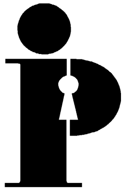

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

# ORDER PO-2954

## Appeal PA09-85

## University of Toronto

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## BACKGROUND:

On March 20, 2008 a protest was held at Simcoe Hall, a University of Toronto (the university) building that houses the offices of several senior university administrators. A number of protesters occupied the building for several hours and blocked the door to the office of the Vice-President and Provost, confining six university employees.

The protest gave rise to an internal complaint that initiated a process under the Code of Student Conduct, as well as criminal charges laid by the Toronto Police. The university sought legal advice on the Simcoe Hall incident from outside legal counsel with respect to both the internal complaint and the criminal proceedings. Ultimately, the majority of the criminal charges were withdrawn and most of the individuals who had been charged entered into peace bonds and other arrangements to resolve the matter with the Crown. As a result, the university withdrew its internal charges against those involved.

A second incident, entirely unrelated to the Simcoe Hall matter, occurred on April 23, 2008 at a meeting of the Arts and Science Student Union (ASSU), which is a student-run representative body. At that meeting, an individual was elected as President for the 2008-2009 academic year. Subsequently, the university received a number of complaints from students about the election procedure alleging various procedural irregularities. As a result, the university commenced an investigation in accordance with its obligations under the Policy of Compulsory Non-Academic Incidental Fees that requires the Office of the Vice-President and Provost to examine allegations of inadequacies in the conduct of a society's affairs and permits it to withhold funds where it finds a society has not met certain procedural requirements.

As the ASSU election matter raised legal issues about the university's duty to collect funds on behalf of a large group of students, it sought legal advice from external legal counsel about whether constitutional and other obligations had been met by the ASSU, and about procedural fairness to the complainants and respondents in the matter. Prior to the conclusion of the university's investigation, the individual elected as President of the ASSU resigned, thereby concluding the matter.

## NATURE OF THE APPEAL:

The appellant, who was present at the Simcoe Hall matter and who was the individual elected as President in the ASSU election matter, submitted an access request to the university under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*). By his request, he sought access to any and all documents from between March 1, 2008 and January 9, 2009, related to him, held by the Office of the Vice Provost of the Students of the University of Toronto, the Office of the President of the University of Toronto, the Office of the Principal of Victoria College, and the University of Toronto Campus Community Police. All of the records sought relate to the two matters identified above as the Simcoe Hall matter and the ASSU election matter.

The university located 977 pages of responsive records and granted access to 217 pages, in their entirety, and 47 pages, in part. The university denied access to the remaining pages and portions

of pages, claiming that they are exempt from disclosure pursuant to section 49(a) (discretion to refuse a requester's own personal information), read in conjunction with sections 14 (law enforcement) and 19 (solicitor-client privilege), and section 49(b) (personal privacy), read in conjunction with section 21 of *FIPPA*.

The appellant appealed the university's decision to deny access.

During mediation, the university provided both the appellant and this office with an index of records. The appellant advised that he is not interested in obtaining access to the personal information of other individuals and identified that he seeks access to the following records only:

> Records 2-3, 8-10, 12, 15, 18-23, 25-46, 48-96, 99-101, 104-106, 115-117, 119-132, 134-141, 143-144, 146-149, 152-168, 170-174, 176-190, 193-196, 202-208, 213-216, 222, 229-231, 234-235, 238, 246, 251-256, 258-261, 263, 267-269, 271-276, and 278.

During the inquiry process, I sought representations from the university. Before the submission of representations, the university issued a supplementary access decision to the appellant and disclosed an additional 15 records in their entirety, and 25 records in part. Accordingly, the following records, or parts of records, are no longer at issue in this appeal:

> In part: Records 23, 26, 139, 143, 157, 159, 208, 213, 214, 215, 216, 222, 229, 230, 231, 234, 235, 238, 251, 252, 255, 256, 258, 261, 273.
>
> In full: Records 66, 90, 126, 127, 158, 189, 190, 192, 246, 253, 254, 259, 268, 269, 274.

In its representations, the university advised that it is no longer claiming the application of the discretionary exemption at section 49(a), read in conjunction with section 14. Accordingly, section 49(a), read in conjunction with section 14, is no longer at issue in this appeal.

Although I invited representations from the appellant, he chose not to make submissions.

## RECORDS:

The records remaining at issue in this appeal are as follows:

> Records 2-3, 8-10, 12, 15, 18-23, 25-46, 48-65, 67-89, 91-96, 99-101, 104-106, 115-117, 119-125, 128-132, 134-141, 143-144, 146-149, 152-157, 159-168, 170-174, 176-188, 193-196, 202-208, 213-216, 222, 229-231, 234-235, 238, 251-252, 255-256, 258, 260-261, 263, 267, 271-273, 275, 276, 278.

## DISCUSSION:

### A. WHAT RECORDS ARE RESPONSIVE TO THE REQUEST?

The request resulting in this appeal was for information regarding the appellant held by specific university offices. The request identified a specific date range. In its index of records the university identified portions of the following records as not responsive to the appellant's request: Records 208, 213-216, 222, 229-231, 234, 235, 238, 251, 252, and 267.

In its representations, the university submits that the only part of a record that it now claims to not be responsive to the appellant's request is the first email in the email chain at Record 267. The university submits that this email falls outside of the date range specified by the appellant in his request.

I have reviewed Record 267 and agree that the first email in the email chain that makes up that record falls outside of the date range specified in the request as it was sent after January 9, 2009. Therefore, I find that Record 267 falls outside of the scope of this appeal. Accordingly, the first email in the email chain that makes up Record 267 should not be disclosed to the appellant and I will uphold the university's decision not to do so.

### B. SHOULD THE UNIVERSITY BE PERMITTED TO CLAIM THE APPLICATION OF SECTION 49(b) TO ADDITIONAL RECORDS AT THIS STAGE OF THE APPEAL?

The university initially released a number of records in part (Records 208, 213-216, 222, 229-231, 234, 235, 238, 251, 252, 267) having severed portions of those records on the basis that they were not responsive to the request. In its representations, the university explains that it re-released those records (with the exception of Record 267 discussed above) pursuant to the supplementary access decision, also with severances, but that it now claims that the severances are justified because the information is exempt under the discretionary exemption at section 49(b), rather than due to the fact that those portions are non-responsive.

