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

ORDER PO-2967

Appeal Numbers PA09-327-2, PA09-328-2 and PA09-398

University of Western Ontario

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BACKGROUND:

These appeals all relate to requests under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for access to information generated as a result of certain events involving the requester, members of a student society and certain officers/employees of the University of Western Ontario (the University). Although each request was addressed separately by the University, and processed separately through mediation and adjudication by this office, because they all share similar facts and issues, I have decided to address all of these appeals in one order. Appeal PA09-433 which also shares similar facts and issues, but was commenced by a different requester, will be dealt with in a separate order.

Briefly, appeal PA09-327-2 arose out of a request for e-mail messages to or from nine named individuals containing references to the requester, for a specified time period. The appellant subsequently clarified that his request could exclude duplicates or copies of emails as well as emails that the appellant had sent or received.

Appeal PA09-328-2 arose out of a request for Campus Community Police Service (CCPS) records relating to incidents, events, and/or investigations involving the requester for a specified time period. The appellant subsequently clarified that his request could exclude duplicates or copies of emails, emails that the appellant had sent or received and a video that he had provided to the CCPS.

Appeal PA09-398 was a request for the following information:

1. The entire investigative report produced by [a named lawyer at a specified law firm] in relation to events/conflicts within [a student society] (and complaints arising therefrom) during 2008-2009.

2. All contract(s) between the University and the [specified law firm and/or named lawyer] pertaining to the provision of this individual's services for the purpose of investigating events/conflicts within the [student society] (and complaints arising therefrom) during 2008-2009.

3. All invoices (including retainer agreements) from the [specified law firm and/or named lawyer] to the University during 2009.

4. All e-mails sent during 2009 from and to [named lawyer of the specified law firm] to and from [five named individuals employed at the University].

The University granted the requester partial access to the responsive records. In appeals PA09-327-2 and PA09-328-2 the University relied on section 49(a) (discretion to refuse requester's own information) of the *Act*, in conjunction with sections 14(1)(a), (b) and (d) and 14(2)(a) and (c) (law enforcement) 19(a) and (c) (solicitor-client privilege) and 20 (danger to safety or health) as well as section 49(b) (personal privacy) to deny access to the withheld portions of the responsive records. In addition, the University claimed that certain information was withheld on

the basis that the information was not responsive to the clarified requests at issue in those appeals.

In appeal PA09-398, the University granted partial access to the records it identified as responsive to parts 1 and 4 of the request at issue in that appeal. The University relied on section 49(a), in conjunction with sections 14(1) (a), (b) and (d) and 14(2)(c) (law enforcement), 19(a) and (c) and 20, as well as section 49(b) to deny access to the portion it withheld. The University also advised that there were no records that were responsive to parts 2 and 3 of the request at issue in appeal PA09-398.

The requester (now the appellant) appealed the decisions.

During the mediation of appeals PA09-327-2 and PA07-328-2, the appellant confirmed that he was not seeking access to the portions of the records the University identified as non-responsive to the clarified requests in those appeals. Accordingly, that information is no longer at issue.

In addition, in the course of the mediation of appeal PA09-327-2 the appellant accepted the University's explanation that no responsive records could be located for one of the individuals identified in his request.

Further, in the mediation of appeal PA09-328-2, the appellant also agreed to remove the employment dates the University had severed in some of the records pursuant to the personal privacy provisions in the *Act*. As a result, Records 4, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19 and 20 are no longer at issue in appeal PA09-328-2. Finally, the appellant advised that he was no longer seeking access to the withheld information contained in Record 23 and as a result, that record is also no longer at issue in appeal PA09-328-2.

Mediation was not conducted in appeal PA09-398. Instead, because of the University's initial reluctance to provide the records at issue in that appeal to this office because, in part, it was concerned that this may result in waiver of privilege, the Assistant Commissioner Brian Beamish issued a Notice of Inquiry along with an Order for Production, thereby bypassing the mediation stage of the appeals process. The University complied with the Order for Production.

Another adjudicator commenced and/or continued the inquiries and the files were then assigned to me. In the course of the inquiries, the University's initial representations were provided and exchanged in accordance with Practice Direction 7. Notably, however, the appellant only provided responding representations in Appeal PA09-398. These were shared with the University, which provided representations in reply. The appellant subsequently requested that the representations he provided for Appeal PA09-398 be used in Appeals PA09-327-2 and PA09-328-2.

In Part 1 of his representations, the appellant sets out his version of the events that led to his request and in Part II, his stated purpose for requesting the information. He writes:

> I require the information that I have requested in order to make critically important determinations for the purpose of preparing a legal challenge to the university in opposition to the Code of Student Conduct sanctions imposed on me.
>
> Therefore, together with my legal counsel I need to assess:
>
> > (a) whether the complaints filed against me by my political opponents were accurate, credible, and supported by sufficient evidence;
> >
> > (b) whether the university administration (i.e., senior administrators and Campus Police) took seriously the concerns that I raised and the complaints that I submitted;
> >
> > (c) whether the university administration acted impartially - or in a biased manner,
> >
> > (d) whether the investigator, [named investigator], acted impartially - or in a biased manner; and,
> >
> > (e) whether the university administration conducted itself, properly in accordance with its own policies and procedures, normal institutional practices, principles of natural justice, and Canadian jurisprudence.

