Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4487

Appeal PA21-00128

Toronto Metropolitan University

February 22, 2024

Summary: The appellant made a request to the university for access to information about herself for a four-month period in 2017. The university located eight responsive records and granted partial access. The university denied access to record 1 under section 49(b) (personal privacy), and to records 7 and 8 under section 49(a) (discretion to refuse requester's own information) read with section 19 (solicitor-client privilege). In this order, the adjudicator upholds the university's decision to deny access to records 7 and 8. The adjudicator partially upholds the university's decision to deny access to record 1 and orders the university to disclose a severed version of record 1 to the appellant by removing the personal information of another individual.

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) and 49(b).

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) for access under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to records relating to her for a specified period from the university's human rights office.

[2] The appellant communicated with the university and clarified the request to be for

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

access to the following:

> All communication case notes etc. regarding me [the appellant] from the office of human rights between Feb 1st-June 1st 2017.

[3] The university issued a decision stating that it had located eight responsive records and was granting the appellant partial access to them. The university denied access to some of the records based on sections 19 (solicitor-client privilege), 49(b) (personal privacy) and 49(c.1) (supplied explicitly or implicitly in confidence).

[4] The appellant appealed the university's decision to deny access to records 1, 2, 7 and 8 to the Office of the Information and Privacy Commissioner of Ontario (IPC). A mediator was appointed to assist the parties with resolution.

[5] During mediation, the appellant informed the mediator that she no longer sought full access to record 2. As a result, access to record 2 is no longer an issue in this appeal.[2]

[6] Also during mediation, the university stated that it was no longer relying on the exemption in section 49(c.1), which it had claimed over record 1. Instead, the university took the position that record 1 is exempt under section 49(b) (personal privacy). Section 49(c.1) was removed, and section 49(b) was added as an issue in this appeal with respect to record 1 only.

[7] Because it appeared that some of the records might contain the appellant's personal information, section 49(a) (discretion to refuse requester's own information) was also added during mediation to the university's claim that records are exempt because they are solicitor-client privileged. Section 49(a) allows an institution to deny a requester access to their own personal information when read with section 19.

[8] The appellant maintained that she seeks access to record 1 which the university withheld in full based on section 49(b) (personal privacy), and to records 7 and 8 which the university withheld in full based on section 49(a) read with section 19.

[9] 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 appellant. Because portions of the university's representations about records 7 and 8 contained information that I was satisfied would reveal contents of those 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 sections 5 and 6 of the IPC's *Practice Direction 7* on the sharing of representations.

[10] In this order, I uphold the university's decision to deny access to records 7 and 8 under section 49(a) read with section 19(a). I partially uphold the university's decision to

[2] The issue of the reasonableness of the university's search for responsive records was also made an issue during mediation but later removed and is not an issue in this appeal.

deny access to record 1 under section 49(b). I order the university to disclose a severed version of record 1 to the appellant by removing the personal information belonging to another identifiable individual.

RECORDS:

[11] There are three records at issue, numbered by the university as records 1, 7 and 8. The university claims that they are exempt as follows:

Records	Exemptions claimed
1 (access denied in full)	Section 49(b) (personal privacy)
7 and 8 (access denied in full)	Section 49(a) (right to refuse access to requester's own information), read with section 19 (solicitor-client privilege)

[12] The university did not provide copies of records 7 or 8 to the IPC. Instead, the university submitted an affidavit sworn by a lawyer employed by the university, in accordance with the IPC's Protocol for Appeals Involving Solicitor-Client Privilege claims where the institution does not provide copies of the records to the IPC.[3]

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 records 7 and 8?

C. Does the discretionary personal privacy exemption in section 49(b) apply to some or all of record 1?

DISCUSSION:

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

[13] 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

[3] Issued June 2020.

identifiable individual."

[14] 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.[4] 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.[5]

[15] 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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> …
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
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> (c) any identifying number, symbol or other assigned to the individual,
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> (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.

[16] Generally, information about an individual in their professional, official or business capacity is not considered to be "about" the individual.[6] Section 2(3) of the *Act* states that:

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

[17] The university submits that the records contain the appellant's name and

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

[5] 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.

[6] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

information that reveals something of a personal nature about her. The university also submits that the records contain the personal information of another identifiable individual.

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

Analysis and findings

[19] I have reviewed the records and find that they contain the appellant's personal information and personal information belonging to another identifiable individual (the subject of the appellant's complaint).