The *Code of Procedure* (the *Code*) for appeals under *FIPPA* sets out basic procedural guidelines for parties involved in an appeal before this office. Section 11 of the *Code* sets out the procedure for institutions wanting to raise new discretionary exemption claims. That section reads, in part:

> In an appeal from an access decision, excluding an appeal arising from a deemed refusal, an institution may make a new discretionary exemption claim only within 35 days after the institution is notified of the appeal … If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

Previous orders have identified that the objective of the 35-day policy established by this office is to provide government organizations with a window of opportunity to raise new discretionary exemptions, but to restrict this opportunity to a stage in the appeal where the integrity of the

process would not be compromised or the interests of the appellant prejudiced.[1] However, the 35-day policy is not inflexible. The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.[2]

Furthermore, in Order PO-1832, Adjudicator Donald Hale stated as follows in reviewing this issue:

> In determining whether to allow the Ministry to claim this discretionary exemption at this time, I must balance the maintenance of the integrity of the appeals process against any evidence of extenuating circumstances advanced by the Ministry (Order P-658). I must also balance the relative prejudice to the Ministry and to the appellant in the outcome of my decision.

The university acknowledges that it has raised the application of this discretionary exemption to these particular records more than 35 days after receiving notice of the appeal, but submits that it should be allowed to apply the exemption. Specifically, it submits that the personal information for which it believes that section 49(b) applies was encompassed by records that were originally claimed as non-responsive. Accordingly, now that they have determined that the records are responsive to the request, the personal privacy of several affected individuals is affected and should be considered. Additionally, the university submits that there would be no prejudice to the requester in doing so.

In the particular circumstances of this appeal, I have decided to permit the university to claim, at this stage in the appeal, section 49(b) for the severed portions of the records that it had previously identified as not responsive to the request. Upon my review of the records, I note that all of the information for which the university is now claiming section 49(b) was previously withheld as not responsive to the appellant's request. I also note that all of this information contains information which may qualify as the personal information of individuals other than the appellant. Finally, I accept that the interests of these individuals should be addressed when determining whether this information should be disclosed.

Most importantly, I find that the appellant is not prejudiced by the late raising of section 49(b). The appellant has been given an opportunity to address the exemption claim and no delay has resulted due to it being raised. Accordingly, I will allow the university's claim that the discretionary exemption at section 49(b) applies to the portions of records that it had previously deemed as non-responsive to the request. Specifically, I will allow section 49(b) to be claimed for the information at issue in Records 208, 213-216, 222, 229-231, 234, 235, 238, 251, and 252.

## C. DO THE RECORDS CONTAIN "PERSONAL INFORMATION"?

Under *FIPPA*, different exemptions may apply depending on whether a record at issue contains or does not contain the personal information of the requester.[3] Where records contain the

[1] Order PO-2113
[2] Order PO-2113 and Order PO-2331
[3] Order M-352

requester's own personal information, either alone or together with the personal information of other individuals, access to the records is addressed under Part III of *FIPPA* and the exemptions at section 49 may apply. Where the records contain the personal information belonging to individuals other than the appellant, access to the records is addressed under Part II of *FIPPA* and the exemptions found at sections 12 to 22 may apply. In order to determine which sections of *FIPPA* apply, it is necessary to decide whether the record contains "personal information" as defined in section 2(1) of *FIPPA* and, if so, to whom it relates.

The university has withheld information in this appeal on the basis that its disclosure would constitute an unjustified invasion of various individuals' personal privacy under section 49(b). It has also withheld records and portions of records under the exemption at section 49(a), read in conjunction with section 19. However, as the exemptions in section 49 only apply if the records contain the "personal information" of the appellant, before reviewing the possible application of the exemptions claimed, I must first determine if the record contains "personal information" and, if so, to whom it relates.

To satisfy the requirements of the definition in section 2(1) of *FIPPA*, the information must be "recorded information about an identifiable individual," and it must be reasonable to expect that an individual may be identified if the information is disclosed.[4] The definition of personal information in section 2(1) contemplates inclusion of the following types of information:

> (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 where 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

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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.).

(h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

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) of the definition of the term in section 2(1) may still qualify as personal information.[5]

Older orders of this office established that information associated with an individual in a professional, official or business capacity will not necessarily be considered to be "about" the individual.[6] On April 1, 2007, amendments relating to the definition of personal information in *FIPPA* came into effect. To some extent, the amendments formalized the distinction made in previous orders between personal and professional (or business) information for the purposes of *FIPPA*. Sections 2(3) and (4) state:

> (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.

However, it remains true that 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.[7]

The university submits that all of the records at issue contain both the personal information of the appellant, as well as that of other identifiable individuals. The university explains that there are three groupings of personal information on which it bases its unjustified invasion of privacy claims:

(1) personal information about the employee victims involved in the Simcoe Hall matter;

(2) personal information about alleged protesters other than the appellant involved in the Simcoe Hall matter; and

(3) personal information about the ASSU (Arts and Science Student Union) complainants.

The university submits that information about the employee victims in the records related to the Simcoe Hall matter is either "non-privileged witness statements" prepared by the university

[5] Order 11
[6] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225
[7] Orders P-1409, R-980015, PO-2225 and MO-2344

police (Records 55, 56, 64, 65, 67, 207), "privileged witness statements" sent to counsel to support their advice (Records 58, 59, 60, 193, 194, 195), or records containing the "synopsis" part of the internal complaint (Records 63, 91, 94, 96, 275, 278).

The university further submits that the witness statements contain information about the employees, including their identity as victims and their views and opinions about the incident including how it has personally affected them. The university points to Order M-794 in which Adjudicator Hale held that notes taken by two immigration officers who witnessed an assault contained their personal information and was not information about them in a professional capacity as law enforcement officers. The university submits that this information should qualify as "personal information" due to the intensely emotional nature of the experience and the fact that "the situation of the employee victims during these incidents was outside of the context of their official or employment roles and responsibilities."

The university submits that the remaining records related to the Simcoe Hall matter reveal personal information about alleged protesters other than the requester, including whether they have been criminally charged, information about bail conditions, information about how charges were resolved, photographs of their faces, student numbers, dates of birth, personal addresses and phone numbers, as well as educational history.

Finally, with respect to the records related to the ASSU matter, the university submits that all of these records contain the personal information of individuals who filed complaints about the ASSU election. The university submits that it has disclosed most of the information contained in these records to the requester because the complainants were acting in official capacities. However, the university submits that the remaining information includes program and year of enrolment, personal opinions or views, identity of persons criminally charged, educational history, personal email addresses and personal telephone numbers. The university submits that this type of information consists of "personal information" within the meaning of *FIPPA*.