With respect to the appellant's stated purpose for requesting disclosure, the University submits in reply that:

> … the Appellant did receive full particulars of the allegations upon which [the senior administrator] relied in making his findings against the Appellant under the Code of Student Conduct. He received copies of all of the e-mail messages that were the subject of the complaints under the Code of Student Conduct. He was given a full opportunity to dispute those allegations both before [the senior administrator] and on appeal before the University Discipline Appeal Committee and he did so. During those proceedings neither he nor his legal counsel indicated that he needed additional documentation to respond to the allegations of misconduct. Furthermore, if the Appellant is contemplating further legal proceedings, he will have all of the rights of production and discovery through the court system to obtain any documents necessary to pursue his claim.

Finally, in the course of the adjudication of these appeals an individual consented to the release of any personal information in the records that relates to him.

RECORDS:

The records remaining at issue are set out in the Notices of Inquiry provided to the appellant in each of the appeals at issue.

OVERLAPPING RECORDS

The University provided charts with its representations setting out that there was an overlap between some of the records at issue in the appeals. Some of the responsive records may appear in more than one appeal. Any order that I make in this appeal will reflect the overlap of the records.

DOCUMENTS RECORDS IN THE POSSESSION OF THE APPELLANT

To support his submissions, the appellant attached to his representations in Appeal PA09-398 a number of emails from individuals regarding his conduct. This will be addressed below.

DISCUSSION:

SEARCH FOR RESPONSIVE RECORDS

The appellant takes the position that there should be records that exist that are responsive to parts 2 and 3 of the request in Appeal PA09-398.

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]

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[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, PO-2592.

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 University submitted that parts 2 and 3 of the appellant's request in Appeal PA09-398 provided sufficient detail to identify responsive records and the University "responded literally to it." With respect to Part 2 of the request, the University submits that University counsel states in his affidavit that no contract exists for the relevant time period. With respect to Part 3 of the request the University submits that he states that he conducted a search for invoices within the specified timeframe, but none were found that related to the services described in part 2 of the request.

The appellant submits that "it remains a mystery" to him how an external investigator "was hired but did not have a contract in place for her services, and did not invoice the institution for her services." He submits that without seeing a contract or invoices, it is impossible for him to discern the nature of the investigator's relationship to the institution and to the decision-making process.

In reply, the University advises an invoice was received in 2010 for the services of the investigator, but that is outside the timeframe in the request at issue in Appeal PA09-398.

In my view, the University has established that it conducted a reasonable search for records that are within the scope of parts 2 and 3 of the request at issue in Appeal PA09-398. Should the appellant wish to submit a further request for records for a different time frame, he may do so.

LATE RAISING OF A DISCRETIONARY EXEMPTION

The *Code of Procedure* (the *Code*) provides basic procedural guidelines for parties involved in appeals before this office. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal. Section 11.01 states:

> In an appeal from an access decision an institution may make a new discretionary exemption within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. 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.

[5] Order MO-2185.

[6] Order MO-2246.

Section 11.02 applies to an access decision arising from a Deemed Refusal Appeal. It states:

> An institution does not have an additional 35-day period within which to make a new discretionary exemption claim after it makes an access decision arising from a Deemed Refusal Appeal.

The University's initial representations in appeal PA09-327-2 marked the first time that it claimed that the discretionary exemptions at sections 49(a) and 14(1)(a),(b),(d), 14(2)(c) also applied to Records 25 and 26 at issue in that appeal. However, because that matter arose from a Deemed Refusal Appeal, the previous adjudicator in this appeal determined that it was not permitted to claim any new discretionary exemptions in that appeal. As a result, I will not address the application of those exemptions to Records 25 and 26 at issue in appeal PA09-327.

The additional exemptions that the University claimed to apply to certain records at issue in appeal PA09-398, being sections 19(a) and (c) do, however, remain at issue.

The purpose of the policy set out above is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. Where the institution had notice of the 35-day rule, no denial of natural justice was found in excluding a discretionary exemption claimed outside the 35-day period. [7]

In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must also balance the relative prejudice to the University and to the appellant.[8] The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.[9]

The usual practice of this office is to send a Confirmation of Appeal to the institution, once a mediator is assigned to the appeal. The Confirmation of Appeal notifies the institution of the appeal and is typically issued the day a mediator is assigned to an appeal. The Confirmation of Appeal also sets out the deadline for the institution to claim additional discretionary exemptions. In the case of appeal PA09-398, because no records had been provided to this office, no Confirmation of Appeal was ever sent. Thereafter, Assistant Commissioner Beamish sent a Notice of Inquiry and an Order for Production to the University, thereby bypassing the mediation stage of the appeals process. Accordingly, no mediator was assigned and no Confirmation of Appeal was ever sent. The University's initial representations marked the first time that it raised the possible application of sections 19(a) and (c) with respect to all of Records 2, 3, 4 and 5 and the remainder of Records 11 and 12 at issue in that appeal.

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[7] *Ontario (Ministry of Consumer and Correctional Services v. Fineberg)*, Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.). See also *Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).]

[8] Order PO-1832.

[9] Orders PO-2113 and PO-2331.

In the particular circumstances of this appeal, I have decided to permit the University to claim, at this stage in the appeal, section 49(a) in conjunction with sections 19(a) and (c) for all of Records 2, 3, 4 and 5 and the remainder of Records 11 and 12 at issue in appeal PA09-398.

As set out above, no Confirmation of Appeal was ever received by the University. Furthermore, I find that the appellant is not prejudiced by the late raising of section 49(a) in conjunction with sections 19(a) and (c). 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 to claim, at this stage in the appeal, section 49(a) in conjunction with sections 19(a) and (c) for all of Records 2, 3, 4 and 5 and the remainder of Records 11 and 12 at issue in appeal PA09-398.

