



**Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario**

INTERIM ORDER PO-2924-I

Appeal PA09-286

York University



**Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8**

**Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8**

**Tel: 416-326-3333
1-800-387-0073
Fax/Téloc: 416-325-9188
TTY: 416-325-7539
<http://www.ipc.on.ca>**

NATURE OF THE APPEAL:

York University (the University) received a request pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

Copies in full of all records, including electronic, dating from January 1, 2009 that name me or relate or pertain to me in any way and that have been produced or received or come into the possession of the Board of Governors, the Executive Committee of the Board of Governors, the President, the Vice-Presidents, and the counsel or their offices.

The University located responsive records and issued a decision granting partial access to them, citing sections 19 (solicitor client privilege), 17 (third party information) and 49(b)/21(1) (personal privacy), as well as the exclusionary provision in section 65(6) (employment and labour relations) of the *Act*.

The requester, now the appellant, appealed the University's decision.

During mediation, the appellant withdrew his request for access to Records 4, 26 and 27 and the University clarified that with respect to its section 65(6) claim, it was relying on section 65(6)3. The appeal was not resolved during mediation and, as a result, proceeded to adjudication, where an adjudicator conducts an inquiry.

I began my inquiry by sending a Notice of Inquiry setting out the facts and issues in this appeal to the University, the eight individuals whose personal information may be contained in the records (the affected persons) and the business whose third party information may be contained in the records (the affected party), seeking their representations. I received representations from the affected party, five affected persons and the University. Because the affected party consented to release of its information in the records, section 17(1) is no longer at issue in this appeal. One affected person consented to the sharing of his representations. All of the affected persons who responded to the Notice of Inquiry objected to the release of their personal information in the records. I then sent a copy of the University's and this one affected person's representations to the appellant and received his representations.

The affected persons' representations only address the issue as to the applicability of the personal privacy exemptions in sections 21(1) or 49(b).

Record 52 is described by the University as a legal file from the Office of the University's Counsel. During adjudication, the University sent a revised decision letter to the appellant agreeing to disclose seven of the 52 documents in Record 52 upon payment of the prescribed fee. However, the University did not provide me with copies of the 48 documents remaining at issue in Record 52. I have determined that I cannot adjudicate the issues concerning these 48 documents without further information as to their content. Accordingly, this is an interim order which will not address them. I will issue a further order once I have the necessary information concerning these documents and I will remain seized of this appeal for that purpose.

RECORDS:

The records that are being adjudicated upon in this order are described in the following index:

| Record # | Date | Description | Released? | Exemptions claimed |
|-----------------|-------------|---|------------------|---------------------------|
| 5 | 5-Feb-09 | Email thread between University Secretary and General Counsel; University President; Chief Marketing Officer, Marketing and Communication; (individual at named company; Manager, Communications; Vice-President Academic, re priv. and confidential | no | 19(a)&(c); 65(6) |
| 6 | 5-Feb-09 | Email from University Secretary and General Counsel to Vice-President Finance & Administration; Executive Director, Employee Relations; University President; Vice-President, Academic; Dean, Faculty of Arts; Chief Marketing Officer, Marketing and Communication; Director, Media Relations re Legal planning: privileged and confidential | no | 19(a)&(c); 65(6) |
| 7 | 9-Feb-09 | Email thread between University Secretary and General Counsel; University President | no | 19(a)&(c); 65(6) |
| 8 | 9-Feb-09 | Email from University President re: priv. and conf. | no | 19(a)&(c); 65(6) |
| 9 | 13-Feb-09 | Email thread re appellant | no | 19(a)&(c); 65(6) |
| 10 | 13-Feb-09 | Email thread re appellant | no | 19(a)&(c); 65(6) |
| 11 | 13-Feb-09 | Email re Next step - confidential | no | 19(a)&(c); 65(6) |
| 12 | 17-Feb-09 | Email thread re appellant meeting request 17 02 09.doc privileged and confidential | no | 19(a)&(c); 65(6) |
| 13 | 3-Feb-09 | Email thread re CUPE - Forward: [FWD: York University President Accused of Fraud] privileged & confidential | partial | 19(a)&(c) |
| 14 | 3-Feb-09 | Email from University Secretary and General Counsel to Coordinator, Administrative Support Services, Office of the Counsel, re draft letter: privileged and confidential | no | 19(a)&(c); 65(6) |
| 15 | 3-Feb-09 | Email thread re draft letter: privileged and confidential | no | 19(a)&(c); 65(6) |

