Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4486

Appeal PA21-00004

Toronto Metropolitan University

February 22, 2024

Summary: The appellant made a request to the university for access to information about herself. The university issued a decision granting partial access to responsive records. The university denied access to some responsive records based on section 49(a) (discretion to refuse requester's own information), read with section 19 (solicitor-client privilege). In this order, the adjudicator finds that the records contain the appellant's personal information but contain communications that are solicitor-client privileged and are therefore exempt under section 49(a), read with section 19(a). She upholds the university's 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"), 19 and 49(a).

Orders and Investigation Reports Considered: Order PO-2624.

Cases Considered: *Descôteaux v Mierzwinski*, [1982] 1 S.C.R. 860.

OVERVIEW:

[1] The appellant made a request to Toronto Metropolitan University[1] (TMU or the university) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information about herself. The request was for access to:

[1] At the time of the request and the decision under appeal, this institution was known as Ryerson University.

> All communication, meeting notes, emails or documents mentioning or concerning [appellant's name] Department: The Office of the Vice Provost, Students (OVPS), including the student conduct office (currently Student Care), and former Vice Provost Students [named individual] or email address [named individual's email address] between the dates of January 1st 2017-December 25 2018.

[2] The university located 93 responsive records and issued a decision granting partial access to the appellant.[2] The university denied access to portions of some records and to other records in their entirety on the basis of the exemptions in sections 19 (solicitor-client privilege), 49(b) (personal privacy), and 49(c.1) (supplied explicitly or implicitly in confidence).

[3] The appellant appealed the university's decision to the Office of the Information and Privacy Commissioner of Ontario (IPC). The parties participated in mediation to explore the possibility of resolution.

[4] During mediation, parties whose interests might be affected by disclosure of the records were notified of the request and asked to give their consent to disclose information in the records relating to them.[3] Two parties consented.

[5] After it received the affected parties' written consent, the university disclosed additional records.[4] The university also issued a revised decision in which it disclosed more information to the appellant, removed its section 49(c.1) claim, and added section 13(1) (advice or recommendations), which it later removed.[5]

[6] Because it appeared that the records may contain the appellant's personal information, the mediator raised the possible application of section 49(a) (discretion to refuse requester's own information) read with section 19. Section 49(a) allows an institution to deny a requester access to their own personal information when read with section 19.

[7] The mediation concluded with 16 records at issue, over which the university claimed the exemption in section 49(a) read with section 19. With no further mediation possible, the appeal was transferred to the adjudication stage of the appeal process. I conducted an inquiry during which I received representations from the university and the

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[2] Before the university issued a decision, the appellant filed a deemed refusal appeal with the IPC. File PA20-00791 was opened to address the university's failure to issue a decision within the time prescribed under the *Act*. After it received a Notice of Inquiry in the deemed refusal appeal, the university located responsive records and issued a decision granting partial access to them. Once the access decision was issued, the deemed refusal appeal was closed.

[3] Section 28 of the *Act* sets out circumstances in which an institution is required to notify parties to whom information in a record to which access has been requested relates. In this case, the mediator notified affected parties at the appellant's request.

[4] Records 44, 45 and 46 in part, and records 78, 84, 85 and 86 in full.

[5] Also in mediation.

appellant. Because portions of the university's representations contained information that I was satisfied would reveal the contents of the records if shared with the appellant, those portions were severed from the copy of the university's representations provided to the appellant in accordance with the IPC's *Practice Direction 7* on the sharing of representations.

[8] In this order, I find that the records at issue are exempt under section 49(a) read with section 19(a) because they are solicitor-client privileged. I find that the university exercised its discretion to deny access properly and I dismiss the appeal.

RECORDS:

[9] There are 16 records at issue. They are numbered 1, 2, 3, 6, 7, 19, 20, 32, 43, 65, 73, 74, 76, 81, 90, and 91. The university claims that all 16 records are exempt under section 49(a) read with section 19.

[10] The university did not provide copies of the records at issue to the IPC. Instead, the university submitted an affidavit sworn by its general counsel, in accordance with the IPC's Protocol for Appeals Involving Solicitor-Client Privilege Claims where the institution does not provide copies of the records at issue to the IPC.[6] The university attached an index of records as an exhibit to its affidavit, in which it described 12 of the 16 records. I address this discrepancy below.