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.[10] 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 certain 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 sections 14(1) (a), (b) and (d) and 14(2)(a) and (c) (law enforcement), 19 and 20. 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.[11] 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

[10] Order M-352.

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

> 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.[12]

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.[13] 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.

[12] Order 11.

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

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.[14]

The University submits that with some identified exceptions, the bulk of the records at issue contain the personal information of the appellant, as well as that of other identifiable individuals.

The appellant does not address whether the records contain information that qualifies as personal information under the *Act*. Instead he provides the factual background and his stated purpose for requiring the information, as set out above. That said however, the appellant does state in his representations that "truly personal information of others that is unrelated to either the background or my purpose may be excluded …"

Based on my review of the records at issue, with some limited exceptions set out in this decision, they all contain personal information of the appellant and other identifiable individuals within the scope of the definition of personal information set out at section 2(1) of the *Act*.

In particular, the records contain the following types of personal information: the views and opinions of other individuals about the incidents and the appellant, their birth dates, their personal e-mail addresses, their home address and home phone number, their extracurricular activities, their student identification number, as well as their names 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 University also submits that certain information generated with respect to two identified individuals constitutes their personal information because, although they were employees at the time, it relates to something that was not a part of their regular business activities. In this regard, in making my determinations in this appeal, I have considered whether the information reveals something of a personal nature about these individuals.

Finally, as set out above, the appellant does not seek access to the "truly personal information of others that is unrelated to either the background or my purpose". I will assume that this includes information such as birth dates, personal email addresses, home addresses, home phone numbers and student identification numbers. As a result that information will be removed from the scope of the appeal and severed from any record that I may ultimately order to be disclosed to the appellant.

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. Sections 49(a) and 49(b) are relevant in this appeal. Those sections state:

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

> 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;

I will first address the possible application of the application of the exemption at sections 19(a) and (c) and/or section 49(a), in conjunction with sections 19(a) and (c), as the case may be.

SOLICITOR-CLIENT PRIVILEGE

The University claims that sections 19(a) and/or (c) of the *Act* apply to the following records:

- Appeal PA09-327-2: Records 7, 22, 24, 28, 29, 30, 38, 39, 41 and 42
- Appeal PA09-328-2: Records 1, 12, 21, 22, 26 and 27
- Appeal PA09-398: Records 1 to 13, 16 to 21, 23 to 26, 27 and 30 to 35

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.

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.[15]

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.[16] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[17]

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.[18]

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[19]

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.[20]

Litigation privilege

Litigation privilege protects records created for the dominant purpose of litigation, actual or reasonably contemplated.[21]
In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver,[22] pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

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[15] 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).

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

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

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

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

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

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

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

> 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.

Loss of privilege

Waiver

Under branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege.

Waiver of privilege is ordinarily established where it is shown that the holder of the privilege:

- knows of the existence of the privilege, and
- voluntarily evinces an intention to waive the privilege[23]

Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[24]

Waiver has been found to apply where, for example:

- the record is disclosed to another outside party[25]

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[23] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

[24] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; see also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.).

[25] Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).

- the communication is made to an opposing party in litigation[26]

- the document records a communication made in open court[27]

Waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party. The common interest exception has been found to apply where, for example:

- the sender and receiver anticipate litigation against a common adversary on the same issue or issues, whether or not both are parties[28]

- a law firm gives legal opinions to a group of companies in connection with shared tax advice[29]

- multiple parties share legal opinions in an effort to put them on an equal footing during negotiations, but maintain an expectation of confidentiality vis-à-vis others.[30]

Termination of litigation

Common law litigation privilege under branch 1 may be lost through termination of litigation, actual or reasonably contemplated.[31]

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.[32]

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[26] Orders MO-1514 and MO-2396-F.

[27] Orders P-1551 and MO-2006-F.

[28] *General Accident Assurance Co. v. Chrusz* (above); Order MO-1678.

[29] *Archean Energy Ltd. v. Canada (Minister of National Revenue)* (1997), 202 A.R. 198 (Q.B.).

[30] *Pitney Bowes of Canada Ltd. v. Canada* (2003), 225 D.L.R. (4th) 747 (Fed. T.D.).

[31] *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.

[32] *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.[33]

Loss of Privilege

The application of branch 2 has been limited on the following common law grounds as stated or upheld by the Ontario courts:

- waiver of privilege by the *head of an institution*[34] and
- the lack of a "zone of privacy" in connection with records prepared for use in or in contemplation of litigation.[35]

The Representations of the University

In its representations, the University provided me with detailed submissions on many of the specific records setting out why, in its view, the solicitor-client privilege exemption in section 19 applies. The University also provided more general submissions about the events that led to the creation of the records. The University takes the position that the email communications at issue all relate to the University's investigations of the events involving the appellant and that the events that gave rise to the creation of the records raised several complex, interrelated legal issues, including the retaining of an investigator (who is a lawyer) to produce a Report (being the subject of the request in appeal PA09-398).

The University submits that the nature of the situation involving the appellant and other individuals had reached a point where all of the options available to its senior administrators required legal advice, and the records that the University claims are subject to sections 19(a) and/or (c) reflect the sharing of information with legal counsel for the purpose of obtaining and providing that advice.

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

[34] See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.).

[35] See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.).

The University explains:

> There were legal issues raised with respect to the possibility of criminal charges and the potential application of the University's Code of Student Conduct. Legal counsel was involved in a continuum of communication among himself, Campus Police and senior administrators in order that he could be kept informed and provide advice as required.