| | | | | |
|----|-----------|---|---------|---------------------------|
| 16 | 3-Feb-09 | Email thread re draft letter: privileged and confidential | no | 19(a)&(c); 65(6) |
| 17 | 3-Feb-09 | Email thread re draft letter: privileged and confidential | no | 19(a)&(c); 65(6) |
| 18 | 3-Feb-09 | Email re York University President Accused of Fraud | partial | 19(a)&(c); 65(6) |
| 19 | 3-Feb-09 | Email thread re draft letter: privileged and confidential | no | 19(a)&(c); 65(6) |
| 20 | 3-Feb-09 | Email thread re draft letter: privileged and confidential | no | 19(a)&(c); 65(6) |
| 21 | 3-Feb-09 | Email thread re draft letter: privileged and confidential | no | 19(a)&(c); 65(6) |
| 22 | 3-Feb-09 | Email re York University President Accused of Fraud | partial | 19(a)&(c); 65(6) |
| 23 | 3-Feb-09 | Email re York University President Accused of Fraud | partial | 19(a)&(c); 65(6) |
| 24 | 4-Feb-09 | Email re York University President Accused of Fraud | partial | 19(a)&(c); 65(6); 21(1) |
| 25 | 5-Feb-09 | Email re York University President Accused of Fraud | partial | 19(a)&(c); non-responsive |
| 28 | 10-Feb-09 | Email thread re YFC [York faculty concerned about the future of York University]: privileged and confidential | no | 19(a)&(c) |
| 29 | 10-Feb-09 | Email thread re YFC | no | 19(a)&(c) |
| 30 | 10-Feb-09 | Email thread re YFC: privileged and confidential | no | 19(a)&(c) |
| 31 | 11-Feb-09 | Email thread re Dean, Faculty of Arts Joins the Fraud (fwd): priv. and confid. | partial | 19(a)&(c) |
| 32 | 11-Feb-09 | Email thread re YFC | no | 19(a)&(c) |
| 33 | 18-Feb-09 | Email thread re defamation etc.: priv. and confidential | no | 19(a)&(c); 65(6) |
| 34 | 6-Mar-09 | Email thread between University Secretary and General Counsel; Associate Director, Media Relations; Senior Executive Officer, Office of the President; (name) University of Toronto Varsity newspaper, re The Varsity Newspaper – University President accused of fraud | partial | 19(a)&(c) |

| | | | | |
|----|-----------|---|---------|-------------------------|
| 35 | 9-Mar-09 | Email thread between University Secretary and General Counsel; Director, Media Relations; Chief Marketing Officer, Marketing and Communication; University President ; (name) University of Toronto Varsity newspaper, re The Varsity Newspaper – looking for a comment | partial | 19(a)&(c) |
| 36 | 9-Mar-09 | Email thread between University Secretary and General Counsel; Director, Media Relations; Associate Director, Media Relations; (name) University of Toronto Varsity newspaper, re The Varsity Newspaper – University President accused of fraud | partial | 19(a)&(c) |
| 37 | 23-Mar-09 | Email thread re Official letter needed for human rights matter | no | 19(a)&(c) |
| 38 | 23-Mar-09 | Email thread re Official letter needed for human rights matter | no | 19(a)&(c) |
| 39 | 25-Mar-09 | Email thread between Chair of the Board of Governors; University Secretary and General Counsel; Director, Media Relations, re Privileged and Confidential | no | 19(a)&(c) |
| 40 | 2-Apr-09 | Email thread between University Secretary and General Counsel; Academic Affairs Officer, Faculty of Graduate Studies; and a student | no | 19(a)&(c); 21(1); 49(b) |
| 41 | 13-Jan-09 | Email thread re appellant | no | 19(a)&(c) |
| 42 | 3-Feb-09 | Email thread between faculty member and Dean Faculty of Arts, re York University President Accused of Fraud | partial | 21(1) |
| 43 | 3-Feb-09 | Email thread between University Secretary and General Counsel and Dean Faculty of Arts, re draft letter: privileged and confidential | no | 19(a)&(c) |
| 44 | 3-Feb-09 | Email thread between Dean Faculty of Arts; Dean, Atkinson; Executive Assistant, Office of the Dean, Atkinson; (name) Associate Professor, Atkinson; (name) professor, re York University President Accused of Fraud | partial | 65(6) |
| 45 | 3-Feb-09 | Email thread between a faculty member and Dean Faculty of Arts, re York University President Accused of Fraud | no | 21(1) |