I have reviewed the records at issue and I accept the university's position that all of them contain the personal information of both the appellant and other individuals. All of the records contain personal information that qualifies as belonging to the appellant as they relate to two incidents in which he was involved. From my review, I also find that some of the records contain information that qualifies as the personal information of "employee victims." These records consist primarily of witness statements and contain the individuals' personal opinions or views about the incidents [paragraph (e)] and their names, together with other personal information about them [paragraph (g)].

Some of the records contain the personal information of alleged protesters. Specifically, they contain their ages [paragraph (a)], their criminal history [paragraph (b)], their student numbers [paragraph (c)], their addresses and telephone numbers [paragraph (d)], as well as their names, together with other personal information about them [paragraph (g)].

Finally, some of the records contain the personal information belonging to individuals who filed complaints about the ASSU matter. This information includes their educational history [paragraph (c)], their telephone numbers [paragraph (d)], their personal opinions or views

[paragraph (e)] and their names together with other personal information about them [paragraph (g)].

I find, therefore, that the records at issue contain the personal information of the appellant and other individuals as contemplated by the definition in section 2(1) of *FIPPA*. Therefore, the request falls under Part III of *FIPPA* and, as submitted by the university, the relevant exemptions are the discretionary ones found at section 49. I will now review whether the personal information at issue qualifies for exemption under sections 49(a) or (b).

## D. ARE THE RECORDS EXEMPT PURSUANT TO THE DISCRETIONARY EXEMPTION AT SECTION 49(a), READ IN CONJUNCTION WITH THE SOLICITOR-CLIENT PRIVILEGE EXEMPTION AT SECTION 19?

Section 47(1) of *FIPPA* gives individuals a general right of access to their own personal information held by an institution. Section 49 of *FIPPA* provides a number of exemptions from this right. Sections 49(a) and 49(b) are relevant in this appeal. Those sections state:

> 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 [emphasis added];
>
> (b) where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

The university has withheld information in this appeal on the basis that its disclosure would constitute an unjustified invasion of another individual's personal privacy under section 49(b). It has also withheld records and portions of records under section 49(a), read in conjunction with section 19 of *FIPPA*.

### Solicitor-client privilege

The relevant portions of section 19 of *FIPPA* read:

> 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, in the case of an educational institution, arises from section 19(c). The university must establish that at least one branch applies.

***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.[8]

*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.[9] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[10]

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.[11]

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[12]

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.[13]

***Branch 2: statutory privileges***

Branch 2 is a statutory exemption that applies to a record that was prepared by or for Crown counsel, or counsel for an educational institution, "for use in giving legal advice." The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

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[8] 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).
[9] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[10] Orders MO-1925, MO-2166 and PO-2441
[11] *Balabel v. Air India, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).*
[12] *Susan Hosiery Ltd. v. Minister of National Revenue, [1969] 2 Ex. C.R. 27.*
[13] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

**University's Representations**

The university takes the position that the following records related to the Simcoe Hall matter are exempt from disclosure pursuant to section 49(a), read in conjunction with section 19: Records 2, 3, 8-10, 12, 25, 30-34, 52-55, 57-60, 62, 71-89, 92, 93, 95, 96, 99-101, 105, 106, 115-117, 119-123, 125, 128-132, 134-138, 140, 141, 144, 146-149, 152-156, 160-168, 170-174, 176-188, 193-196, 271, 272, 267, 272, 276.

The university also submits that the following records related to the ASSU matter are exempt from disclosure pursuant to section 49(a), read in conjunction with section 19: Records 18-22, 27-29, 35-46, 48-51, 124, 202-206, 260, 263.

In its representations, the university provided me with record-by-record submissions describing the contents of each record and submitting why, in its view, the solicitor-client privilege exemption in section 19 applies. The university also makes more general submissions on the application of solicitor-client privilege to the records for which it has been claimed. Specifically, the university submits that as the incidents that gave rise to the creation of the records raised several complex, interrelated legal issues, it sought the advice of outside counsel that it retained from a private firm. The university submits that all of the records form part of the "continuum of communications" between its staff and outside counsel on a "complex and prolonged matter" that required a good deal of exchange between the parties to provide the information required for the formulation and provision of legal advice. The university submits that it required that the advice be confidential and that many of the records are marked "privileged" or "confidential" and that those that are not specifically marked were implicitly sent and received in confidence.

**Analysis and Findings**

I have reviewed all of the records for which the university has claimed section 49(a) and, for the reasons outlined below, I have found that all of them are exempt from disclosure under the statutory solicitor-client privilege exemption at section 19(c).

The majority of the records for which the university claims section 49(a), in conjunction with the solicitor-client privilege exemption at section 19, are emails and other correspondence between the university's external legal counsel and internal legal counsel and/or other university staff. Having considered the representations of the university and information contained in the records themselves, in my view, all of it falls squarely within the type of information for which section 19(c) applies. I find that the records were prepared by or for counsel employed or retained by the university and has been passed from counsel or client to the other as part of the continuum of communications aimed at keeping both informed for the purpose of seeking and providing legal advice with respect to the two incidents to which the records relate. While many of the records are explicitly marked "privileged" or "confidential," based on the types of information that the records contain and the submissions of the university, I accept that even those records which bear no such markings were implicitly intended to be kept in confidence by the parties and were treated in that manner. I am satisfied that there has been no waiver of privilege with respect to these communications.

The remaining types of information in the records for which the university claims section 49(a), in conjunction with section 19, amount to counsels' working papers such as charts, briefs, and opinions. It is clear that these records were prepared by counsel retained by the university and communicated to their client, in confidence, as part of the process of giving and receiving legal advice on the two incidents to which these records relate. I am also satisfied that there has been no waiver of privilege with respect to these communications.

Accordingly, subject to my review of the university's exercise of discretion, I find that all of the records for which the university has claimed section 49(a), in conjunction with section 19(c) of *FIPPA*, are exempt from disclosure. 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).

## E. ARE THE RECORDS EXEMPT PURSUANT TO THE DISCRETIONARY EXEMPTION AT SECTION 49(b) AS THEIR DISCLOSURE WOULD AMOUNT TO AN UNJUSTIFIED INVASION OF THE PERSONAL PRIVACY OF INDIVIDUALS OTHER THAN THE APPELLANT?

