 19 to the records and exercising their discretion under section 49(a).

[76] With respect to section 49(b), the university submits that they properly exercised their discretion by withholding the personal information of individuals other than the appellant, which they state was necessary to protect those individuals from an unjustified invasion of privacy and not for any improper purpose. They state that they considered all relevant circumstances in the appeal when determining that certain information constituted an unjustified invasion of personal privacy, including the criteria listed in section 21(2). They state that they considered the purposes of the *Act*, including that information should be made available to the public and that individuals have a right of access to their own personal information. They state that they considered that exemptions should be limited and specific, that the personal privacy of individuals should be protected, and the historic practices of the university and relevant IPC orders regarding the release of similar information.

[77] The appellant submits that the university did not properly exercise their discretion under section 49(a), stating that the university can find a way to balance the interests of each party without violating his rights. He states that the university is attempting to control the outcome of a human rights complaint that they are the respondent to and that the university is attempting to prevent a legal process from unfolding where the anti-Black racism of the university would be exposed. He submits that if the university had considered all relevant circumstances when determining if the records should be disclosed, they would have found that doing so would not be an unjustified invasion of personal privacy.

[78] He further states that the university did not properly exercise their discretion under section 49(b) of the *Act*, explaining that the university is withholding information to gain an advantage in a human rights hearing where they are the respondent. He generally takes issue with the amount of evidence the university provided. He explains that the

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[36] Order MO-1573.
[37] Section 54(2).

university has a duty to protect the rights of individuals without an expectation of privacy, and that the individuals who called security without the promise of confidentiality and submitted their information voluntarily.

Analysis and finding

[79] Based on my review of the parties' representations and the nature and the content of the records at issue, I find that the university properly exercised its discretion to withhold the information pursuant to the discretionary exemptions at sections 49(a) and (b) of the *Act*. In my view, the fact that the appellant has brought legal proceedings against the university is a relevant factor for the university to consider when exercising their discretion under section 49(a), and it suggests that choosing to not disclose staff recommendations and privileged legal communications regarding the appellant is reasonable in the circumstances. Additionally, I am not persuaded by the appellant's assertion that callers to university security have no expectation of privacy.

[80] While I appreciate that the appellant feels that the university has not treated him fairly, I am satisfied that the university took into account relevant considerations, and did not act in bad faith or for an improper purpose when deciding whether or not to release the records. Accordingly, I uphold the university's exercise of discretion in deciding to withhold the personal information in the records under the section 49(a) and (b) exemptions.

F. Did the institution conduct a reasonable search for records?

[81] During mediation, the appellant submitted that a video and phone call recording should exist for the incident underlying the request. If a requester claims that additional records exist beyond those found by the institution, the issue is whether the institution has conducted a reasonable search for records as required by section 24 of the *Act*.[38] If the IPC is satisfied that the search carried out was reasonable in the circumstances, it will uphold the institution's decision. Otherwise, it may order the institution to conduct another search for records.

[82] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist.[39]

[83] The *Act* does not require the institution to prove with certainty that further records do not exist. However, the institution must provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records;[40] that is, records that

[38] Orders P-85, P-221 and PO-1954-I.
[39] Order MO-2246.
[40] Orders P-624 and PO-2559.

are "reasonably related" to the request.[41]

[84] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.[42] The IPC will order a further search if the institution does not provide enough evidence to show that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[43]

Representations, analysis, and finding

[85] The university provided an affidavit of a university Community Safety and Security employee (the employee) with its representations. In the affidavit, the employee stated that the information sought by the appellant appeared clear to her and it was her understanding that the appellant sought records relating to the incident on the specified date.

[86] She states that she instructed members of her team to conduct searches, and all team members searched for records in the Community Safety and Security department's internal paper and electronic databases, systems, emails, and shared drives. She states that the team members saved and downloaded any responsive records found, including video and audio records relating to the incident, and no additional recordings related to the incident were found. She states that an additional search was later conducted by team members and no additional records were found.

[87] She stated that the university switched to a new audio logging system and lost recordings that were not saved elsewhere prior to September 27, 2020, which would include recordings related to the incident. She stated that audio logs are considered transitory and are retained for 30 days, unless otherwise requested. She submits that the access request occurred well past 30 days and that no further records exist.

[88] The appellant did not provide specific representations on the reasonableness of the university's search.

[89] For the following reasons, I find that the university has provided sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all the responsive records within its custody or control. Further, I also find that the appellant has not provided a reasonable basis for me to conclude that additional responsive records exist.

[90] In their submissions, the university provided a detailed explanation of the efforts it took to locate records responsive to the appellant's request. Once the request was received, the university had experienced employees knowledgeable in the subject matter

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[41] Order PO-2554.
[42] Orders M-909, PO-2469 and PO-2592.
[43] Order MO-2185.

of the request search for the records. It is clear from the affidavit that the employees expended a reasonable effort to locate records which are reasonably related to the request.

[91] The appellant did not dispute the university's representations on their search efforts. Based on the information before me, I find that the appellant has not sufficiently provided a reasonable basis to challenge the university's evidence of the steps that it took, such that I can accept that a further search should be ordered. Furthermore, as mentioned, the *Act* does not require the university to prove with certainty that further records do not exist. The university was required to provide enough evidence to show that it made a reasonable effort to identify and locate records that are reasonably related to the request. Accordingly, I find that there is no reasonable basis to conclude that further records exist.

[92] In conclusion, I uphold both the university's decision to withhold the information in the records under the claimed exemptions and the reasonableness of its search, and I dismiss the appeal.

ORDER:

I uphold the university's access decision and the reasonableness of its search and dismiss the appeal.

Original Signed By: January 8, 2023

Stephanie Haly
Senior Adjudicator