| | | | | |
|----|-----------|---|---------|------------------|
| 46 | 4-Feb-09 | Email from a faculty member to Dean Faculty of Arts, re friend's amazement | no | 21(1) |
| 47 | 4-Feb-09 | Email thread between faculty members and Dean Faculty of Arts, re calming down | partial | 21(1) |
| 48 | 6-Feb-09 | Email thread re University President letter to faculty | partial | 19(a)&(c) |
| 49 | 10-Feb-09 | Email re Privileged and confidential | no | 19(a)&(c) |
| 50 | 12-Feb-09 | Email thread between Dean Faculty of Arts and a faculty member, re (name) | no | 21(1); 49(b) |
| 51 | 1-Apr-09 | Email thread between Dean Faculty of Arts and (name), re draft letter that was prepared in 2005 | no | 19(a)&(c); 65(6) |

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

I will now determine whether section 65(6)3 excludes Records 5 to 12, 14 to 22, 24, 33, 44 and 51 from the *Act*. This section reads:

Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

If section 65(6) applies to the records, and none of the exceptions found in section 65(7) applies, the records are excluded from the scope of the *Act*.

The term “employment of a person” refers to the relationship between an employer and an employee. The term “employment-related matters” refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship [Order PO-2157].

If section 65(6) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507].

Section 65(6) may apply where the institution that received the request is not the same institution that originally “collected, prepared, maintained or used” the records, even where the original institution is an institution under the *Municipal Freedom of Information and Protection of Privacy Act* [Orders P-1560 and PO-2106].

The exclusion in section 65(6) does not exclude all records concerning the actions or inactions of an employee simply because this conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees [*Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.)].

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

Section 65(6)3: matters in which the institution has an interest

Introduction

For section 65(6)3 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and
3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

The University submits that a job competition and the hiring process are employment-related matters that fall within the scope of the exclusion in section 65(6)3. It states that:

Records 5, 8, and 24 were prepared in the context of the hiring of [the] inaugural Dean of the Faculty of Liberal Arts and Professional Studies. Specifically, the records deal with allegations of fraud made against the President in the hiring of the new Dean and the University's efforts to clarify the facts with regards to the Dean's hiring and his qualifications. The University submits that it has a significant interest, as employer, in those records as the recruitment process is fundamental to the University's administrative and governance structure. Consequently, the University's interest, as an employer, in the employment-related matter at issue satisfies section 65(6)3.

Records 6, 7, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, and 33 were prepared in the context of the appellant's employment with the University. Specifically, they concern the University's consideration of what actions might be taken with regards to the appellant who was identified as a contact person in a press release, issued by York Faculty Concerned about the Future of York University (YFCFYU), which alleged fraud on the part of the University President in the hiring of the new Dean. Notably, [name] Executive Director of the Department of

Faculty Relations, is included in the correspondence indicating that faculty employment issues are involved. These records pertain largely to the drafting of a letter to the appellant and the employer's efforts to set up a meeting with him to inquire of him who might be responsible for the press release and the fraud allegation.

Records 9, 10 and 51 arise out of the appellant's outstanding case with the Ontario Human Rights Commission. Specifically, Records 9 and 10 are considerations of the University's counsel on procedural matters. Record 51 concerns the employment context of two faculty members - one regarding the appellant and his human rights case, the other not related to the appellant's request. The appellant's human rights case against York University is an employment-related matter in which the institution has an interest.

Record 44 consists of a communication between the outgoing Deans of the Faculty of Arts and the Atkinson Faculty of Professional Studies and concerns both the hiring of the new Dean and the appellant's employment situation.

Part 1: collected, prepared, maintained or used

Based upon my review of the records at issue for which section 65(6)3 has been claimed, I find that they were all prepared, maintained or used by the University, therefore, part 1 of the test has been met.

Part 2: meetings, consultations, discussions or communications

Based upon my review of the records, I find that they are all related to discussions, consultations and communications of various sorts which took place with respect to the contents of the records. Consequently, I find that the preparation, maintenance or use of the records by the University were in relation to meetings, consultations, discussions or communications. Therefore, I am satisfied that the University has met part 2 of the section 65(6)3 test.