I have found that all of the records at issue in this appeal contain the personal information of the appellant together with that of other identifiable individuals. Additionally, I have found that many of these records are exempt pursuant to section 49(a) of *FIPPA*, in conjunction with the solicitor-client privilege exemption at section 19. Therefore, they are no longer at issue. However, section 49(b) of *FIPPA* was the only exemption claimed for the following records or portions of records: 15, 23, 26, 55, 56, 61, 63, 64, 65, 67, 68, 69, 70, 91, 94, 104, 139, 143, 157, 159, 207, 208, 213, 214, 215, 216, 222, 229, 230, 231, 234, 235, 238, 255, 256, 258, 273, 275, and 278. Accordingly, I must now determine whether section 49(b) applies to them.

As noted above, where a record contains both the personal information of the appellant and other individuals, the relevant personal privacy exemption is section 49(b) of *FIPPA*. Under section 49(b), the university has the discretion to deny the appellant access to his own personal information in that record if the university determines that the disclosure of the information *would* constitute an unjustified invasion of another individual's personal privacy. Conversely, upon weighing the appellant's right of access to his own personal information against another individual's right to protection of their privacy, the university may choose to disclose a record with mixed personal information.

When the analysis takes place under section 49(b), sections 21(2), (3) and (4) of *FIPPA* provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy.

Section 21(3) lists the types of information whose disclosure is *presumed* to constitute an unjustified invasion of the personal privacy of another individual. Where one of the presumptions in section 21(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is where the personal information falls under section 21(4) or the "public interest override" at section 23 applies.[14] The "public interest

[14] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

override" in section 23 has not been argued in this appeal and, in my view, neither it nor any of the exceptions in section 21(4) applies in the circumstances.

If none of the presumptions against disclosure in section 21(3) apply, the university is obliged to consider and weigh the possible application of the factors listed in section 21(2) of *FIPPA*, as well as all other considerations which are relevant in the circumstances of the case.[15]

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.

**University's representations**

The university submits that the disclosure of the records that contain personal information about the six employee victims of the Simcoe Hall matter (Records 55, 56, 58, 59, 60, 63, 64, 65, 67, 91, 94, 96, 174, 193, 194, 195, 207, 275, 278) would result in an unjustified invasion of their personal privacy as a result of the application of the presumption at section 21(3)(b), which reads:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where 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 to continue the investigation.

The university has divided its submissions on these records into three categories based on the type of record:

> (a) "non-privileged witness statements" prepared for use by the University of Toronto Campus Community Police (Records 55, 56, 64, 65, 67, 207) for eventual transmission to the Toronto Police for assessment;
>
> (b) "privileged witness statements" [ie: where section 49(a) read in conjunction with section 19 would apply] sent to [internal and external legal counsel] to support their legal advice and treated as confidential and privileged (Records 58, 59, 60, 193, 194, and 195);
>
> (c) records that contain the "synopsis" part of the internal complaint (Records 63, 91, 94, 96, 174, 275, 278).

I have found that all of the records that the university describes in its representations as "privileged witness statements," specifically, Records 58, 59, 60, 193, 194 and 195, as well as

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[15] Order P-99

Records 96 and 174 are exempt from disclosure under section 49(a), read in conjunction with the solicitor-client exemption at section 19. Accordingly, it is not necessary for me to address those records in my discussion of section 49(b).

With respect to the non-privileged witness statement, the university submits that disclosure would result in an unjustified invasion of privacy based on the presumption in section 21(3)(b) because they include personal information of the employee victims that "was compiled and is identifiable as part of an investigation into a possible violation of law."

The university submits:

> The University of Toronto Campus Community Police employ Special Constables appointed under the *Police Services Act* and pursuant to a Memorandum of Understanding with the Toronto Police Services Board. They are authorized to enforce the *Criminal Code*, other federal and provincial statutes and Municipal By-Laws in cooperation with the [Toronto Police].
>
> The Campus Police acted within this authority in gathering the non-privileged witness statements and did so for the purpose of investigation into a possible violation of the *Criminal Code*. Though it is not necessary that charges be laid for the presumption in section 21(3)(b) to apply, in this case the Campus Police provided the non-privileged witness statements to the Toronto Police, who assessed them and decided to initiate criminal proceedings.

With respect to the records that contain the synopsis part of the internal complaint, the university submits that they are exempt from disclosure pursuant to the presumption at section 21(3)(b). The university submits that the synopsis contains personal information that was compiled and is identifiable as part of an investigation into a possible violation of law as contemplated by section 21(3)(b). The university argues that these synopses were drafted by the University of Toronto Campus Community Police based on the non-privileged witness statements and they are exempt for the following three reasons:

> (a) the complaint identifies campus police as the complainant;
>
> (b) the responsibility of campus police for investigating possible violations of law is known; and
>
> (c) the synopsis is about misconduct that became the subject of criminal charges dealt with in open proceedings.

The university has also claimed that section 49(b) applies to the records that contain the personal information of the alleged protesters other than the requester present at the Simcoe Hall matter (Records 61, 68, 69, 70, 104, 139, 143, 157, 159, 273) and the personal information of the ASSU complainants (Records 15, 23, 26, 208, 213, 214, 215, 216, 222, 229, 230, 231, 234, 235, 238, 255, 256, 258). The university submits generally that it withheld these records for the following reasons:

(a) the personal information about other protesters is highly sensitive [section 21(2)(f)];

(b) one protester was protected under the terms of the *Youth Criminal Justice Act;*

(c) some records of personal information about the other protesters were compiled and are identifiable as part of an investigation into a possible violation of law [section 21(3)(b)];

(d) the university has redacted discrete pieces of the ASSU complainants' personal information from the records, the disclosure of which will not advance the requester's ability to scrutinize the university or its actions [section 21(2)(a)];

(e) the ASSU complainants' personal information can no longer be relevant to a fair determination of the requester's rights because the ASSU matter has concluded [section 21(2)(d)]; and

(f) though the ASSU election complaints were provided to the requester, an order to release the withheld personal information to the requester would give him access to the complainants' personal information without any express or implied restriction on its use.

