ORDER PO-2972

Appeal PA09-392

University of Ottawa

NATURE OF THE APPEAL:

The University of Ottawa (the University) received five separate requests from the same requester for access to information under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*). Appeal PA09-392, which resulted from one of the requests, is the subject of this order. Two other appeals (assigned appeal file numbers PA09-393 and PA09-396), which also resulted from the requests, will be addressed by separate orders.

This appeal addresses a request for access to all records about the requester that were "created by and/or communicated by/to [a named Assistant Dean] and/or the Office of the Assistant Dean and Secretary General of the Faculty of Graduate and Postdoctoral Studies to/by another person or persons". These included, but were not limited to:

- records naming the requester explicitly by the requester's given name, surname, and/or any name identifiable with the requester's person

- records wherein the requester is identified by "an alias" that includes, but is not limited to, "an institutional student number, an e-mail address, abbreviated spellings of names identifiable with [the requester's] person, and substantive references to [the requester's] person"

The request also provided:

> The Institution is to understand "include" as expansive in meaning in that to "include" is to enlarge the normal, natural, everyday meaning of the term to include what would or might not otherwise be included. In other words, "include" is permissive, not limitative, of meanings other than what is stated.
>
> The Institution is not to limit the scope of this request unilaterally and/or arbitrarily. If any clarifications or interpretational decisions are required by the Institution in order to respond to this request and/or if this request does not sufficiently describe the records sought, then as required by subsection 24(2) of the *Act* the institution is to inform me of the defect and shall offer assistance in reformulating the request so as to comply with subsection 24(1) of the *Act*.
>
> In the event that the Institution is of the opinion that sections 12 to 22 of the *Act* exempt from disclosure a portion or portions of a respondent record or records, the Institution, pursuant to subsection 10(2) of the *Act*, shall disclose as much of the record or records as can reasonably be severed without disclosing the information that falls under one of the exemptions; the Institution shall indicate and explain its exercises of discretion.

The University identified records responsive to this request and, in its initial decision letter, granted partial access to them, upon payment of a fee. As set out in a detailed index attached to its initial decision letter, the University relied on the exemption at section 21(1) of the *Act* (personal privacy) to deny access to the portion of the records that it withheld.

The requester (now the appellant) appealed the University's decision.

At mediation, the appellant advised that she no longer being sought access to the information that the University withheld under section 21(1) of the *Act*. Accordingly, that information is no longer at issue in this appeal. The appellant took the position, however, that based on a review of the responsive records the University identified in two of the appellant's other requests, additional records that were responsive to the request under consideration in this appeal ought to exist. In addition, the appellant requested that the University provide a copy of the correspondence between the named Assistant Dean's office and the University's Freedom of Information office in the course of processing the appellant's access to information request.

In response, the University agreed to conduct a further search for responsive records, focusing on the time period from April 2009 to August 2009. It used additional search terms and criteria to conduct the search, but did not advise the appellant what those were. The University then issued a supplementary decision letter disclosing a copy of the correspondence between the Assistant Dean's office and the University's Freedom of Information office, as well as granting partial access to an additional 18 records that it located in its further search. A revised index of records accompanied its supplementary decision letter. Of the additional records that were identified, the University relied on section 49(a) (discretion to refuse requester's own information), in conjunction with section 19 (solicitor-client privilege), to deny access to a portion of Record 7-4 and all of Record 122.

Still at mediation, the appellant requested that the University extend the search to the time period from 2003 to 2009 using the additional search terms and criteria, and to disclose the additional terms and criteria that were used in the subsequent search. Ultimately, the University agreed to conduct a third search for responsive records for the period from January 1, 2003 to March 31, 2009 and located additional responsive records. In a further supplementary decision letter the University disclosed 12 additional records, as well as set out search terms and/or criteria used in the previous searches. In addition, the University provided a further revised index of records to the appellant. The Appellant maintained the position that the University failed to conduct an adequate search for responsive records but advised the mediator that she was only seeking access to Record 122.

Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

I commenced my inquiry by sending a Notice of Inquiry setting out the facts and issues in the appeal to the University, initially. The University provided representations in response. I then sent a Notice of Inquiry along with the University's representations to the Appellant. The Appellant provided representations in response. I determined that the Appellant's representations raised issues to which the University should be provided an opportunity to reply. Accordingly, I sent a copy of the Appellant's representations to the University inviting its representations in reply. The University provided reply representations.

RECORD

Remaining at issue in this appeal is record 122, being an email with an attachment.

DISCUSSION:

SEARCH FOR RESPONSIVE RECORDS

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24.[1] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[2] To be responsive, a record must be "reasonably related" to the request.[3]

A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[4]

A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[5]

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[6]

The Representations of the University

The University submits that three searches for responsive records were conducted by experienced employees or individuals who were "familiar with the operation of, and filing

[1] Orders P-85, P-221 and PO-1954-I.