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

The phrase "labour relations or employment-related matters" has been found to apply in the context of:

- a job competition [Orders M-830 and PO-2123]
- an employee's dismissal [Order MO-1654-I]
- a grievance under a collective agreement [Orders M-832 and PO-1769]
- disciplinary proceedings under the *Police Services Act* [Order MO-1433-F]
- a "voluntary exit program" [Order M-1074]

- a review of “workload and working relationships” [Order PO-2057]
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act* [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.)].

The phrase “labour relations or employment-related matters” has been found *not* to apply in the context of:

- an organizational or operational review [Orders M-941 and P-1369]
- litigation in which the institution may be found vicariously liable for the actions of its employee [Orders PO-1722 and PO-1905].

The phrase “in which the institution has an interest” means more than a “mere curiosity or concern”, and refers to matters involving the institution’s own workforce [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above].

The records collected, prepared maintained or used by an institution are excluded only if the meetings, consultations, discussions or communications are about labour relations or “employment-related” matters in which the institution has an interest. Employment-related matters are separate and distinct from matters related to employees’ actions [*Ministry of Correctional Services*, cited above].

I will consider part 3 of the test for each group of records separately.

Records 5, 8 and 24

Based upon my review of these three records, I agree with the University that Records 5, 8, and 24 were prepared in the context of the hiring of the Dean of the Faculty of Liberal Arts and Professional Studies. The meetings, consultations, discussions or communications in the records are about employment-related matters involving a member of the University’s own workforce. The University’s interest in this employment related-matter extends beyond a “mere curiosity or concern.” Therefore, I find that part 3 of the test has been met with respect to these records and that they are excluded from the application of the *Act*.

Records 6, 7, 11, 12, 14, 16, 17, 18, 19, 20, 21, 22 and 33

Although these records concern the University's consideration of what actions might be taken with regards to the appellant, an employee of the University, these records relate to the appellant’s actions, not the terms and conditions of his employment or a human resources question [*Ministry of Correctional Services*, cited above]. Therefore, I find that Records 6, 7, 11, 12, 14, 16, 17, 18, 19, 20, 21, 22, and 33 do not meet part 3 of the test and are, accordingly, subject to the *Act*. I will consider below whether these records are exempt by reason of the application of section 19.

Record 15 contains information concerning the appellant's employment with the University, and specifically describes what actions might be taken with regards to the employment of the appellant at the University [see *Ministry of Correctional Services*, cited above]. Therefore, I find that part 3 of the test has been met with respect to Record 15 and that it is excluded from the application of the *Act* as it addresses directly an employment related matter in which the University has an interest.

Records 9, 10 and 51

These records relate to the appellant's case with the Ontario Human Rights Commission. I find that the University has not provided sufficient evidence to link Records 9 and 10 to the terms and conditions of the appellant's employment or a human resources question, nor is such a link apparent from a review of these two records. Therefore, I find that part 3 of the test has not been met for Records 9 and 10 and they are subject to the *Act*. I will consider below whether these two records are exempt by reason of section 19.

Based upon my review of Record 51, I find that this record relates to a labour relations matter concerning a University employee and is excluded from the application of the *Act*.

Record 44

Although the University claims that this record concerns both the hiring of the new Dean and the appellant's employment situation, I disagree and find that the information at issue in this record does not concern employment-related matters in which the University has an interest. The disclosed portion of this email is an email chain between University employees' commenting on the press release referred to above. Therefore, I find that part 3 of the test has not been met and that the information at issue in this record is subject to the *Act*. As no exemptions have been claimed for this record, I will order it disclosed.

Section 65(7): exceptions to section 65(6)

If the records fall within any of the exceptions in section 65(7), the *Act* applies to them. Section 65(7) states:

This Act applies to the following records:

1. An agreement between an institution and a trade union.
2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.

4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

None of the records at issue fall within any of the exceptions listed in section 65(7), nor has the University or the appellant claimed that they do. Therefore, section 65(7) does not apply.

Conclusion re: section 65(6)3

In conclusion, I agree with the University that Records 5, 8, 15, 24 and 51 are not subject to the application of the *Act* by reason of section 65(6)3.