**Analysis and finding**

The following parts of section 21 of *FIPPA* will be discussed in the reasons that follow:

> (2) 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,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny; …
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request; …
>
> (f) the personal information is highly sensitive; …
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence;
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

> (b) 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 to continue the investigation; …
>
> (d) relates to employment or educational history;

As noted above, all of the records in this appeal contain the personal information of the appellant, together with that of other identifiable individuals. There are three groups of records that remain at issue. First, there are the records that also contain the personal information of the six employee victims of the Simcoe Hall matter (Records 55, 56, 63, 64, 65, 67, 91, 94, 207, 275, 278). Second, there are the records that also contain the personal information of the other alleged protesters in the Simcoe Hall matter (Records 61, 68, 69, 70, 104, 139, 143, 157, 159, 273). Third, there are the records that contain the personal information of the ASSU complainants (Records 15, 23, 26, 208, 213, 214, 215, 216, 222, 229, 230, 231, 234, 235, 238, 255, 256, 258).

***Section 21(3)***

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

The university claims that the presumption at section 21(3)(b) applies to the records that contain the personal information of the six employee victims of the Simcoe Hall matter (Records 55, 56, 63, 64, 65, 67, 91, 94, 207, 275, 278) because they were compiled and are identifiable as part of an investigation into a possible violation of law. Additionally, from my review, some of the records related to the Simcoe Hall matter that contain the personal information of protesters other than the appellant (Records 61, 68, 69, and 70) may also be subject to the presumption at section 21(3)(b).

Previous orders issued by this office have established that investigations led by campus police into possible violations of law fit within the ambit of the presumption in section 21(3)(b).[16] Additionally, even if no charges are laid and no criminal proceedings are commenced following the investigation, section 21(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.[17] There is nothing in section 21(3)(b) that indicates that the presumption applies only while a law enforcement investigation is ongoing, because it concerns a "possible" violation of law.[18]

Based on my careful review of the records containing the personal information of the six employee victims, which include formal complaints filed under the Code of Student Conduct, occurrence reports, witness statements and supplementary statements, I accept the university's position that the presumption at section 21(3)(b) applies to them. I find that they were compiled and are identifiable as part of an investigation into the Simcoe Hall matter undertaken by the university's campus police with a view to determining whether violations of the *Criminal Code* had occurred.

[16] Order PO-2722
[17] Order P-242
[18] Order M-389

Similarly, I find that the records containing the personal information of the other protesters, which consist of surveillance photographs, witness statements, and completed charge forms or occurrence reports, were compiled by campus police and are identifiable as part of the investigation into the Simcoe Hall matter. Therefore, I find that the presumption at section 21(3)(b) also applies to them. As previously noted, the fact that the charges laid against some of the protesters, including the appellant, were withdrawn does not negate the application of the presumption.

As the presumption at 21(3)(b) applies, disclosure of the information at issue in Records 55, 56, 61, 63, 64, 65, 67, 68, 69, 70, 91, 94, 207, 275, and 278 is presumed to constitute an unjustified invasion of the personal privacy of the individuals to whom the information relates. As any personal information that relates to the appellant in these records is too intertwined with the personal information of the other individuals it cannot be severed. Accordingly, subject to my review of the university's exercise of discretion, which I will discuss below, I find that the discretionary exemption at section 49(a) applies to Records 55, 56, 61, 63, 64, 65, 67, 68, 69, 70, 91, 94, 207, 275, and 278.

*Section 21(3)(d): educational history*

Records 139 and 143, which form part of the second group of records that contain the personal information of the alleged protesters in the Simcoe Hall matter, are copies of an email exchanged between university staff regarding the graduation status of some of the alleged protesters. Both records have been disclosed in part. Section 21(3)(d) of *FIPPA* makes it a presumed unjustified invasion of privacy to disclose information that relates to an individual's educational history. Order PO-2711 established that information about a single event is insufficient to constitute "history," while information about a series of events, or in the case of that appeal, the progress of a party's involvement in an academic dishonesty matter was sufficient to be considered "education history." In the circumstances of this appeal, the information that remains at issue in Records 139 and 143 discuss the individuals' educational progress in the university system to the date of the record. Accordingly, I find that disclosure of the information at issue in these records is subject to the presumption at section 21(3)(d).

As with the application of the presumption at 21(3)(b), given that the presumption at section 21(3)(d) applies, and neither section 21(4) nor the public interest override applies, disclosure of the information at issue in records 139 and 143 *would* amount to an unjustified invasion of the personal privacy of the individuals to whom the information relates and the discretionary exemption at section 49(b) applies. Subject to my review of the university's exercise of discretion, I will uphold the university's decision to deny the appellant access to the information that remains at issue in Records 139 and 140.

Having reviewed the remaining records related to the Simcoe Hall matter (records 104, 157, 159, 273), I find that none of the presumptions at section 21(3) of *FIPPA* apply to the information that remains at issue. Additionally, none of the presumptions at section 21(3) apply to the information at issue in the final group of records at issue, those that also contain the personal information of the ASSU complainants (Records 15, 23, 26, 208, 213, 214, 215, 216, 222, 229, 230, 231, 234, 235, 238, 255, 256, 258).

As none of the presumptions against disclosure apply, I must weigh the possible application of the considerations listed in section 21(2) of *FIPPA*, as well as any other considerations which may be relevant in the circumstances of this appeal. However, from my review of the information that remains at issue, some of the information should be disclosed to the appellant on the basis of the absurd result principle. As a result, prior to addressing the considerations listed at section 21(2) I will address those records or portions of records which, in my view, attract the application of that principle.

***Absurd Result***

Previous orders have established that where a requester originally supplied the information or is otherwise aware of it, the information may be found not exempt under section 49(b) because to find otherwise would be absurd and inconsistent with the purpose of the exemption.[19] The absurd result principle has been applied where, for example, the information is clearly within the requester's knowledge.[20]

Records 231 and 238 are email exchanges between the Director of the Office of Vice-Provost, Students, and the appellant. Attached to the email exchange in Record 231 are four letters of complaint which, as is evident by the emails, the appellant was asked to respond to. Attached to Record 238 is a fifth letter of complaint which the appellant is also being asked to respond to. The records have been disclosed in part with some portions of the complaint letters having been severed. Record 235 is an email from a member of the ASSU executive, forwarding a letter from another member of the ASSU executive which addresses an upcoming council meeting. The appellant is carbon copied on the email. The majority of the record has been disclosed with the exception of the email address of one of the ASSU executives. In my view, all of these records attract the application of the absurd result principle. As Records 231, 235, and 238 are all emails that were sent directly to the appellant's email address and that he received in their entirety, all of the information contained in these emails is clearly within his knowledge. I find that to deny him access to this information would lead to an absurd result. Accordingly, I will order that the portions of Records 231, 235, and 238 that remain undisclosed be provided in full to the appellant.