The University submits that all of the records form part of the "continuum of communications" between the University's solicitor and senior University officers and staff regarding the provision of legal advice in relation to the investigation, the drafting of correspondence and to the events as they unfolded. The University submits that it required that the advice be confidential and that some records (such as the Report and drafts of the Report at issue in appeal PA09-398) are either marked as confidential or contain explicit references to confidentiality.

The University relies on Order PO-2800 in support of its position that the privilege attaches not only to the communication itself, but to documents attached to the communication, on the basis that those documents were part of the information that the solicitor required in order to provide advice. The University submits that this rationale would apply to emails between senior administrators being copied to counsel for the University in order to provide him with information necessary for him to provide advice.

In particular, with respect to the creation of the Report (including the tabbed attachments) and drafts of the Report at issue in appeal PA09-398, the University submits that:

> … [The investigator] was retained by [the University's solicitor] to prepare a report that would assist him in providing legal advice to [a senior University administrator] on how to deal with those issues. [The University's solicitor] arranged for information to be communicated to [the investigator] for the purpose of preparing the report. All of that information was provided to [the investigator] in confidence. [The investigator] prepared her report and communicated that report to [the University's solicitor] and [the senior University administrator] in confidence. The records at issue consist of communications between [the University's solicitor] and the client (the University and its employees), a report prepared for and at the request of [the University's solicitor], and communications sent to an agent of the University ([the investigator]) at the request of [the University's solicitor].
>
> …
>
> …, the [outside solicitor] Report was prepared for him so that he could advise [the senior administrator]. The situation involving the Appellant and other individuals had reached a point at which it was having a serious and detrimental effect on members of the University community. It was a sensitive and potentially volatile situation. The communications among senior administrators and with [the investigator] were all part of the continuum designed to assist in the completion of

> that report and to ensure that it would include all of the information necessary for the-provision of that advice.
>
> …, all of the records in question formed part of the process of preparing the [investigator's] Report. The [investigator's] Report was prepared for [the University's solicitor] for use in giving legal advice to his client.

In support of its position the University also relies on Order MO-2195, in which it was held that the solicitor-client privilege provisions of the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*) applied to a report prepared by a forensic accounting firm for the exclusive use of a law firm in providing legal advice to a municipality. The University submits that this information was held to be privileged because it was part of the continuum of advice provided. It submits that the same reasoning is applicable to the Report and drafts at issue in appeal PA09-398. The University submits:

> [The University's solicitor] retained [the investigator] to prepare a report to assist him in providing legal advice on what measures, if any, should be taken by the University. Upon receipt of the report, [the University's solicitor] gave legal advice to [the senior administrator] based on the facts set out in the report.
>
> …
>
> Further, [the University's solicitor] instructed [the investigator] that all information she received was to be kept confidential and that she was to provide only [the University's solicitor] with that information through her report. While it was necessary for there to be free and open communication among those members of the senior administration who were necessarily involved in providing information and receiving legal advice, communication was restricted to those individuals and not shared outside of that group. Given the relationship between legal counsel and senior University administrators, the nature of the matter under discussion, and the fact that the records have not been disclosed to anyone other than those seeking or giving legal advice, it is submitted that the test for confidentiality has been met.

The University submits that under certain limited circumstances, it would be prepared to waive privilege to allow for fairness in proceedings under the University's Code of Student Conduct, but that was not necessary in this case. The University argues that none of these communications have been publicly disclosed by legal counsel or any University administrator and that privilege has not been waived, either intentionally or unintentionally.

In support of its position, the University relies on an affidavit of its solicitor, the contents of which could not be shared with the appellant for confidentiality reasons.

The University confirms in its representations that the statutory litigation privilege set out in section 19(c) only applies to the records at issue in appeal PA09-327-2.

The Representations of the Appellant

The appellant submits that one of the issues that is sought to be addressed by his requests is his assertion that the University's solicitor purportedly provided legal advice to those who complained about the appellant before their complaints were commenced. In his view therefore, "[the University's solicitor] cannot be considered impartial or to have been engaged solely in internal advising." The appellant states that the purpose for his requests "is, in part, to determine whether he executed his duties in a biased/prejudiced manner."

The appellant also takes issue with the impartiality of the investigator retained by the University to produce the Report. He alleges that the investigator "is a former corporate director of an affiliated college of the institution. Thus her impartiality is highly questionable". He also raises a concern that the investigator "was not hired as an 'external' (i.e. 'independent'/'impartial') investigator - as she was represented to me - but rather that she operated as an agent/extension of senior administrators who were prejudiced towards me".

The Reply Representations of the University

The University relies on its initial submissions and takes the position that the appellant's submissions regarding the impartiality of the investigator are related to the "purpose" for his request and are not relevant to the issue of the application of sections 19(a) or (c) of the *Act*. The University further submits:

> … that the Appellant's assertion that [the investigator] "previously served as a corporate director within the institution" is incorrect. [The investigator] has never served in such capacity at The University of Western Ontario. The Appellant seems to be referring to his earlier submission … wherein he stated that [the investigator] is a former corporate director of an affiliated college of the institution. The University and its Affiliated University Colleges are separate legal entities, each with its own governing board.

Analysis and Findings

I will first address the emails, the Report (including its attachments), and drafts of the Report at issue in Appeal PA09-398.