ISSUES:

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

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 section 19 exemption for solicitor-client privilege, apply to the information at issue?

DISCUSSION:

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

[11] In order to determine which sections of the *Act* may apply to the records, I must first decide whether the records contain "personal information," and, if so, whose. Section 2(1) of the *Act* defines "personal information" as "recorded information about an

[6] Issued June 2020.

identifiable individual."

[12] Information is about an identifiable individual when it refers to the individual in a personal capacity, meaning that it reveals something of a personal nature about them, and it is reasonable to expect that the individual can be identified from the information alone or combined with other information.[7] Generally, information about an individual in their professional, official or business capacity is not considered to be "about" them, and the *Act* also contains specific provisions about individuals acting in such a capacity.[8]

[13] Section 2(1) contains a list of examples of personal information at paragraphs (a) through (h). The university submits that the following are relevant to this appeal:

> "personal information" means recorded information about an identifiable individual, including,
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> …
>
> (c) any identifying number, symbol or other assigned to the individual,
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

[14] The appellant does not dispute that all the records at issue contain information about her and therefore contain her personal information.

[15] I find that the records contain the appellant's personal information. Based on the university's description of the records in its representations, I am satisfied that the records discuss the appellant and/or matters involving the appellant, and that disclosure of the appellant's name would reveal other personal information about her, including the nature of her issues with the university. I therefore find that the records contain the appellant's personal information as defined in paragraphs (e) and (h) of section 2(1).

Issue B: Does the discretionary exemption at section 49(a), allowing an institution to refuse access to a requester's own personal information, read with section 19 (solicitor-client privilege), apply to the records?

[16] Section 47(1) of the *Act* gives individuals a general right of access to their own

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

[8] Sections 2(2.1) and (2.2) of the *Act* provide that the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity is not personal information. See Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

personal information held by an institution. Section 49, however, provides some exemptions from this general right of access to one's own personal information.

[17] Section 49(a) states that:

> 49. A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > (a) where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19 20 or 22 would apply to the disclosure of that personal information.

[18] In this case, the university relies on section 49(a) read with section 19.

Section 19: solicitor-client privilege

[19] 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 that:

> 19. 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.

[20] In previous decisions, the IPC has referred to the three different exemptions in section 19 as making up two "branches."

[21] The first branch, referred to as branch 1, is found in section 19(a) (subject to "solicitor-client privilege") and is based on common law. The second branch, or branch 2, is 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") and contains statutory privileges created by the *Act*.

[22] The university claims that both sections 19(a) and (c) apply to the records.

[23] The university must establish that at least one branch applies. Accordingly, I will first consider whether the records or parts of records are exempt from disclosure under the solicitor-client communication privilege in branch 1, found in section 19(a).

Branch 1: Common law solicitor-client communication privilege

[24] At common law, solicitor-client privilege contains two types of privilege: (i) solicitor-client communication privilege, and (ii) litigation privilege.

[25] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[9] 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.[10] The privilege does not cover communications between a lawyer and a party on the other side of a transaction.[11]

[26] Litigation privilege, the second type of common law privilege, protects records created for the dominant purpose of litigation. It is based on the need to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial.[12]

[27] Under common law, a client may waive privilege. An express waiver of privilege happens where the client knows of the existence of the privilege and voluntarily demonstrates an intention to waive it.[13] 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] 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]

Summary of Representations

The university's representations

[28] The university states that solicitor-client privilege is a fundamental right that allows a client to communicate freely with their legal counsel. It says that the privilege is absolute once established and is essential to the proper functioning of our legal system.[17]

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[9] *Descôteaux v Mierzwinski*, (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[10] *General Accident Assurance Co. v Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[11] *Kitchener* (*City*) *v Ontario* (*Information and Privacy Commissioner*), 2012 ONSC 3496 (Div. Ct.)
[12] *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).
[13] *S. & K. Processors Ltd. v Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (C.A.)
[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] *Canada (Privacy Commission) v Blood Tribe Department of Health*, [2008] 2 S.C.R. 574, at para. 9.

[29] The university submits that it sought and obtained the advice of its general counsel on a matter involving the appellant. The university says that the records are part of a continuum of communications that address the subject matter for which legal counsel was consulted, and/or reveal the legal advice that its counsel provided on a matter involving the university and the appellant. The university says that, once matters involving allegations regarding the appellant's treatment came to its attention, litigation became reasonably contemplated, so that all of the records are also subject to the litigation privilege in branch 2 and that litigation was, in fact, commenced a few months later.