Records 213, 214, 215, 216, 222, 229, 230, 234, 256 are emails between the complainants in the ASSU election matter and the Director of the Office of the Vice-Provost, Students. Some of the records consist only of the letter of complaint sent to the Director by the complainant while others are exchanges between the two, containing the letter of complaint sent by the complainant, a reply email from the Director, and a subsequent response from the complainant. Much of this information has been disclosed but the university has severed some of the personal information of the complainants in both the emails from the complainants to the Director and the complainants' letters. In my view, the portions of the records that represent the complaint letters that were attached to Records 231 and 238 are clearly within the appellant's knowledge. He has already received copies of them and to withhold this information would lead to an absurd result. Accordingly, I will order that the remaining portions of Records 214, 222, 229 and 256 be disclosed in there entirety, as the information that has been severed is contained in copies of

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[19] Orders M-444, MO-1323
[20] Orders MO-1196, PO-1679, MO-1755

letters that were attached to Record 231. The portions of Records 213, 215, 216, 230 and 234, which consist of copies of the complaint letters that were attached to Record 231, should also be disclosed to the appellant on the basis of the absurd result principle. However, the complainant's personal email address that has been severed in Records 213, 215 and 216 and the portions of the email exchanges between the Director and the complainants that have been severed in Records 216, 230 and 234 are not subject to the application of the absurd result principle and I must examine whether any of the considerations in sections 21(2) apply to that information, along with the information contained in the records that remain at issue.

***Section 21(2)***

I must now weigh the possible application of the considerations listed in section 21(2) to the remaining Simcoe Hall records, (Records 104, 157, 159, 273) and to those that also contain the personal information of the ASSU complainants (Records 15, 23, 26, 208, 255, 258) and the portions of Records 213, 215, 216, 230, and 234, that I did not find subject to the absurd result principle.

*Considerations weighing in favour of privacy protection*

The university submits that two considerations weighing in favour of privacy protection are relevant to the disclosure of the information at issue: sections 21(2)(f) (highly sensitive) and (h) (provided in confidence). Having reviewed section 21(2) and considered the circumstances of this appeal, in my view these are the only considerations that might weigh in favour of privacy protection.

Section 21(2)(f)

In order to bring personal information within the ambit of section 21(2)(f) (highly sensitive), I must be satisfied by the evidence that disclosure of the information would result in "a reasonable expectation of 'significant' personal distress" to the subject individual.[21] The university claims in its representations that due to the context in which it was gathered the personal information in these records is inherently highly sensitive and, therefore, that the consideration at section 21(2)(f) is relevant to the determination of whether or not it should be disclosed. On my review of the information at issue, I am satisfied that the information about the alleged protestors (other than the appellant) of the Simcoe Hall matter is highly sensitive within the meaning of section 21(2)(f) as it relates to criminal charges laid against them and the subsequent resolution of those charges. I accept that the disclosure of this information may be distressing in nature to the individuals to whom it relates. Specifically, I find that the following records attract the application of the consideration in section 21(2)(f):

- Record 104 is a letter from counsel of a number of the alleged protesters attaching peace bonds negotiated on their behalf. The information that remains at issue is the names of the alleged protesters as well as the copies of their peace bonds. In my view, the consideration in section 21(2)(f) applies to this information.

[21] Orders PO-2518, PO-2617, MO-2262 and MO-2344

- Records 157, 159 and 273 are copies of a letter from university staff to outside legal counsel regarding the criminal proceedings facing the alleged protesters in the Simcoe Hall matter. These records have been disclosed in part. The information that has been severed is the names of the protesters, other than the appellant, against whom criminal charges were ultimately laid. In my view, the consideration in section 21(2)(f) applies to this information as well.

- Records 26 and 258 are copies of a letter sent to the Director, Office of the Vice-Provost, Students, by a member of the ASSU executive which describes the position taken by ASSU in relation to the investigation into the ASSU election complaint. The records have been disclosed in part, but have been severed to remove the email address of the sender and the names of two of the Simcoe Hall protesters who were charged criminally. In my view, the names of the protesters attract the application of the consideration in section 21(2)(f). However, given that the email was sent in the individual's capacity as a member of the ASSU executive, I do not accept that disclosure of her email address would cause "significant" personal distress on her part. Accordingly, I do not find that the email address attracts the application of the consideration in section 21(2)(f).

Section 21(2)(h)

The consideration at section 21(2)(h) contemplates whether the information at issue was provided to the institution in confidence. I accept that the context and the surrounding circumstances of the university's investigation into the ASSU matter as a result of formal complaints made are such that a reasonable person would expect that the information supplied in this context would be subject to a degree of confidentiality.[22] Having said this, however, past orders have determined that there are limits to the expectation of confidentiality in relation to information provided in the course of an investigation into workplace conduct.[23] In Order M-82, Inquiry Officer Holly Big Canoe stated the following with respect to the application of section 14(2)(h), the municipal equivalent to section 21(2)(h):

> In my view, it is neither practical nor possible to guarantee complete confidentiality to each party during an internal investigation of an allegation of harassment in the workplace. If the parties to the complaint are to have any confidence in the process, respondents in such a complaint must be advised of what they are accused of and by whom to enable them to address the validity of the allegations…

In that decision, Inquiry Officer Big Canoe found that section 21(2)(h) applied, but that it was only relevant as a consideration with respect to "the information provided by individuals other than the appellant, and not in respect of information provided by the affected persons in direct response to the appellant's complaint."[24] Senior Adjudicator John Higgins reached the same conclusion in Order P-1014 that the factor in section 21(2)(h) applied to "all personal

[22] Order PO-1910
[23] Orders M-82 and P-1014
[24] Institution's application dismissed February 9, 1995 in *Hamilton (City) v. Ontario (Information and Privacy Commissioner)*, Hamilton Doc. D246/93 (Ont. Div. Ct.).

information provided by the witnesses and the complainant which pertains to individuals other than the appellant."

In Order PO-2916, Adjudicator Daphne Loukidelis adopted the reasoning set out in Orders M-82 and P-1014 and found that the factor favouring non-disclosure in section 21(2)(h) applies only to the personal information of the affected parties themselves, not the information or views they shared with the investigator respecting the subject matter of the investigation, which was intermingled with the views and opinions expressed about the appellant himself.