In *R. v. Campbell*,[36] the Supreme Court of Canada pointed out (at paragraph 50): "It is, of course, not everything done by a government (or other) lawyer that attracts solicitor-client privilege." After describing the varying functions performed by government and in-house lawyers, the Court stated:

[36] [1999] 1 S.C.R. 565.

> Whether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered.

In *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*,[37] the British Columbia Court of Appeal was considering whether, in the circumstances, the communication of experts' opinions to a solicitor engaged in rendering legal advice fell within the scope of solicitor-client privilege. The Court wrote:

> Having concluded that the College's lawyer was engaged in rendering legal advice when she obtained the experts' opinions, the next question is whether those communications fall within the scope of the privilege. That is, did the communications take place within the relationship between the lawyer and her client, the College? In my view, they did not.
>
> To support her allegation that Dr. Doe had hypnotized her, the Applicant provided information to the College concerning the conduct of Dr. Doe, and tapes, notes and gifts she had received from him during the course of her employment. In order to understand this information, and to determine whether it supported the Applicant's allegations, the College required experts to interpret it and assess whether there was evidence that the Applicant had in fact been hypnotized. The lawyer's role was to obtain the experts' reports and, with their assistance, advise the SMRC of the legal implications of the complaint.
>
> The College claimed confidentiality for its investigative process on the grounds that experts may refuse to participate if their reports are not kept confidential. Legal advice privilege does not, however, exist to protect a relationship of confidentiality between the College and the experts. The rationale for legal advice privilege is the protection of the confidentiality of the relationship between the College and its lawyer. Whether communications involving third parties are protected within the context of that relationship is the real issue to be considered.
>
> In *Chrusz*,[38] Doherty J.A. analyzed the extension of legal advice privilege to third party communications. In that case, an insurance company retained an independent claims adjuster to investigate a claim for loss of a motel damaged by fire and a lawyer to advise it concerning the claim. The adjuster provided his reports to the lawyer. Several months after the insurer had advanced partial payment of the claim, a former employee of the motel owner made a statement alleging that the owner had inflated the claim. The insurer sued the owner. The owner counterclaimed against the insurer and the adjuster, made a claim in defamation against the former employee, and sought disclosure of the adjuster's

[37] 2002 BCCA 665 [leave to appeal refused at [2003] S.C.C.A. No. 83].

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

reports and the former employee's statement. The insurance company claimed privilege over the reports and the statement.

In his discussion of the application of legal advice privilege to third-party communications (at paras. 104-117), Doherty J.A. noted that although it is "well-settled" that legal advice privilege can extend to communications between a solicitor or a client and a third party, the case law is not extensive or well-developed. He stated (at para. 106) that the authorities establish two principles:

> • not every communication by a third party with a lawyer which facilitates or assists in giving or receiving legal advice is protected by client-solicitor privilege; and
>
> • where the third party serves as a channel of communication between the client and solicitor, communications to or from the third party by the client or solicitor will be protected by the privilege so long as those communications meet the criteria for the existence of the privilege.

For cases where the third party does not act as a conduit or channel of communication between the client and the lawyer, Doherty J.A. proposed (at paras. 120-5) a functional analysis to determine whether legal advice privilege applies to the communications between the third party and the lawyer. In principle, legal advice privilege ought to extend only to third party communications that are in furtherance of a function which is essential to the existence or operation of the relationship between the solicitor and the client. Doherty J.A. illustrated this principle (at paras. 120-22):

> . . . If the third party's retainer extends to a function which is essential to the existence or operation of the client-solicitor relationship, then the privilege should cover any communications which are in furtherance of that function and which meet the criteria for client-solicitor privilege.

Client-solicitor privilege is designed to facilitate the seeking and giving of legal advice. If a client authorizes a third party to direct a solicitor to act on behalf of a client, or if the client authorizes the third party to seek legal advice from the solicitor on behalf of the client, the third party is performing a function which is central to the client-solicitor relationship. In such circumstances, the third party should be seen as standing in the shoes of the client for the purpose of communications referable to those parts of the third party's retainer.

If the third party is authorized only to gather information from outside sources and pass it on to the solicitor so that the solicitor might advise the client, or if the third party is retained to act on legal instructions from the solicitor (presumably given after the client has instructed the solicitor), the third party's function is not

essential to the maintenance or operation of the client-solicitor relationship and should not be protected.

Doherty J.A. tied the existence of the privilege "to the third party's authority to obtain legal services or to act on legal advice on behalf of the client" (at para. 125). He reasoned that:

> In either case the third party is empowered by the client to perform a function on the client's behalf which is integral to the client-solicitor function. The agent does more than assemble information relevant to the legal problem at hand.
> [Emphasis added.]

In summary, third party communications are protected by legal advice privilege only where the third party is performing a function, on the client's behalf, which is integral to the relationship between the solicitor and the client. I find this analysis persuasive.

Applying this analysis to the communications between the College's lawyer and the experts from whom opinions were obtained in this case, I conclude that the experts did not perform a function on behalf of the client which was integral to the relationship between the College and its lawyer. The experts were not authorized by the College to direct the lawyer to act or to seek legal advice from her. The experts were retained to act on the instructions of the lawyer to provide information and opinions concerning the medical basis for the Applicant's complaint. While the experts' opinions were relevant, and even essential, to the legal problem confronting the College, the experts never stood in the place of the College for the purpose of obtaining legal advice. Their services were incidental to the seeking and obtaining of legal advice.