[30] The university submits that there has been no waiver of solicitor-client privilege in any of the responsive records.

The appellant's representations

[31] The appellant disputes the university's representations regarding the law on solicitor-client privilege.

[32] She submits that solicitor-client privilege is an important aspect of Canada's legal framework and that there may be times when invoking it advances the public interest.[18] However, she says that the fact that a proper invocation of solicitor-client privilege may advance the public interest in confidentiality ought not to be confused and conflated with solicitor-client privilege itself broadly being in the public interest. Citing the Supreme Court of Canada's decision in *Blank v Canada*,[19] the appellant says that a proper interpretation of the *Act* is one that favours more disclosure, not less. She argues that, while there is strong judicial support for solicitor-client privilege, there is equally strong judicial support for disclosure of documents, including in contexts where legal advice has been provided.

[33] The appellant argues that the public has an important and near-absolute interest in both confidentiality and disclosure. She submits that jurisprudence regarding solicitor-client privilege ought not to be misconstrued as elevating the public's interest in confidentiality (as protected by solicitor-client privilege) over and above its interest in disclosure. Rather, she says it ought to be understood as "highly contextual comments designed to help address cases of tension between these two (at times competing) public interests and that "this is a case where the public interest in disclosure is greater than the public interest in confidentiality."

[34] The appellant says that the records likely relate to a decision about whether she would be permitted to attend an event at the university in February 2017. She says that, at that time, the conflict that gave rise to her resulting legal action would not have

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[18] The public interest override in section 23 of the *Act* does not apply to records that are exempt under section 19, and section 23 is not an issue in this appeal. I understand the appellant's arguments to more broadly address the tension between the public interest in disclosure versus confidentiality where solicitor-client privilege is an issue, and not that section 23 should apply.

[19] *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).

triggered a reasonable expectation of litigation because the litigation was not commenced until August 2017. She says that the university administration would not yet have been made aware of the allegations of discrimination taking place against the appellant, so that there was no reason for university officials to anticipate or predict litigation in or around February 2017. She says that, at most, even if the university head and senior administrator had turned their minds to the risk of litigation in early 2017, they could not have had anything more than a general apprehension of litigation, since the incidents that escalated that risk and solidified the reasonable prospect of litigation only unfolded in the following months.

[35] Alternatively, the appellant says that, if the university knew about the details of alleged ongoing discriminatory treatment against the appellant early on and had turned its mind to the risk of litigation, it concluded that it was more than generic and made records in anticipation of it, then the university acknowledged and enabled the appellant's discriminatory treatment by seeking to preserve the adversarial process rather than protect a victimized student. The appellant says that, either way, the records were not prepared for the dominant purpose of litigation.

[36] The appellant disputes that the records described by the university in its affidavit are captured by solicitor-client privilege, arguing that the university's general counsel never states this explicitly in her affidavit. The appellant says that the general counsel's statement that records "either include legal advice or were sent to the Office of the General Counsel for the purpose of facilitating such advice in connection with a dispute that occurred on campus involving members of the University community" leaves open the possibility that few or even none of the records include legal advice but were simply communications sent to the Office of the General Counsel. The appellant submits that, if any advice was indeed provided, it may have been provided at a much later point in time.

[37] The appellant says that the university cannot simply assert solicitor-client privilege as an absolute protection against it respecting the public interest in disclosure. She submits that solicitor-client privilege is neither absolute nor a *carte blanche* that shields an entire "continuum of communication from university and provides it with a sweeping override to undermine any public interest in disclosure." She says that the discretionary nature of section 49(a) must not be understood exclusively as the university interprets it – namely as discretion to prevent an individual access to their own personal information – but rather ought to be understood additionally, and arguably primarily, as permitting and facilitating the university to disclose otherwise confidential information to a requester when the requester's own information is at issue.

[38] The appellant says that the university failed to consider the public interest in disclosure versus the public interest in the confidentiality of the solicitor-client relationship in exercising its discretion to deny access.

Analysis and findings

[39] I have considered the university's representations and the description of the records both in the representations and in the index of records attached as Exhibit A to the affidavit, which describes the records.