[2] Orders P-624 and PO-2559.

[3] Order PO-2554.

[4] Orders M-909, PO-2469 and PO-2592.

[5] Order MO-2185.

[6] Order MO-2246.

system within, the office of the Assistant Dean, and that they had expended reasonable effort in conducting a search for records reasonably related to the request."

The University submits:

> [It] understands that the Appellant suggested that it search its server for deleted emails. The University maintains that this is not feasible in the circumstances which are explained in the University's Email Practices document[7].
>
> The University cannot determine if records responsive to the request existed but no longer exist. Retention of paper records by the University is governed by the policy "Archives of the University 20-4"[8] and email retention is governed by the practice set out in the document entitled "Email Practices at the University of Ottawa". In this regard the Appellant's request for information was received approximately ten (10) months after the event occurred.
>
> The University submits that, given the nature and scope of the request, it has provided sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request by searching electronic paper records and by searching with reasonable search terms, for example, the Appellant's name, student number, academic course at issue.

The University provided the affidavits of the Assistant Dean and her secretary in support of its position that it conducted a reasonable search for responsive records. The affidavits describe in detail the searches that were conducted. These culminated in the final search that utilized a wide variety of search terms including, as set forth in the affidavit of the Assistant Dean's secretary, the appellant's first and last name separately.

The Appellant's Representations

In her representations, the appellant acknowledges that additional searches were conducted but submits that the additional records that were located as a result of the subsequent searches could have been located using the criteria from the very first search. The appellant submits that this demonstrates that the Assistant Dean "did not perform searches using keywords". The appellant further submits that most of the "newly-located records are e-mails and, therefore, directly challenge the Institution's claim that records were destroyed/deleted by [the Assistant Dean]."

In addition, the appellant submits that an email communication from the University's *FIPPA* coordinator to the Assistant Dean omits the following portion of the request:

[7] The University provided a copy of this document with its representations.
[8] The University provided a copy of this document with its representations.

> The Institution is to understand "include" as expansive in meaning in that to "include" is to enlarge the normal, natural, everyday meaning of the term to include what would or might not otherwise be included. In other words, "include" is permissive, not limitative, of meanings other than what is stated.
>
> The Institution is not to limit the scope of this request unilaterally and/or arbitrarily. If any clarifications or interpretational decisions are required by the Institution in order to respond to this request and/or if this request does not sufficiently describe the records sought, then as required by subsection 24(2) of the *Act* the institution is to inform me of the defect and shall offer assistance in reformulating the request so as to comply with subsection 24(1) of the *Act*.
>
> In the event that the Institution is of the opinion that sections 12 to 22 of the *Act* exempt from disclosure a portion or portions of a respondent record or records, the Institution, pursuant to subsection 10(2) of the *Act*, shall disclose as much of the record or records as can reasonably be severed without disclosing the information that falls under one of the exemptions; the Institution shall indicate and explain its exercises of discretion.

The appellant submits that "[t]herefore, the Institution falsified the Appellant's request for records when responding to it.

Furthermore, the appellant submits that by unilaterally deciding which search terms to use in the searches, and thereby disregarding "the Appellant's guidance on the matter", the University subverted the *Act*. In her representations, the appellant provides examples how records may have been missed by not utilizing the search terms she suggested.

The appellant also submits that by cross-referencing the indices in this appeal with those in Appeals PA09-393 and PA09-396 it proves that "[r]ecords exist that demonstrate liability and incrimination of the [Assistant Dean] in her mistreatment of the Appellant with regards to academic and human rights matters at the institution" and that the Assistant Dean "destroyed/deleted" certain "incriminating records". The Appellant further asserts that the deletion of destruction of "the incriminating records" occurred in violation of the University's Student Record Policy.

Finally, the Appellant asserts that the University failed to provide records to the mediator and provided "falsified indices." The appellant submits that this demonstrates "a pattern of behaviour consistent with the intent to deceive the [Information and Privacy] Commissioner".

The appellant suggest that in all the circumstances a further search for responsive records should be conducted by the University's Ombudsperson.

The University's Reply Representations

The University submits in reply that:

- the *FIPPA* Coordinator communicated the relevant and substantive portion of the Appellant's request to the Assistant Dean for the purposes of a search. The Appellant's request was not falsified.

- it is reasonable and appropriate for the Assistant Dean and her secretary to determine those search or key words that will most likely yield the best result in locating responsive records as they are the most familiar with the organization of the records kept in the Assistant Dean's office. Ultimately, the University used nine key words in its efforts to locate responsive records.