[20] Records 7 and 8 discuss the appellant's complaint made to the university's Human Rights Services (HRS) office. I find that they contain the appellant's personal information as within the definition of that term in paragraphs (b), (e) and (h) of section 2(1) of the *Act*.

[21] Record 1 describes an event on campus and an associated incident and identifies the appellant and the individual about whom the appellant complained. I find that it contains the appellant's and the other individual's personal information within the meaning of paragraphs (b) and (h) of section 2(1). Because the appellant's personal information cannot be exempt under section 49(b), I will order it disclosed.

[22] Record 1 also contains information about university employees acting in the course of their employment. The university does not submit that this is "personal information," and I agree. I find that the university employees' information contained in record 1 is about them acting in the course of their employment, does not reveal anything of a personal nature about them, and is not personal information as that term is defined in section 2(1) of the *Act*. Because this is not personal information, I will order this information disclosed.

Issue 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 records 7 and 8?

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

[24] 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.

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

Section 19: solicitor-client privilege

[26] 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,
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> (a) that is subject to solicitor-client privilege;
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> (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
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> (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.

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

[28] 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*.

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

[30] 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

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

[32] 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.[7] Confidentiality is an essential

[7] *Descôteaux v Mierzwinski*, (1982), 141 D.L.R. (3d) 590 (S.C.C.).

component of solicitor-client communication privilege. The institution must demonstrate that the communication was made in confidence, either expressly or by implication.[8] The privilege does not cover communications between a lawyer and a party on the other side of a transaction.[9]

[33] 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.[10]

[34] 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.[11] 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.[12] Generally, disclosure to outsiders of privileged information is a waiver of privilege.[13] However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.[14]

Summary of Representations

The university's representations

[35] The university submits that records 7 and 8 are part of a continuum of communications between its staff and legal counsel about the appellant's complaint.

[36] The university submits that the records "were prepared for the purpose of conveying legal advice and, considered in this context, are part of the 'continuum of communications' that sustain the solicitor-client relationship." The university says that records 7 and 8 reveal the substance of the legal matter involving the appellant that was discussed with counsel and on which the university sought legal advice, and that they must remain confidential to preserve the ability for it to communicate fully and frankly with its legal counsel. It says that, because records 7 and 8 contain a request to legal counsel for advice, the entire records are subject to privilege, and not just those portions that involve actual advice.

[37] The university submits that, to qualify as solicitor-client communication privileged,

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[8] *General Accident Assurance Co. v Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[9] *Kitchener (City) v Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)
[10] *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).
[11] *S. & K. Processors Ltd. v Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (C.A.)
[12] *R. v Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.
[13] 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.).
[14] *General Accident Assurance Co. v Chrusz,* cited above; Orders MO-1678 and PO-3167.

the records need not contain legal advice, as long as they are part of the continuum of communications which addresses the subject matter for which legal counsel has been consulted.[15] The university, citing a human rights tribunal file number, says that "[a]s anticipated, the underlying dispute culminated in a legal claim against the University and others."

[38] The university says that there has been no waiver of solicitor-client privilege in either of records 7 or 8.

The appellant's representations

[39] The appellant submits that the inclusion of the phrase "and/or" in the university's description of the records in its affidavit leaves open the possibility that some of the communication might not have been solely with legal counsel. The appellant says that this raises the question of whether records 7 and 8 truly involve "direct communications of a confidential nature between lawyer and client." The appellant also states that the university's affidavit never explicitly states that records 7 and 8 are, in fact, privileged, and that the use of the words "either" and "or" to describe them allows for the possibility that the records are emails simply sent to the Office of the General Counsel but that do not contain advice.

[40] The appellant also submits that the records were prepared months in advance of the related legal action and could not have been prepared either in contemplation of, or for the dominant purpose of, litigation.

Analysis and findings

[41] I have considered the university's representations and the description of records 7 and 8 in both its representations and in the index of records attached as Exhibit A to its affidavit.

[42] Based on my review of the materials before me, I find that records 7 and 8 fall within the solicitor-client communication privilege exemption within branch 1, or section 19(a) of the *Act*, and are therefore exempt from disclosure under section 49(a), read with section 19(a).

[43] Broadly speaking, records 7 and 8 contain a request for legal advice in connection with a dispute on campus described by the university and appellant in their respective representations. The university's exhibit to its affidavit includes a date and time for each email, identifies the sender and recipient by name and title (including for the lawyer involved), and describes the nature of the communication and request for advice made to its general counsel.