In my view, the investigator (who was a lawyer) was retained to conduct a fact-finding investigation, rather than provide legal services. Accordingly, applying the analysis outlined above, the branch 1 solicitor-client communication privilege does not apply to many of the records at issue in Appeal PA09-398. Nor, in my view did the University tender sufficient evidence to establish the application of litigation privilege to those records.

That said, I find that the Report at issue (including its attachments) in Appeal PA09-398 does fall within the ambit of section 19(c) of the *Act*. In this regard, I find that the investigator was retained by the University to prepare the Report for use by the University solicitor to provide legal advice to the University. In addition, as the drafts of the Report culminated in the final version of the Report, disclosing the drafts would disclose the substance of the content of the final report. Accordingly, in my view, section 19(c) also applies to the drafts of the Report. The information which I have found to be exempt under section 19(c) is found in the following records at issue in Appeal PA09-398: Record 1, Record 6 (pages 726 to 828), Record 23 (pages 856 to 957) and Record 27 (pages 962 to 1026).

Furthermore, notwithstanding that the investigator conducted investigative services there is one communication between the University solicitor and the investigator that does fall within the scope of branch 1. This is set out below.

The balance of the records for which the University claims section 19 or 49(a), in conjunction with section 19, are emails and other correspondence between the investigator and the University solicitor and/or University administrators or staff. Some of these communications do fall within the scope of branch 1. These are set out below.

Having considered the representations of the parties and information contained in the records themselves, I find as follows:

In Appeal PA09-327-2 Records 7, 22, 24, 29, 38, 39, 41 and 42 are email communications between the University's solicitor and administrators or staff. I find that these are direct communications of a confidential nature between a solicitor and client, or its agents or employees, made for the purpose of obtaining or giving professional legal advice or are part of a continuum of communication between a lawyer and client, or its agents or employees made for the purpose of seeking and providing legal advice and fall within the scope of section 19(a) of the *Act*.

In Appeal PA09-328-2 Records 26 and 27 are email communications between the University's solicitor and administrators or staff. I find that these are direct communications of a confidential nature between a solicitor and client, or its agents or employees, made for the purpose of obtaining or giving professional legal advice or are part of a continuum of communication between a lawyer and client, or its agents or employees, made for the purpose of seeking and providing legal advice and fall within the scope of section 19(a) of the *Act*.

In Appeal PA09-398 Record 13 is an email communications between the investigator and the University's solicitor. I find that this is a direct communication of a confidential nature between a solicitor and client made for the purpose of obtaining or giving professional legal advice and thereby falls within the scope of section 19(a) of the *Act*.

In Appeal PA09-398 while not contained in a communication between a solicitor and a client a portion of Records 11 and 12 would reveal the substance of a solicitor client communication between the University's solicitor and client, or its agents or employees made for the purpose of obtaining or giving professional legal advice or would reveal part of a continuum of communication between a lawyer and client, or its agents and employees, made for the purpose of seeking and providing legal advice and fall within the scope of section 19(a) of the *Act*.

In Appeal PA09-327-2 while not contained in a communication between a solicitor and client a portion of Record 28 and the responsive portion of Record 30 would reveal the substance of a solicitor client communication between the University's solicitor and client, or its agents or employees made for the purpose of obtaining or giving professional legal advice or would reveal part of a continuum of communication between a lawyer and client, or its agents or employees, made for the purpose of seeking and providing legal advice and fall within the scope of section 19(a) of the *Act*.

In Appeal PA09-328-2 while not contained in a communication between a solicitor and client a portion of Record 21 and a portion of Record 22 would reveal the substance of a solicitor-client communication between the University's solicitor and client, or its agents or employees, made for the purpose of obtaining or giving professional legal advice or would reveal part of a continuum of communication between a lawyer and client, or its agents or employees made for the purpose of seeking and providing legal advice and fall within the scope of section 19(a) of the *Act*.

In Appeal PA09-328-2, although contained in a CCPS occurrence report, a portion of Record 1 (pages 13 to 14) and Record 12 (pages 92 to 94) would reveal the substance of a solicitor-client communication between the University's solicitor and client, or its agents or employees, made for the purpose of obtaining or giving professional legal advice or would reveal a part of a continuum of communication between a lawyer and client, or its agents or employees, made for the purpose of seeking and providing legal advice and fall within the scope of section 19(a) of the *Act*.

While some of the records are explicitly marked "privileged" and/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. Although the University stated that the appellant received "full particulars of the allegations upon which [the senior administrator] relied in making his findings against the Appellant under the Code of Student Conduct" and that he "received copies of all of the e-mail messages that were the subject of the complaints under the Code of Student Conduct", in the absence of evidence to the contrary, I am satisfied that there has been no waiver of privilege with respect to the information that I have found to be subject to sections 19(a) and or (c) above. Accordingly, subject to my discussion on the exercise of discretion below, these records, or portions of records, qualify for exemption under sections 19(a) or (c) or section 49(a) in conjunction with sections 19(a) or (c) of the *Act*, as the case may be.

I do not make the same findings with respect to the balance of the information in the records that the University claimed to be subject to section 19(a) or (c) of the *Act*. In my view, they reveal nothing of a solicitor-client communication nor do they otherwise fall within sections 19(a) or (c).

As I have found the above-noted records, or portions thereof, to be exempt under sections 19(a) or (c) or section 49(a) in conjunction with sections 19(a) or (c) of the *Act*, as the case may be, it is not necessary to consider whether they are also exempt under the other exemptions claimed by the University. I will now consider whether the remaining information is subject to the other exemptions claimed.

Finally, as no other exemptions were claimed for Records 16 and 20 at issue in Appeal PA09-398, I will order that they be disclosed to the appellant.