[40] As also noted above, neither Exhibit A nor the portions of the university's representations that describe the contents of the records at issue were shared with the appellant during the inquiry. This is because I determined during the inquiry that disclosure would reveal the substance of the records. Sections 5 and 6 of the IPC's *Practice Direction 7* allow an adjudicator to withhold information contained in a party's representations if disclosure of the information would reveal the substance of a record claimed to be exempt, where the information would be exempt if contained in a record subject to the *Act*,[20] and allow an adjudicator to consider whether the information was communicated to the IPC in a confidence that it would not be disclosed to the other party.[21]

[41] However, I have reviewed all of the materials before me and, for the reasons that follow, I find that the records are exempt from disclosure under section 49(a), read with section 19(a), because they fall within the solicitor-client communication privilege exemption, or Branch 1, in section 19(a).

Number of records at issue

[42] According to the university's decision and representations, there are 16 records at issue. The appellant does not dispute this but notes that the university did not describe all 16 records in its affidavit. The university's affidavit refers to 12 records, with records 4, 73, 74 and 76 omitted from the description of records in Exhibit A. These four records are, however, described in the body of the university's representations. Their description is similar to the university's description of the remaining records in the university's representations, which, in turn, is consistent with the description of the 12 records in Exhibit A. Although the description of the records in the university's representations was not shared with the appellant for the confidentiality reasons noted above, I have nevertheless considered the description of records 4, 73, 74 and 76 in the university's representations.

The records are exempt under section 49(a) read with section 19(a)

[43] The records, all emails, begin with a request to the university's general counsel for advice regarding a matter involving the appellant. Broadly speaking, the records are

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[20] Section 5 of *Practice Direction 7* states: "An Adjudicator may withhold information contained in a party's representations where: (a) disclosure of the information would reveal the substance of a record claimed to be exempt or excluded; or (b) the information would be exempt if contained in a record subject to the *Act*; or (c) the information should not be disclosed to the other party for another reason."
[21] Section 6(i) of *Practice Direction 7*.

described as emails between counsel and university administrators or employees and begin after an issue is brought to the university's attention. The records reflect a request for, receipt of, and acknowledgement of legal advice and retainer of counsel. Later records refer to a legal claim brought against the university by the appellant, identify a claim number, and continue up to and after the start of legal action. All fall within the timeframe of the request. The university's description of the records includes a date and time for each email and identifies the sender and recipient by name and title, including for the lawyers involved. Where other records are included as part of chains, they are also identified as both standalone emails or as part of a chain.

[44] The Supreme Court of Canada in *Descôteaux v Mierzwinski*[22] held that solicitor-client communication privilege rests on three requirements: that the communication is between solicitor and client, entails the seeking or giving of legal advice, and which is intended by the parties to be confidential.[23] I find that all three are present in this case. I find that the details of the records as described are consistent with a client becoming aware of an issue, contacting legal counsel, providing information to legal counsel and receiving advice, including, as it did in this case, to litigation, at which point the communications between the university and legal counsel continue, but are about the legal action.

[45] 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.[24] The privilege covers the document containing legal advice, the request for legal advice, and also information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.[25]

[46] Litigation does not need to exist or be contemplated for a client to seek legal advice. In this case, before any litigation was commenced, the university contacted and retained its general counsel for advice, received legal advice, and there is no evidence before me that it did not treat either the request for, or receipt of, legal advice confidentially.

[47] The appellant argues that it is unlikely that the university communicated and sought legal advice in every email at issue and that not all 16 records are privileged.

[48] Common law solicitor-client communication privilege covers not only the request for and the legal advice itself, but also communications between the lawyer and client

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[22] [1982] 1 S.C.R. at 888.
[23] Relying on *Descoteaux v Mierzwinski*, [1982] 1 S.C.R. 860 at 888 and *Pritchard v Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809 at paragraph 15 and *Solosky v The Queen*, [1980] 1 S.C.R. 821.
[24] Orders PO-2441, MO-2166 and MO-1925.
[25] *Balabel v Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.); *Canada* (*Public Safety and Emergency Preparedness*) *v Canada* (*Information Commissioner*), 2013 FCA 104.

aimed at keeping both informed so that advice can be sought and given.[26]

[49] Based on my review, all but one of the records at issue is a direct communication between the university's legal counsel and an employee. One record, record 43, is described as being an email between university employees conveying counsel's advice and collecting information to provide to counsel.