I do not agree with the University that Records 6, 7, 9, 10, 11, 12, 14, 16, 17, 18, 19, 20, 21, 22, 33 and 44 are subject to the application of the *Act* by reason of section 65(6)3. I will consider below whether these records are exempt from the *Act*, except for Record 44. As no exemptions have been claimed for Record 44, I will order it disclosed.

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains “personal information” and, if so, to whom it relates. That term is defined in section 2(1) as follows:

“personal information” means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature,

and replies to that correspondence that would reveal the contents of the original correspondence,

- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name 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;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

Sections 2(2), (3) and (4) also relate to the definition of personal information. These sections state:

(2) Personal information does not include information about an individual who has been dead for more than thirty years.

(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.

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

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225 and MO-2344].

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

Only the University provided representations as to whether the records contain personal information. It submits that:

The original request received by the University was for "all records ... that name me or relate or pertain to me in any way". Accordingly, all of the records deemed responsive to this request mention the appellant's name or pertain to him. While some of the records mention the appellant, many are not in respect to him as they deal with the University's response to the allegations of fraud contained in the press release. Furthermore, many of the records contain other individuals' personal information, and are not about the appellant, but rather mention his name only incidentally.

... Other individuals' personal information - consisting of their personal opinions or views on the press release and on the hiring process and the qualifications of the new Dean himself, on their employment history, and their educational history-fall within the definition of "personal information" in section 2(1) of the *Act*. The records containing other individuals' personal information is correspondence sent to an institution by an individual that is implicitly or explicitly of a private or confidential nature.

Analysis/Findings

I found above that Records 6, 7, 9, 10, 11, 12, 14, 16, 17, 18, 19, 20, 21, 22 and 33, are subject to the *Act* as the exclusionary provision in section 65(6)3 did not apply. The University acknowledges that Records 13, 23, 25, 27 to 32, 34 to 39, 41, 43 and 48 to 49 are subject to the *Act*. As stated by the University, all of these records concern the appellant and his actions, which may result in legal action being taken against the appellant in his personal capacity or disciplinary or other action being taken against the appellant as an employee of the University. Therefore, the information in the records concerns the appellant in his personal capacity (see Orders P-165, P-170, P-448, P-1180 and PO-2525).

Some of the records at issue also contain the personal information of individuals other than the appellant in their personal rather than their professional capacity. Based upon my review of the records at issue, I find that they contain the personal information of the appellant and other identifiable individuals, including the affected persons, in their personal capacity. This personal information includes these individuals' employment and educational history, the views or opinions of another individual about these individuals, correspondence sent to the University by these individuals that is implicitly or explicitly of a private or confidential nature, along with their names which appear with other personal information (paragraphs (b), (f) to (h) of the definition of "personal information" in section 2(1)).

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/SOLICITOR-CLIENT PRIVILEGE

Section 47(1) gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

Section 49(a) reads:

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

where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, **19**, 20 or 22 would apply to the disclosure of that personal information.

Section 49(a) of the *Act* 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 personal information [Order M-352].

Where access is denied under section 49(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information. In this case, the institution relies on section 49(a) in conjunction with section 19.

Section 19(a) and (c) of the *Act* states as follows:

A head may refuse to disclose a record,

- (a) that is subject to solicitor-client privilege;
- (c) that was prepared by or for counsel employed or retained by an educational institution for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 contains two branches as described below. Branch 1 arises from the common law and section 19(a). Branch 2 is a statutory privilege and arises from section 19(b), or in the case of an educational institution, from section 19(c). The institution must establish that at least one branch applies.

It appears that the University is relying on the solicitor-client communication privilege in both Branch 1 and Branch 2. It submits that:

... the appellant has no right to access [the records at issue] as they reflect the advice of the University's General Counsel to other senior management, and also privileged advice with external counsel, and are therefore protected by solicitor-client privilege. Order PO-2746 establishes that records consisting of direct communications of a confidential nature between the University's lawyers and its staff made for the purpose of obtaining or giving professional legal advice are exempt pursuant to section 19(a). Order PO-2626 establishes that legal advice being sought from or given by counsel employed or retained by the University is exempt from disclosure under section 19(c).

The appellant did not provide direct representations on whether the records at issue are subject to the section 19 exemption. Instead, he states that:

York University has also sweepingly claimed the solicitor-client privilege exemption and the labour relations and employment exclusion for the same purpose, far beyond the intentions of the *Act*. The widely acknowledged historic significance of these events for the future of Internet privacy throughout North America establishes without question an overriding public interest in the full disclosure of these records.