Although these orders deal with investigations into workplace conduct, given that the current appeal relates to an internal investigation conducted by the university, I find that the reasoning applied in those orders is applicable to the current appeal. Accordingly, I find that the factor favouring privacy protection in section 21(2)(h) applies only to the personal information of the witnesses or complainants, and not the information they provided to the university respecting the subject matter of the investigation. It should also be noted that, with the exception of one complainant, it is clear from the records that all of them have consented to the disclosure of their identity to the appellant and their names have not been severed.

In keeping with the principles established in these prior orders I find that the undisclosed portions of the following records attract the application of section 21(2)(h):

- Record 15 is an email sent between university staff entitled ASSU resignation, access to which was denied it its entirety. On review of this email, I accept that its disclosure would reveal personal information about an identifiable individual other than the appellant. Given the nature of the information, I find that as it does not consist of information or views shared with the university respecting the subject matter of the investigation, I find that this record attracts the application of section 21(2)(h).

- Records 23 and 255 are emails sent between university staff members that summarize the university's review and information gathering with respect to the ASSU matter. The majority of both these records has been disclosed, but the names of the students who contacted the university in opposition to the complaints have been severed. In my view, this information attracts the application of the consideration favouring privacy protection at section 21(2)(h) as it consists of their names alone and does not reveal the views they shared with the university during the investigation.

- Record 208 is a copy of a complaint letter sent via email to the Director, Office of the Vice-Provost, Students. The university has disclosed portions of this complaint letter to the appellant, including the identity of the complainant but has severed other portions that consist of the complainant's personal information. It does not appear that this complaint letter was shared, in its entirety, with the appellant and there is no indication that this individual has consented to the disclosed of his statement. From my review, it appears that the information that was severed by the university amounts only to the personal information of the complainant, and not information related to the subject matter of the investigation. Accordingly, I find that the consideration favouring

privacy protection at section 21(2)(h) applies to the information that remains at issue in Record 208.

- As noted above, Records 26 and 258 are copies of a letter that was emailed to the Director, Office of the Vice-Provost, Students, by a member of the ASSU executive which describes the position taken by ASSU in relation to the investigation into the ASSU election complaint. The records have been disclosed in part, but have been severed to remove the email address of the sender and the names of two of the Simcoe Hall protesters who were charged criminally. Specifically, with respect to the email address of the sender, although she appears to be acting on behalf of ASSU, I find it reasonable to conclude that she would assume that the university would keep her email address in confidence rather than disseminate it to any individual who asked for it. In my view, the email address of the sender attracts the application of the consideration favouring privacy protection at section 21(2)(h).

- The portions of Records 213, 215, 216, 230 and 234 that remain at issue are the parts of the email exchanges between the Director that are not subject to the application of the absurd result principle and that were not disclosed by the university. Having reviewed the information that remains at issue, I find that it consists of the personal information of the complainants that does not directly relate to the subject matter of the investigation. As a result, I find that the consideration at section 21(2)(h) favouring privacy protection applies to this information.

*Considerations weighing in favour of disclosure*

Although the appellant chose not to submit representations and therefore did not make submissions on which considerations in section 21(2) might weigh in favour of disclosure, the university did raise the two considerations in section 21(2) which may be considered to be relevant to the disclosure of the information at issue: sections 21(2)(a) (public scrutiny) and (d) (fair determination of rights). Additionally, in my view, an additional unlisted circumstance should be considered in the current appeal: disclosure will ensure public confidence in the integrity of an institution.[25] Having reviewed section 21(2) and considered the circumstances of this appeal, in my view these are the only considerations that might weigh in favour of disclosure.

21(2)(a): public scrutiny

The objective of section 21(2)(a) of *FIPPA* is to ensure an appropriate degree of scrutiny of government and its agencies by the public. In Order P-1014, Senior Adjudicator Higgins concluded that public policy supported "proper disclosure" in proceedings such as the workplace harassment investigation at the centre of that appeal, and that the support was grounded in a desire to promote adherence to the principles of natural justice. Senior Adjudicator Higgins agreed with the appellant that "an appropriate degree of disclosure to the parties" involved in such investigations was a matter of considerable importance. However, in the facts of that appeal, the senior adjudicator concluded that "the interest of a party to a given proceeding in

[25] Order P-237

disclosure of information about that proceeding is essentially a private one." Rather, because the appellant in that matter wished to review the records for himself to try to assure himself that "justice was done in this particular investigation, in which he was personally involved," the factor in section 21(2)(a) did not apply.

Although the records in the current appeal are not related to an investigation into a complaint of workplace harassment, in my view, the analysis of Senior Adjudicator Higgins provides some guidance as they relate to internal investigations conducted by an institution. In the circumstances of this appeal, the records relating to the Simcoe Hall incident resulted in an internal investigation which led to criminal charges being laid against a number of individuals, including the appellant. Moreover, the records related to the ASSU matter relate to a formal complaint lodged against the appellant that resulted in an internal investigation by the university.

In the appeal before me, I have been presented with no evidence to suggest that the appellant's motives in seeking access to the records are more than private in nature to ensure that the university's investigation into the complaint was conducted in an appropriate manner. As in Order P-1014, this is a private interest, and therefore, section 21(2)(a) is not a relevant consideration. Additionally, in my view, the subject matter of the records does not suggest a public scrutiny interest.[26] Accordingly, I find that the factor in section 21(2)(a) does not apply to the information that remains at issue.

<u>21(2)(d): fair determination of rights</u>

With respect to the consideration in section 21(2)(d), it is intended to apply to personal information which is relevant to a fair determination of rights affecting the person who made the request. In order for this consideration to apply, the appellant must establish that:

(1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds;

(2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed;

(3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and

(4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.[27]

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[26] See Order PO-2905 where Assistant Commissioner Brian Beamish found that the subject matter of a record need not have been publicly called into question as a condition precedent for the factor in section 21(2)(a) of *FIPPA* to apply, but rather that this fact would be one of several considerations leading to its application.