- the original search was conducted using search terms that were reasonable in light of the request and the University was of the belief that it was complete. During mediation, when the Appellant stated that she had received records from her other access to information requests for records from the Dean of the Faculty of Graduate and Postdoctoral Studies that should have been produced under the request for records from Margaret Moriarty's office, the University willingly agreed to conduct a second search covering a time period suggested by the Appellant at mediation. The University also willingly conducted a third search covering a period commencing 2003, as requested by the Appellant. These additional searches using additional search terms were conducted in an effort to try to locate records the Appellant believed should have been produced and to resolve the reasonable search issue.

- the University denies the allegations made by the Appellant to the effect that the Assistant Dean destroyed or deleted "incriminating records". The University submits that it is not unusual for an electronic record such as an e-mail to have more than one copy. The sender of the e-mail may have a copy of the e-mail in his or her email account or the recipient may have a copy or both have a copy. The University submits that it is unaware of an "incriminating record" that was deleted or destroyed. If, after three searches of the Assistant Dean's office, a record is not found in her e-mail but is located in the other Offices captured by the other request, it remains that the record was located and provided to the Appellant.

- with respect to the allegation that the University deceived the Information and Privacy Commissioner, the University sent a copy of the request, the Coordinator's decision letter, correspondence relating to the request and a copy of the index and responsive records with severances to this office in response to the request for documentation. It was not until the mediator notified the University that she did not have a copy of the undisclosed records with respect with Appeals PA09-393 and PA09-396 that the University became aware that the undisclosed records were not enclosed with the materials provided to this office. On the same

> day the University was made aware of the oversight, the University immediately sent the records to the Mediator.

Finally, the University disagrees with the Appellant's proposed resolution as it is "outside of the mandate and modes of intervention of the University Ombudsperson as stated in the University Ombudsperson Terms of Reference".

Analysis and Finding

The appellant alleges that the University did not conduct a reasonable search because she is certain that other responsive records exist that are within the University's custody and control. Her argument is based a number of allegations with respect to the University's conduct and her firm belief that a search using different terms would yield further undiscovered documents. As set out above, however, the *Act* does not require the institution to prove with absolute certainty that further records do not exist. In order to satisfy its obligations under the *Act*, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records within its custody and control. In my opinion, the University's searches were extensive and wide-ranging and properly conducted by those most knowledgeable about its record keeping practices. I find that, based on the multiple searches it conducted, utilizing a variety of search terms, the University has made a reasonable effort to locate responsive records.

In all the circumstances, I find that the University has provided sufficient evidence to establish that it has conducted a reasonable search for responsive records.

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.[9] Where records contain the 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 Record 122 under the exemption at section 49(a), read in conjunction with section 19. However, as the exemption in section 49(a) only applies if the record contains the "personal information" of the appellant, before reviewing the possible application of the exemption claimed, I must first determine if the record contains "personal information" and, if so, to whom it relates.

[9] Order M-352.

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.[10] 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 ethic 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 content 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) of the definition of the term in section 2(1) may still qualify as personal information.[11]

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.[12] On April 1, 2007, amendments relating to the definition of personal information in

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

[11] Order 11.

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

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.[13]

I have reviewed the record at issue and I am satisfied that it contains the personal information of the appellant within the scope of the definition of personal information set out at section 2(1), above.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION

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. Section 49(a) states:

> 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 [emphasis added];

SOLICITOR-CLIENT PRIVILEGE

Sections 19(a) and (c) of the *Act* read:

> A head may refuse to disclose a record,
>
> (a) that is subject to solicitor-client privilege; or
>
> (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.

[13] Orders P-1409, R-980015, PO-2225 and PO-2435.

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 in the case of counsel employed or retained by an educational institution, from section 19(c). The institution 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.[14]

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.[15] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[16]

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.[17]

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[18]

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.[19]

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[14] 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).

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

[16] Orders MO-1925, MO-2166 and PO-2441.

[17] *Balabel v. Air India, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).*

[18] *Susan Hosiery Ltd. v. Minister of National Revenue, [1969] 2 Ex. C.R. 27.*

[19] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

Litigation privilege

Litigation privilege protects records created for the dominant purpose of litigation, actual or reasonably contemplated.[20]

In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver,[21] pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

> The "dominant purpose" test was enunciated [in *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169] as follows:
>
> > A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.
>
> It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both.
>
> . . . . .
>
> [For this privilege to apply], there must be more than a vague or general apprehension of litigation.

Termination of litigation

Common law litigation privilege under branch 1 may be lost through termination of litigation, actual or reasonably contemplated.[22]

Termination of litigation may not end the privilege where the policy reasons underlying the privilege remain, despite the end of the litigation. Privilege may be sustained where, for example, there is related litigation involving the same subject matter in which the party asserting the privilege has an interest.[23]

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[20] Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (cited earlier); see also *Blank v. Canada (Minister of Justice)* (cited earlier).