Branch 1: common law privilege

Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue [Order PO-2538-R; *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)].

Solicitor-client communication privilege

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

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Orders PO-2441, MO-2166 and MO-1925].

The privilege applies to “a continuum of communications” between a solicitor and client:

. . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

Branch 2: statutory privileges

Branch 2 is a statutory exemption that is available in the context of Crown counsel giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

Statutory solicitor-client communication privilege

Branch 2 applies to a record that was prepared by or for Crown counsel, or counsel for an educational institution, “for use in giving legal advice.”

Analysis/Findings

I found above that Records 6, 7, 9, 10, 11, 12, 14, 16, 17, 18, 19, 20, 21, 22 and 33, were subject to the *Act* as the exclusionary provision in section 65(6)3 did not apply. The University has claimed that sections 19(a) and (c) apply to these records, as well as to Records 13, 23, 25, 27 to 32, 34 to 41, 43 and 48 to 49.

I will consider first whether the Branch 2 statutory solicitor-client communication privilege in section 19(c) applies to the records.

The records constitute email chains. Based on my review of the records and the representations of the University, I find that the information in each of the records at issue, except Record 13, was prepared by or for counsel employed or retained by the University for use in giving legal advice or in contemplation of or for use in litigation. Therefore, I find that section 19(c) applies to the information at issue in Records 6, 7, 9, 10, 11, 12, 14, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27 to 32, 33, 34 to 41, 43 and 48 to 49. I have not been provided with any evidence to support a finding that the privilege in these records has been waived. Subject to my review of the University’s exercise of discretion, I conclude that these records are exempt from disclosure under section 49(a), in conjunction with section 19(c) of the *Act*. As I have found that these records are subject to section 19(c), it is not necessary for me to consider whether they are also subject to section 19(a)

I find that Record 13 is not a direct communication 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 nor was it prepared by or for counsel employed or retained by an educational institution for use in giving legal advice or in contemplation of or for use in litigation. Therefore, I find that neither sections 19(a) or (c) apply to this record. As no other exemptions have been claimed, I will order it disclosed.

The appellant appears to be claiming that section 23 of the *Act* applies to the records for which the University has claimed section 19 and for the records which are excluded from the *Act* by reason of Section 65(6)3. Section 23 reads:

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

Section 23 does not apply to records that are not subject to the *Act*, nor to records that are exempt by reason of section 19 [see *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII)].

In conclusion, subject to my discussion below of the University's exercise of discretion, Records 6, 7, 9, 10, 11, 12, 14, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27 to 32, 33, 34 to 41, 43 and 48 to 49 are exempt from disclosure under section 49(a), taken in conjunction with section 19(c) [see Order PO-2626].

PERSONAL PRIVACY

I will now determine whether the mandatory exemption at section 21(1) or the discretionary exemption at section 49(b) apply to the personal information at issue in Records 42, 45 to 47 and 50.

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 a number of exemptions from this right.

Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

If the information falls within the scope of section 49(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy. See below for a more detailed discussion of the exercise of discretion issue.

Under section 21, where a record contains personal information only of an individual other than the requester, the institution must refuse to disclose that information unless disclosure would not constitute an "unjustified invasion of personal privacy".

In both these situations, sections 21(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met.

If the information fits within any of paragraphs (a) to (f) of section 21(1), it is not exempt from disclosure under section 21 or 49(b).

In the circumstances, it appears that the only exception that could apply is paragraph (f) of section 21(1). This section reads:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

If any of paragraphs (a) to (d) of section 21(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under sections 21(1) or 49(b). If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21. Neither sections 21(3) or 21(4) apply in this appeal.

If no section 21(3) presumption applies, 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 [Order P-239].

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) [Order P-99].

The University submits that Records 40, 42, 45 to 47 and 50 only contain the personal information of identifiable individuals other than the appellant and therefore the mandatory personal privacy exemption at section 21(1) should apply.

The University states that:

By and large, the appellant is not the subject of the records, but rather he is mentioned only incidentally....