[27] Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

None of the appellant's correspondence or communications during the course of this appeal implicitly address the requirements for the application of section 21(2)(d) and given that he chose not to submit representations, they were also not explicitly addressed. Additionally, the requirements cannot be established from a review of the records themselves. In fact, the records themselves reveal that the university's investigations into both the Simcoe Hall incident and the ASSU matter have concluded. In addition, they appear to reveal that the criminal proceedings related to the Simcoe Hall incident have also concluded. In my view, there is no evidence to demonstrate that the appellant is facing an outstanding proceeding, either existing or contemplated, for which the disclosure of the remaining information is required to ensure a fair determination of his rights. Accordingly, I find the basis upon which I am able to find that the consideration at section 21(2)(d) applies, has not been established, and this consideration is not applicable in this appeal.

Public confidence in the integrity of the institution

As mentioned previously, I find that there is an additional relevant circumstances not listed in section 21(2) that should be considered in the present appeal to assist me in determining whether disclosure would be an unjustified invasion of personal privacy: whether the disclosure of the personal information is necessary to ensure public confidence in the integrity of the university.[28]

In Order P-1014, where the appellant was seeking access to all of the information gathered by the investigator of a workplace harassment complaint, as well as all the statements given by people interviewed in the investigation, Senior Adjudicator Higgins stated:

> In my view, the comments made by the appellant, quoted above in my discussion of section 21(2)(a), also raise the possible application of this factor. In my discussion of section 21(2)(a), I found that the appellant's interest in scrutiny of the institution's activities in this case was a private one, and I did not apply section 21(2)(a). However, it is my view that the degree of disclosure to the parties in WDHP [Workplace Discrimination and Harassment Prevention] investigations does have an influence on public confidence in institutions conducting such investigations.
>
> If it appears that these investigations are secret trials which prejudice the rights of those accused, public confidence will be eroded. Failure to disclose information which was considered by the investigator in arriving at his decision would clearly prejudice the rights of individuals accused of harassment. Accordingly, I find that this factor applies to information in the records which is directly related to the subject matter of the investigation.

I agree with the reasoning outlined by Senior Adjudicator Higgins. I find that the unlisted factor described as "public confidence in the integrity of an institution" that weighs in favour of disclosure is a relevant consideration in the circumstances of this appeal. In my view, it is important that as much of the information as possible, that is directly related to the subject matter of the investigation into the ASSU election matter and that was considered by the university in

[28] Order P-237

making its determination on the outcome of the complaint, is disclosed. Such disclosure helps to ensure that investigations impacting individuals' status in the university community are perceived to be as open as possible and that public confidence in the integrity of the university's complaints system remains intact.

Although I have found that the unlisted factor "public confidence in the integrity of the institution" is a relevant consideration in this appeal favouring disclosure, having considered the information that remains at issue, I find that the consideration does not apply. Given the information that has already been disclosed to the appellant and the nature of the information that remains at issue I find that the disclosure of the information that remains is neither necessary to, nor would it help establish public confidence in the integrity of the university. Accordingly, although relevant to the subject matter of the records in their totality, I find that the unlisted consideration does not apply in the circumstances of this appeal to the personal information that is not subject to one of the section 21(3) presumptions.

*Balancing of the factors for and against disclosure*

I have found the considerations favouring privacy protection at sections 21(2)(f) and/or (h) apply to the personal information remaining at issue in Records 15, 23, 26, 104, 157, 159, 208, 214, 215, 216, 230, 234, 255, 258, and 273. I have found that no factors favouring disclosure apply to any of the information at issue in these records. Accordingly, I find that disclosure of this information *would* amount to an unjustified invasion of personal privacy of the individuals to whom the information relates and that any information related to the appellant is so intertwined that it cannot be severed. Subject to my review of the university's exercise of discretion, I therefore find section 49(b) applies to exempt the information at issue in these records from disclosure.

## F. DID THE UNIVERSITY EXERCISE ITS DISCRETION IN A PROPER MANNER?

I must now determine whether the university exercised its discretion in a proper manner in applying sections 49(a) and (b) of *FIPPA* to all of the records and portions of records at issue for which I have upheld those exemptions. It is not necessary for me to conduct this analysis with respect to those records or portions of records that I found should be disclosed on the basis of the absurd result principle (Records 214, 231, 238, 222, 229, 256, in full, and Records 213, 215, 216, 230 and 234, in part).

The exemptions at sections 49(a) and (b) 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 any of these cases, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[29] However, pursuant to section 54(2) of FIPPA, this office may not substitute its own discretion for that of the institution.

The university submits that, with respect to the records for which section 49(a), read in conjunction with section 19, was claimed, it considered the need to ensure that its administrators are confident in their ability to access counsel for legal advice. The university submits that disclosure of the records related to these "two particularly complex and sensitive matters would likely have a particularly strong 'chilling effect' on administrator confidence and would do particular harm to … the important principle of solicitor-client privilege…" The university states that it is of the view that these interests clearly outweigh the appellant's right of access to his own personal information in the records.

With respect to the records for which section 49(b) was claimed, the university submits that the other individuals' personal privacy outweighs the appellant's interest in receiving access to his own personal information. The university submits that this is the case due to the sensitivity of the personal information about the employee victims and the need to protect them from harm, as well as the sensitivity around the personal information of the other protesters who were involved in criminal proceedings.

In light of my review of the records and the circumstances under which they were created, as well as having considered the university's representations, I find that it has properly exercised its discretion not to disclose this information to the appellant. In my view, the university relied only on relevant factors in making the decision to exercise its discretion in the manner that it did.

I find that the university applied the exemptions appropriately to the withheld portions of the records and, in my view, any additional disclosure of the information would constitute an unjustified invasion of the personal privacy of identifiable individuals and, in some circumstances result in the disclosure of information that is subject to solicitor-client privilege. Accordingly, I find that the information for which I have found section 49(a), read in conjunction with section 19, or section 49(b) applies, is properly exempt from disclosure under *FIPPA*.

## ORDER:

1. I order the university to disclose the information remaining at issue in Records 214, 222, 229, 231, 235, 238, and 256 in its entirety.

2. I order the university to disclose only the portions of the information remaining at issue in Records 213, 215, 216, 230 and 234 that consist of the complaint letters. For the sake of clarity, I have enclosed copies of these records with the information that is to be severed highlighted in **yellow**.

3. I order the university to disclose the information described in provisions 1 and 2 to the appellant by **April 4, 2011** but not before **March 30, 2011**.

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[29] Order MO-1573

4. I uphold the university's decision to deny access to the remainder of the records and portions of the records at issue.

5. In order to verify compliance with this order, I reserve the right to require the university to provide me with a copy of the records disclosed to the appellant.

Original signed by: February 28, 2011
Catherine Corban
Adjudicator