[50] In Order PO-2624, on which the university relies, Adjudicator Laurel Cropley found that email communications between non-legal staff of the Ministry of Training, Colleges and Universities were privileged even though some of the emails at issue were not sent to legal counsel. The adjudicator found that these emails were part of the "continuum of communications" since they addressed the subject matter for which legal counsel had been consulted and/or revealed the legal advice provided by counsel. Adjudicator Cropley wrote:

> Previous orders of this office (Orders PO-2087, 223 and 2370) have found that e-mail communications passing between non-legal Ministry staff that refer directly to legal advice originally provided by legal counsel to other Ministry staff would reveal privileged communications and were, therefore, exempt from disclosure under section 19. That is precisely the case in the current appeal. As I noted above, the records consist of e-mail chains. While some of the e-mails in the chains were not directly sent to legal counsel, they clearly address the subject matter for which legal counsel had been consulted, often refer to the need for the communications to be sent to legal and/or reveal the legal advice provided by counsel. In the end, these e-mails form part of the chain that was ultimately sent to legal counsel. In this context, the e-mails form part of the "continuum of communications" recognized in *Balabel* as falling within the solicitor-client communication privilege.

[51] I agree with and adopt this reasoning here. Even though the record may be exchanged between university employees, because it discusses the legal issues involving the appellant and has as its purpose the gathering of information to provide to legal counsel on the subject matter for which counsel has been consulted, I find that it, too, is subject to solicitor-client privilege.

[52] Accordingly, I find that the records are all part of a continuum of communications between the university and legal counsel on a matter involving the appellant and the university. I find that the records are aimed at keeping the client (the university in this case) and its counsel informed so that advice could be sought and given and that the records therefore fall within the common law solicitor-client communication privilege aspect of section 19(a). They are direct communications of a confidential nature between or involving university employees and legal counsel retained by the university that were

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[26] *Supra* note 14.

prepared for the purpose of soliciting, giving or receiving legal advice, or are communications that would, if disclosed, reveal legal advice sought by or given to the university by counsel.

[53] I also find that there is no evidence to suggest that the university has either explicitly or implicitly waived its privilege with respect to any of the records. I therefore find that section 49(a), read with section 19(a), applies to all 16 records.

[54] The university need not prove that more than one type of privilege applies to the records. Accordingly, because I have found that the records are solicitor-client privileged under section 19(a), I need not consider the university's claim that they are also subject to common law litigation privilege or to the statutory litigation privilege in section 19(c). I will next consider the university's exercise of discretion to deny access to the records.

The university exercised its discretion appropriately

[55] The section 49(a) and 19(a) exemptions are discretionary and permit an institution to disclose information despite that it could withhold it. The institution must exercise its discretion when determining whether to disclose information in response to a request. On appeal, although it cannot substitute its discretion for that of the institution, the IPC may determine whether the institution failed to exercise its discretion properly.[27]

[56] The university says that it considered the purposes of the *Act*, including that information should be made available to the public and that individuals should have a right of access to their own personal information, and that the application of the exemptions should be limited and specific. The university says it considered that the appellant was seeking access to her own personal information, and the sensitivity of the information in the records.

[57] The appellant argues that the university failed to consider all the relevant circumstances when applying section 19 because it failed to consider factors that favoured the appellant's interest in disclosure, which the appellant says is a public interest in there being full disclosure.

[58] I find that the university exercised its discretion under section 49(a), read with section 19(a), appropriately. I find that the university considered relevant factors in exercising its discretion, including the need to allow for the giving and receiving of confidential legal advice and whether disclosure to the appellant would result in waiving solicitor-client privilege over confidential communications between client and counsel. Given that many records were partially disclosed, I am satisfied that the university considered whether it was possible to disclose some information to the appellant without waiving privilege. Finally, there is no suggestion that the university exercised its discretion

[27] In the case of a finding of an improper exercise of discretion, the IPC may send a matter back to the institution for a re-exercise of its discretion.

in bad faith or for an improper purpose, or that it relied on irrelevant considerations.

[59] I uphold the university's exercise of discretion and, therefore, its decision to deny access to the 16 records at issue under section 49(a) read with section 19(a).

ORDER:

I uphold the university's decision and dismiss this appeal.

Original signed by:	February 22, 2024
Jessica Kowalski Adjudicator	