THREAT TO SAFETY OR HEALTH

The University submits that section 20 of the *Act* applies to information in the following records:

Appeal PA09-327-2: Records 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 25, 26, 28, 31, 32, 33, 34, 35 and 37

Appeal PA09-328-2: Records 1, 2, 3, 5, 8, 12, 21, 22, 28 and 29

Appeal PA09-398: Records 2, 3, 4, 5, 10, 12, 17, 18, 19, 31, 32, 33, 34 and 35

Section 20 states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

For this exemption to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated.[39]

An individual's subjective fear, while relevant, may not be sufficient to establish the application of the exemption.[40]

The Representations of the University

The University submits that:

> … based on the circumstances surrounding the creation of the records, the disclosure of the information at issue in this appeal would reasonably be expected to seriously threaten the health or safety of the individuals named in the records. As stated earlier, the University continues to deal with complaints related to this matter and the University is concerned that disclosure would result in an escalation of tensions involving the same individuals. Such disclosure would worsen the situation and, in particular, cause undue stress for the subject individuals. The University submits that such stress, worry and anxiety qualifies the records for exemption under section 20. The threat to health or safety is not "frivolous or exaggerated" in accordance with the guidance provided by the Ontario Court of Appeal in the *Ontario (Ministry of Labour)* decision referred to above.

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[39] *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.).

[40] Order PO-2003.

The University submits that "the perceptions of individuals with respect to fears for their safety as documented in the records at issue were reasonable, and there is a reasonable possibility that the release of information in the records could escalate tensions and result in the reemergence of those concerns and perceptions." In the portions of its representations that were withheld due to confidentiality concerns, the University referred to the content of a number of withheld records in an effort to demonstrate that section 20 is applicable in the circumstances of this appeal.

In support of the application of section 20 the University relies on Order PO-1940 and an affidavit of an individual, the contents of which could not be shared with the appellant for confidentiality reasons.

The Representations of the Appellant

The appellant submits that the circumstances at issue occurred some time ago and there is "no reasonable basis for assuming that that there is any threat to the 'health or safety' of anyone involved."

The appellant submits that if the University believed that "anybody's 'health or safety' was/is at risk, then a reasonable person would have expected the institution to have immediately imposed measures to prevent contact among all parties involved."

The University's Reply Representations

The University submits that the applicability of this exemption should not be based on the University's actions, or perceived inaction, in response to the incidents involving the appellant. The University submits in reply that it:

> … disagrees with the Appellant's submission that the University could not have truly believed that health or safety was at risk because it did not immediately impose measures to prevent contact among all parties involved. The materials filed with [this office] in relation to this appeal and other related appeals involving the Appellant, clearly demonstrate that the University was very concerned about the volatile situation and took a variety of reasonable measures to defuse the hostility and assist affected students. For example, senior University officials met with the Appellant and others to resolve the issues and agreed on a "cool down" period where communication was directed through the University Legal Counsel (IPC Appeal No. PA09-328-2, record 1, pp. 9 and 11), it stationed Campus Police officers outside one or more [student society] meetings (IPC Appeal No. PA09-328-2, section 4 of the University's submissions), Campus Police met with the Appellant to discuss appropriate behaviour (IPC Appeal No. PA09-328-2, record 1, page 8), and the University arranged for affected students to see a counselor at Student Development Services (e-mail correspondence attached to Appellant's representations). Finally, as part of [the senior administrator's] decision in the Code of Student Conduct proceedings, the Appellant was prohibited from having any contact whatsoever with one student.

Analysis and Findings

As set out above, to qualify for exemption under this section the University must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated. Past orders of this office relating to this exemption have emphasized the need to consider both the type of information at issue and the behaviour of the individual who is requesting the information. The lead authority on this exemption is *Ontario (Ministry of Labour)*.[41]

In *Ontario (Ministry of Labour)*, the Court of Appeal refers to consideration of the quality of the information contained in the record and, more specifically, any "potentially inflammatory" information.

In considering the perceived risk of threat under this exemption, the Court of Appeal in *Ontario (Ministry of Labour)* noted that, in that case, there was a strong evidentiary foundation for assertions of threatening behaviour by the requester. In that case, the Court noted that the institution had:

> … provided a sworn affidavit indicating that the Requester had threatened persons in the OWA [Office of the Worker Advisor], including the deponent, and that the Requester had been legally restrained from entering certain premises of the WCB [Worker's Compensation Board]. The deponent was also familiar with the medical portion of the Requester's WCB file, which included reports expressing concerns that the Requester would act out his/her threats of violence against WCB staff. The evidence provided by the [Ministry of Labour] was uncontroverted.

It has been acknowledged by this office that section 20 is not engaged merely because an individual is "difficult". In a postscript to Order PO-1939, a case dealing with the interaction of an individual with persons in public positions, Adjudicator Laurel Cropley stated:

> In these cases, individuals are often angry and frustrated, are perhaps inclined to using injudicious language, to raise their voices and even to use apparently aggressive body language and gestures. In my view, simply exhibiting inappropriate behaviour in his or her dealings with staff in these offices is not sufficient to engage a section 20 or 14(1)(e) claim.

Instead, she found that there must be "… evidence that the behaviour in question is tied to the records at issue in a particular case such that a reasonable expectation of harm is established should the records be disclosed."

In Order PO-1940, Adjudicator Laurel Cropley found that section 20 applied to deny records to an appellant who was deemed to be "angry and potentially dangerous" after having engaged in a pattern of abusive and intimidating correspondence with the institution. In that order, she stated:

[41] Cited above.