Records 42, 45, 46, 47, and 50 are all implicitly confidential communications expressing personal opinions amongst faculty members regarding the situation brought about by the circulation of the press release accusing the President of academic fraud. Generally these records were deemed responsive because the appellant was named as the contact for the press release. The personal opinions expressed in the records relate to the press release, the new Dean, or the process by which the Dean was hired. Accordingly, although each of these records mentions the appellant's name, they do not constitute his personal information and would instead be an unjustified invasion of another individual's personal privacy, and disclosure may unfairly damage the reputation of the individuals referred to in the records (pursuant to section 21(2)(i) of the *Act*).

Section 21(2)(i) reads:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

the disclosure may unfairly damage the reputation of any person referred to in the record.

The appellant's representations appear to only address the factor in section 21(2)(a) favouring disclosure of the personal information in the records. This section reads:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;

The appellant's entire submission concerning the personal privacy exemption states as follows:

The personal information records sought in this case pertain to the extraordinary and precedent-setting efforts undertaken by York University to identify, in order to initiate reprisal against, anonymous members of the York faculty who, in February 2009, dared to expose academic fraud on the part of the university president. These retaliatory efforts, and the academic fraud itself, have received considerable attention in the media, especially because York's legal actions have established a landmark and disturbing legal precedent with regard to the matter of Internet privacy.

It is ironic in the extreme that York University is invoking the exemption of personal privacy in its response to this appeal, in an attempt to shield from public scrutiny its own unprecedented efforts to invade the privacy of its faculty members, and, by extension, the privacy of all Internet users.

Analysis/Findings

Record 42

The information at issue in this record is one email in an email chain from a faculty member. This faculty member did not consent to disclosure of this email because it includes her personal opinion. I agree that this email contains this affected person's personal opinion under paragraph (e) of the definition of that term in section 2(1). This personal opinion is not about another individual. This record does not contain the appellant's personal information, nor does it concern the issue of the disclosure of personal information related to the protection of internet

privacy. As no factors favouring disclosure apply, I find that the disclosure of this email in Record 42 would be an unjustified invasion of the personal privacy of the affected person who wrote the email and it is, therefore, exempt under section 21(1).

Record 45

This record contains only the personal information of three affected persons. It does not contain the personal information of the appellant. The personal information in this record includes the views or opinions of an affected person about another affected person (under paragraph (g) of the definition), along with the employment history of an affected person (under paragraph (b) of the definition). I find that the factor in section 21(2)(i) favours non-disclosure of this information. This record does not concern internet privacy, which is the basis of the appellant's submission, therefore, I find that the factor in section 21(2)(a) does not apply. As no factors favour disclosure, I find that disclosure of this email chain in Record 45 would, therefore, be an unjustified invasion of the personal privacy of the affected persons referred to therein and that Record 45 is, therefore, exempt under section 21(1).

Record 46

The information at issue in this record is one email from a faculty member. This faculty member does not consent to disclosure of this email as it includes her personal opinion. I agree that this email contains this affected person's personal opinion under paragraph (e) of the definition of that term in section 2(1). This personal opinion is not about another individual. This record does not contain the appellant's personal information. This record, as well, does not concern the issue of disclosure of personal information related to the protection of internet privacy therefore, I find that the factor in section 21(2)(a) does not apply. As no factors favour disclosure, I find that disclosure of this email in Record 46 would, therefore, be an unjustified invasion of the affected person who wrote the email and this email in Record 46 is, therefore, exempt.

Record 47

This record contains two emails. Only a portion of one email in this email chain has been disclosed. One of the emails at issue contains the personal information of the appellant, as containing the views or opinions of another individual about the appellant (paragraph (g) of the definition). The other email at issue in this record contains the personal opinions of affected persons under paragraphs (e) and (g) of the definition of "personal information" in section 2(1). This record, as well, does not concern the issue of disclosure of personal information related to the protection of internet privacy therefore, I find that the factor in section 21(2)(a) does not apply. As no factors favour disclosure, I find that section 21(1) applies to the emails in Record 47.

Disclosure of the email that does not contain the appellant's personal information in Record 47 would be an unjustified invasion of the affected persons mentioned in this email under section 21(1). This email that does not contain the appellant's personal information is, therefore, exempt. I will consider below whether the University exercised its discretion in a proper manner

concerning the email that contains the personal information of the appellant and other identifiable individuals in this record.