[44] The rationale for the common law solicitor-client communication privilege is to

[15] *Pritchard v Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809, at para. 15.

ensure that a client may freely confide in their lawyer on a legal matter.[16] The privilege covers the request for legal advice, the document containing legal advice, and also information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.[17]

[45] 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 aimed at keeping both informed so that advice can be sought and given.[18]

[46] The Supreme Court of Canada in *Descôteaux v Mierzwinski*[19] 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.[20] I find that all three requirements are present in this case. I find that the details of records 7 and 8 as described by the university are consistent with a client becoming aware of an issue, contacting legal counsel, providing information to legal counsel about the issue, and making a request for legal advice.

[47] Litigation need not exist nor be contemplated for a client to seek legal advice or to contact counsel about an issue of concern or that may trigger legal responsibilities or further action. In this case, university staff reported on the appellant's complaint and sought legal advice based on the allegations the appellant made. There is no evidence before me that it did not treat either the discussion of the complaint or the associated request for legal advice confidentially.

[48] I also find that there is no evidence to suggest that the university has either explicitly or implicitly waived its privilege with respect to either record. I therefore find that section 49(a), read with section 19(a), applies to records 7 and 8.

[49] 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 communication 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 under branch 2, or section 19(c) of the *Act*. I will next consider the university's exercise of discretion to deny access to records 7 and 8.

The university exercised its discretion appropriately

[50] The section 49(a) and 19(a) exemptions are discretionary and permit an institution to disclose information despite the fact that it could withhold it. The institution must

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[16] Orders PO-2441, MO-2166 and MO-1925.
[17] *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.
[18] *Supra* note 14.
[19] [1982] 1 S.C.R. at 888.
[20] 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.

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.

[51] The university submits that it weighed the appellant's right of access to her own personal information against its own interest and the public interest in confidentiality protected by the section 19 exemption. The university says it considered that withholding the records was necessary to prevent a waiver of solicitor-client privilege, and that it considered whether it was possible to disclose any portion of the records without waiving privilege.

[52] The appellant says that the discretionary nature of section 49(a) must not be understood as discretion to prevent an individual to access their own personal information, but as permitting and facilitating disclosure of otherwise confidential information to a requester when the requester's own personal information is at issue. The appellant submits that the university failed to consider and balance a public interest in disclosure against a public interest in the confidentiality of the solicitor-client privilege, considering only the latter.

[53] 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. I find that the university's considerations were relevant, and that there is no basis to conclude that the university exercised its discretion in bad faith or for an improper purpose, or that it relied on irrelevant considerations.

[54] I uphold the university's exercise of discretion and, therefore, its decision to deny access to records 7 and 8 under section 49(a) read with section 19(a).

[55] I will next consider the university's claim that the remaining record, record 1, is exempt under section 49(b).

Issue C: Does the discretionary personal privacy exemption at section 49(b) apply to some or all of record 1?

[56] Above I have found that record 1 contains personal information belonging to the appellant and another student.

[57] 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, an institution may refuse to disclose that information to the requester. Because the section 49(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.

[58] Section 49(b) contains a balancing principle, which involves weighing the appellant's right of access to her own personal information against the other individual's right to protection of their privacy. To uphold the application of section 49(b) to deny access, I must be satisfied that disclosure of the other individual's personal information would constitute an unjustified invasion of their personal privacy.[21] If disclosing the other individual's personal information would not be an unjustified invasion of their personal privacy, then the information is not exempt under section 49(b).

[59] Also, the appellant's own personal information, standing alone, cannot be exempt under section 49(b) as its disclosure could not, by definition, be an unjustified invasion of another individual's personal privacy.

[60] Sections 21(1) to (4) give the following guidance for deciding whether disclosure would be an unjustified invasion of the other individual's personal privacy under section 49(b):

- if the information fits within any of paragraphs (a) to (e) of section 21(1), disclosure is not an unjustified invasion of personal privacy, and the information is not exempt under section 49(b);
- section 21(2) lists "relevant circumstances" or factors that weigh for or against disclosure and that must be considered;
- section 21(3) lists circumstances in which the disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy; and,
- section 21(4) lists circumstances where disclosure of personal information does not constitute an unjustified invasion of personal privacy, despite section 21(3).

[61] The parties do not rely on paragraphs (a) to (e) of section 21(1) or on section 21(4), and I find that they do not apply in this appeal.