[21] *Butterworth's: Toronto, 1993*.

[22] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.), *Blank v. Canada (Minister of Justice)* (cited above), Orders MO-1337-I, PO-1855, MO-2221 and PO-2441.

[23] *Carleton Condominium Corp. v. Shenkman Corp.* (1977), 3 C.P.C. 211 (Ont. H.C.).

Branch 2: statutory privileges

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

Termination of litigation does not affect the application of statutory litigation privilege under branch 2.[24]

The Representations of the University

The University submits that Record 122 is subject to both the common law and statutory solicitor-client communication and litigation privilege.

The University submits, in particular:

> Record 122 contains comments made in preparation of the contemplation of legal proceedings. The Appellant's lawyer indicated that he had instructions from the Appellant to commence legal proceedings against the University if the matters referred to in Record 122 remained unresolved. The communications made by the University's Dean of the Faculty of Graduate and Postdoctoral Studies contained in Record 122 were made to the University's Legal Counsel for the purpose of obtaining professional legal advice. This communication was of a confidential nature and was produced in the context of the contemplated legal proceedings, involving the Appellant. More precisely, the purpose of the confidential communications was exchanged with University's Legal Counsel in order to assist the University in preparing for or developing its approach with respect to a threat of contemplating legal proceedings.

The University submits that it has not taken any action that constitutes a waiver of solicitor-client privilege either implicitly or explicitly.

The Appellant's Representations

The appellant takes the position that the University has improperly relied on section 19 of the *Act* to prevent disclosure of this responsive record. The appellant refers to certain documents that were designated as Records 86, 87, and 112 in Appeal PA09-396 as examples of where the University "misused" the section 19 exemption. The Appellant explains that while the University initially claimed that those records were exempt under section 19 of the *Act* "on the sole ground that they contained communications involving the Institution's legal counsel," they were subsequently disclosed in their entirety to the appellant during mediation. The appellant submits therefore that she "has reasonable grounds to believe that the Institution is misusing section 19 of

[24] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (cited above).

the *Act* to prevent from disclosure records that further incriminate the Institution in its mistreatment of the Appellant."

The University's Reply Submissions

In reply, the University denies that it misused the solicitor-client privilege exemption, and repeats and relies on its earlier submissions.

Analysis and Finding

I have reviewed the record and carefully considered the submissions of the parties. Whether or not other records at issue in another appeal were subject to section 19 of the *Act*, is not the issue before me. I must consider whether this record falls within the scope of section 19. In my view, it does. I find that disclosing Record 122 would reveal the substance of a confidential communication between a solicitor and client relating directly to the provision or seeking of legal advice. Accordingly, Record 122 qualifies for exemption under section 49(a), in conjunction with section 19(a), of the *Act*. I am also satisfied that there has been no waiver of privilege with respect to this record.

SEVERANCE

Where a record contains exempt information, section 10(2) requires the University to disclose as much of the record as can reasonably be severed without disclosing the exempt information. This office has held, however, that a record should not be severed where to do so would reveal only "disconnected snippets", or "worthless", "meaningless" or "misleading" information. Further, severance will not be considered reasonable where an individual could ascertain the content of the withheld information from the information disclosed.[25]

Based upon my review of the record any potential severance would either reveal exempt information or result in disconnected snippets of information being revealed.

EXERCISE OF DISCRETION

I must now determine whether the University exercised its discretion in a proper manner in applying section 49(a) in conjunction with section 19(a) of the *Act* to Record 122.

The exemption at section 49(a) is discretionary and permits 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,

[25] [Orders PO-1663 and *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.)].

- 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.[26] However, pursuant to section 54(2) of the *Act*, this office may not substitute its own discretion for that of the institution.

In its representations on the exercise of discretion, the University sets out the factors and circumstances it considered in its exercise of discretion. The appellant asserts that the University improperly applied section 19.

I am satisfied that that the University applied section 49(a), read in conjunction with section 19(a), appropriately to Record 122. The fact that the University ultimately decided not to rely on section 49(a) (in conjunction with section 19) with respect to other records in another appeal, does not lead inevitably to a conclusion that it improperly exercised its discretion to apply section 49(a) (in conjunction with section 19) to the record at issue in this appeal. Accordingly, I find that Record 122 is properly exempt from disclosure under the *Act*.

ORDER:

1. I uphold the reasonableness of the University's search for responsive records.

2. I uphold the decision of the University to withhold access to Record 122.

Original Signed by: May 25, 2011
Steven Faughnan
Adjudicator

[26] Order MO-1573