Record 50

This record is comprised of two emails which contain the personal information of the appellant, certain named affected persons and other identifiable individuals. The personal information includes personal opinions under paragraphs (e) and (g) of the definition of “personal information” in section 2(1), as well as the educational and employment history (paragraph (b) of the definition of “personal information” in section 2(1)).

I find that the factor which weighs against disclosure raised by the University in section 21(2)(i) applies. The applicability of this section is not dependent on whether the damage or harm envisioned by the clauses is present or foreseeable, but whether this damage or harm would be "unfair" to the individual involved [Order P-256].

This record, as well, does not concern the issue of disclosure of personal information related to the protection of internet privacy, therefore, I find that the factor in section 21(2)(a) does not apply. As no factors favour disclosure, I find that disclosure of the emails in Record 50 is an unjustified invasion of the personal privacy of the affected persons who are referred to in the emails. Therefore, Record 50 is exempt by reason of section 49(b), subject to my review of the University’s exercise of discretion.

EXERCISE OF DISCRETION

I will now determine whether the University exercised its discretion under section 49(a) concerning Records 6, 7, 9, 10, 11, 12, 14, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27 to 32, 33, 34 to 41, 43 and 48 to 49 and under section 49(b) concerning one email in record 47 and the emails in Record 50. The sections 49(a) and (b) exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

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

The University submits that:

The primary factor considered by York University in exercising its discretion not to disclose these records to the appellant is that they are employment-related matters in which the University has an interest. As the appellant is an employee of the University, most of the records that contain the personal information of the appellant fall within the labour relations and employment exclusion. Similarly, the ... press release [referred to in the records] was purportedly issued by York University faculty members who are employees of the University and thus comprise employment-related matters in which the institution has an interest. The

press release was generated in response to the hiring of a new Dean ... which is also an employment-related matter in which the University has an interest.

Another primary factor considered by the University in exercising its discretion not to disclose these records to the appellant is that many of the records are subject to solicitor client privilege pursuant to section[s] 19(a) and (c) of the *Act*.

The University also considered the personal privacy of other York University faculty members, a student, and the individual who was hired as the new Dean. In exercising its discretion not to disclose these records to the appellant, the University considered the personal privacy of these individuals and the fact that disclosing their opinions about matters not concerning the appellant would constitute an unjustified invasion of their personal privacy.

As an additional factor, the University considered the ongoing adversarial stance taken by the appellant towards York University and other of its employees.

The appellant did not provide representations on this issue.

Analysis/Findings

The information at issue in this appeal is significant to the University. Records 6, 7, 9, 10, 11, 12, 14, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27 to 32, 33, 34 to 41, 43 and 48 to 49 are subject to solicitor client privilege pursuant to section 19(c) of the *Act*. The emails at issue in Records 47 and 50 contain the personal information of affected persons, as well as the appellant.

I find that the University exercised its discretion in a proper manner, taking into account relevant factors and not taking into account irrelevant factors, in denying the appellant access to the information in the records for which it has claimed the sections 49(a) in conjunction with 19(c) and 49(b) exemptions. Disclosure will not increase public confidence in the operation of the University. In the circumstances of this appeal, the privilege attached to the records or the privacy rights of the identifiable individuals in the records other than the appellant are significant.

Accordingly, I uphold the University's exercise of discretion and find that Records 6, 7, 9, 10, 11, 12, 14, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27 to 32, 33, 34 to 41, 43 and 48 to 50 and the one email in Record 47 are properly exempt.

Therefore, I find that the University exercised its discretion in a proper manner taking into account relevant considerations and not taking into account irrelevant considerations and I am upholding the University's exercise of discretion.

ORDER:

1. I uphold the University's decision that Records 5, 8, 15, 24 and 51 are excluded from the application of the *Act*.

2. I uphold the University's decision that Records 6, 7, 9, 10, 11, 12, 14, 16, 17, 18, 19, 20, 21, 22, 23, 25, 27 to 32, 33, 34 to 43, 45, and 46 to 50 are exempt from disclosure.
3. I order Records 13 and 44 disclosed to the appellant by **November 30, 2010 but not before November 25, 2010.**
4. In order to verify compliance with provision 3 of this order, I reserve the right to require the University to provide me with a copy of the records disclosed to the appellant.
5. I remained seized of this matter in order to deal with any outstanding issues.

Original signed by: _____
Diane Smith
Adjudicator

_____ October 26, 2010