[62] In deciding whether the disclosure of personal information in the records would be an unjustified invasion of personal privacy under section 49(b), I must consider and weigh the relevant factors and presumptions in section 21(2) and (3) and balance the interests of the parties.

Summary of Representations

The university's representations[22]

[63] The university submits that record 1 is an investigative record created because of

[21] Order M-1146.

[22] In its representations under the discussion of section 49(b), the university also claims that record 1 is exempt under section 14(1)(a). Section 14(1)(a) is a law enforcement exemption that applies to ongoing investigations and may be read with section 49(a). It allows an institution to refuse to disclose a record

an investigation by its Human Rights Services (HRS) office. The university says that the investigation involved a possible violation of the Ontario *Human Rights Code* (the *Code*) and the university's Discrimination and Harassment Prevention Policy, which the university says is interpreted and applied in accordance with the *Code*.

[64] The university says that it is required to investigate issues that arise between members of the university community and that its HRS acts as a law enforcement agency for the purposes of the *Act*. The university submits that HRS administers the complaint resolution process under its Discrimination and Harassment Prevention Policy which relates to investigations that could lead to further proceedings before the Human Rights Tribunal of Ontario or a court.

[65] The university submits that two presumptions in section 21(3) apply to record 1. The university says that record 1 is subject to the presumption in section 21(3)(b) because it was compiled and is identifiable as part of an investigation into a possible violation of law. The university also says that disclosure of record 1 would reveal an individual's religious or political beliefs, triggering the presumption in section 21(3)(h), although it does not specify whether it is the appellant's or the other individual's individual beliefs that could reasonably be inferred.

[66] The university also submits that record 1 contains information that is highly sensitive and that the factor in section 21(2)(f) (highly sensitive) also applies to it and weighs against disclosure.

The appellant's representations

[67] The appellant submits that any personal information belonging to another identifiable individual in record 1 can be redacted and the rest of the record disclosed to her. The appellant says that she has a higher degree of interest in the remaining portions of the record because she says they likely contain the university's response to alleged unlawful acts committed against her, and to the university's enforcement of, or failure to enforce, its anti-discrimination policy to protect the appellant from future acts of discrimination. The appellant submits that the university's refusal to disclose record 1 seeks to obscure not only the other student's personal information, but the university's response to the complaint.

Analysis and findings

[68] Record 1 contains a summary of the appellant's complaint to HRS and information

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where the disclosure could reasonably be expected to "interfere with a law enforcement matter." The university did not rely on section 14(1)(a) in its decision. This exemption was not raised during mediation and is not properly before me in this appeal. For this reason, I make no findings on the application of section 14(1)(a) in this order. Rather, I have considered the university's claims that record 1 is a law enforcement record and that its disclosure is presumed to constitute an unjustified invasion of personal privacy under the presumption against disclosure in section 21(3)(b).

about the university's response.

[69] The university relies on the presumption in section 21(3)(h), which states that disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

> …indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

[70] I find that section 21(3)(h) applies to record 1. Record 1 describes an event on campus, an incident that occurred during the event, and the reason underlying the appellant's complaint to HRS. I find that both the appellant's and the other individual's political beliefs and associations can be inferred from the record based on the nature of the event and the appellant's complaint. I therefore find that disclosure of the other individual's personal information contained in record 1 is presumed to constitute an unjustified invasion of that individual's personal privacy because it indicates their political beliefs and associations based on the description of their alleged conduct and the appellant's complaint.

[71] The university also claims that the presumption in section 21(3)(b) applies to record 1. The presumption in section 21(3)(b) states that disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information "was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or continue the investigation." The university has not provided a sufficient basis for me to conclude that a complaint about an alleged violation of a university policy, and that it says was administered under that policy, meets the requirements for section 21(3)(b) to apply. In any event, I have already found that disclosure is presumed to constitute an unjustified invasion of an individual's personal privacy because the presumption in section 21(3)(h) applies to it.

[72] I will therefore consider next whether any factors listed in section 21(2) (or unlisted) apply because under section 49(b), a presumption in section 21(3)(h) must be weighed and balanced with any factors in section 21(2) that may apply, either to favour disclosure or non-disclosure, and against the interests of the parties.

[73] As I have already noted, 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.[23] The list of factors is not exhaustive, and the university must consider any circumstances that are relevant, even if they are not listed under section 21(2).[24]

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[23] Order P-239.
[24] Order P-99.

[74] The university claims that the factor listed in section 21(2)(f) applies to record 1.

[75] In determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, section 21(2)(f) requires the university to consider whether the personal information is highly sensitive. To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.[25]

[76] The university describes the incident in record 1, which contains allegations regarding an individual's conduct at a campus event, as having started a chain of events that led to a human rights complaint and investigation. I accept that, in the circumstances, disclosure of information relating to an individual's alleged conduct in violation of an anti-discrimination and harassment policy, and which may ultimately lead to some form of legal proceedings, can reasonably be expected to cause significant personal distress. I therefore find that the factor in section 21(2)(f) applies to the other individual's personal information contained in record 1 and weighs against its disclosure.

[77] I find that no factors, listed or unlisted, apply to weigh in favour of disclosure of the other individual's personal information in record 1. As I have said above, record 1 contains the mixed personal information of both the appellant and another individual. I find that disclosure of the other individual's personal information would constitute an unjustified invasion of that individual's personal privacy and that this information is therefore exempt under section 49(b). I will order the university to sever this information from the record.

[78] Finally, I have also considered the appellant's submission that she has a "higher degree of interest in the remaining portions of record 1."

[79] Section 10(2) of the *Act* requires the university to disclose as much of a responsive record as can reasonably be severed without disclosing material that is exempt. In this regard, I must determine whether record 1 can reasonably be severed to provide the appellant with any of her own personal information without disclosing the personal information of the other individual that I have found is exempt under section 49(b). I find that it can.

[80] The university submits that this information cannot reasonably be severed but has offered no persuasive explanation for why the remainder of the record cannot be disclosed to the appellant. I have considered the nature of record 1, including that it originated from information the appellant provided to the university, and whether in the circumstances, the absurd result principle could apply to it.

[81] Regarding the remaining information in record 1, I find that withholding it under section 49(b) would lead to an absurd result given that the appellant has knowledge of some of the information contained in the record, and that it contains the appellant's

[25] Order P-99.

personal information. I will therefore order this information, including the substance and status of the appellant's complaint, disclosed.

[82] Past IPC orders have held that denying a requester access to information that they may have originally supplied, or are otherwise aware of, could lead to an absurd result. In certain cases, the information may not be exempt under section 49(b), because to withhold it would be absurd and inconsistent with the purpose of the exemption.[26] The absurd result principle has been applied where, for example, a requester sought access to their own witness statement,[27] was present when the information was provided to the institution,[28] or where the information is clearly within the requester's knowledge.[29]

[83] Based on the appellant's representations and the contents of record 1, I am satisfied that the appellant is aware of some of the information contained in it. This includes the substance of the appellant's complaint and information that could reasonably have been expected to be shared with or reported back to her by HRS about it, including its status and conclusion.

[84] I will therefore order the university to disclose a severed version of record 1 by removing the other individual's personal information from it that I have found to be exempt under section 49(b). Disclosing this information would not constitute an unjustified invasion of the other individual's personal privacy.

Record 1 and the university's exercise of discretion under section 49(b)

[85] As noted above, the section 49(b) exemption is discretionary, and permits an institution to disclose information even though it could withhold it. The IPC may find that the institution erred in exercising its discretion where, for example, it did so in bad faith or for an improper purpose, relied on irrelevant considerations, or failed to consider relevant ones.

[86] I am satisfied that the university did not act in bad faith in denying access to the portions of record 1 that I have found to be exempt, considering that it was required to protect the interests of another identifiable individual whose privacy interests would be affected by disclosure. I accept that the university did not exercise its discretion for an improper purpose. While I have found that a severed version of record 1 must be disclosed to the appellant, this does not affect my conclusion that the university acted appropriately in exercising its discretion, and I uphold its decision to deny access to the other individual's personal information contained in record 1.

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[26] Orders M-444 and MO-1323.
[27] Orders M-444 and M-451.
[28] Orders M-444 and P-1414.
[29] Orders MO-1196, PO-1679 and MO-1755.

ORDER:

1. I uphold the university's decision to deny access to records 7 and 8.

2. I order the university to disclose to the appellant a severed version of record 1 by removing the information highlighted in the copy of the record being provided with the university's copy of this order. The university shall disclose a copy of the severed record to the appellant by April 1, 2024 but not before March 25, 2024.

3. To verify compliance with provision 2 of this order, I reserve the right to require the university to provide me with a copy of the record that it sends to the appellant.

Original signed by: February 22, 2024

Jessica Kowalski
Adjudicator