> [I]t is noteworthy to add (in response to the appellant's assertions that he would not physically attack anyone) that a threat to safety as contemplated by section 20 is not restricted to an "actual" physical attack. Where an individual's behaviour is such that the recipient reasonably perceives it as a "threat" to his or her safety, the requirements of this section have been satisfied. As the Court of Appeal found in *Ontario (Ministry of Labour)*:
>
> > It is difficult, if not impossible, to establish as a matter of probabilities that a person's life or safety will be endangered by the release of a potentially inflammatory record. Where there is a reasonable basis for believing that a person's safety will be endangered by disclosing a record, the holder of that record properly invokes [sections] 14(1)(e) or 20 to refuse disclosure.

That said, in Order PO-2003, Adjudicator Cropley rejected the argument that legal action brought against a requester constituted harassment for the purposes of section 20 of the *Act*.

In the current appeal, based on my review of the content of the records and the confidential and non-confidential representations of the University, as well as considering the representations of the appellant on this issue, I conclude that there is a reasonable basis for concern about the appellant's behaviour with respect to the disclosure of certain information and that the reasons for resisting disclosure of information in two records are not frivolous or exaggerated. I find that the evidentiary standard set out in *Ontario (Ministry of Labour)* for establishing the application of section 20 has been met in this appeal with respect to the following information:

Appeal PA09-328-2 A portion of Records 1 and 12

Information in those records therefore qualifies for exemption under section 20 or section 49(a) in conjunction with section 20, as the case may be. I am not satisfied that section 20 applies to the remainder of the records at issue.

As section 49(a) in conjunction with section 20 was the only exemption permitted to be applied to Records 25 and 26 at issue in Appeal PA09-327-2, I will order that they be disclosed to the appellant.

I will now address the remainder of the information at issue.

LAW ENFORCEMENT

The University submits that sections 14(1)(a), (b) and (d) and/or 14(2)(a) and (c) of the *Act* apply to information in the following records:

Appeal PA09-327-2: Records 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 28 and 31, 32, 33, 34, 35 and 37

Appeal PA09-328-2: Records 1, 2, 3, 5, 6, 7, 8, 21, 22 and 28, 29

Appeal PA09-398: Records 2, 3, 4, 5, 6 (page 725), 7, 8, 9, 10, 11, 12, 17, 18, 19, 21, 23 (page 855), 24, 25, 26, 27 (page 961), 30, 31, 32, 33, 34 and 35

Sections 14(1)(a), (b) and (d) and 14(2)(a) and (c) state:

> (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
>
> (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source.
>
> (2) A head may refuse to disclose a record,
>
> (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;
>
> (c) that is a law enforcement record if the disclosure could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability.

The term "law enforcement" is used in several parts of section 14, and is defined in section 2(1) as follows:

> "law enforcement" means,
>
> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
>
> (c) the conduct of proceedings referred to in clause (b)

The term "law enforcement" has been found to apply in the following circumstances:

- a municipality's investigation into a possible violation of a municipal by-law that could lead to court proceedings.[42]
- a police investigation into a possible violation of the *Criminal Code*.[43]
- a children's aid society investigation under the *Child and Family Services Act* which could lead to court proceedings.[44]

The term "law enforcement" has been found not to apply in the following circumstances:

- an internal investigation by the institution under *the Training Schools Act* where the institution lacked the authority to enforce or regulate compliance with any law.[45]
- a Coroner's investigation or inquest under the *Coroner's Act*, which lacked the power to impose sanctions.[46]

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[47]

Where section 14 uses the words "could reasonably be expected to", the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[48]

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[42] Orders M-16, MO-1245.

[43] Orders M-202, PO-2085.

[44] Order MO-1416.

[45] Order P-352, upheld on judicial review in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993), 102 D.L.R. (4th) 602, reversed on other grounds (1994), 107 D.L.R. (4th) 454 (C.A.).

[46] Order P-1117.

[47] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

[48] Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

It is not sufficient for an institution to take the position that the harms under section 14 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption.[49]

The Representations of the University

The University takes the position that its Campus Community Police Service (CCPS) is a law enforcement agency. The University further submits that its CCPS officers are "special constables" under section 53(3) of the *Police Services Act* and have the function of enforcing the *Criminal Code* and Ontario Provincial Statutes on the campus of the University. The University submits that the CCPS were engaged in "policing" when conducting their investigations with respect to incidents involving the appellant and other individuals.

In particular, the University takes the position that the identified records were generated during an investigation by senior University officers and the CCPS into a possible trespass and assault matter, allegations of intimidation and harassment, as well as whether there were grounds for safety concerns. The University submits that these investigations could lead to criminal charges and/or proceedings against the appellant and others in a Court or a tribunal. The University takes the position that if the affected individuals felt that they could not submit additional concerns about these matters in confidence, the University's ability to continue dealing with the situation would be severely diminished and the ability of CCPS to collect new information into the future would be compromised. The University submits that it and the CCPS continue to deal with complaints both from and against the appellant. The University takes the position that until all aspects of these complaints have been dealt with, there remains the possibility of law enforcement proceedings arising from continuing investigations of the behaviour of the appellant and others.

The University further submits that disclosure of the records remaining at issue would reveal the names of complainants and witnesses, as well as the nature of their complaints or statements. The University also submits that disclosure "could also interfere with further Code of Student Conduct investigations."

The University submits that Orders P-377 and MO-1753 which held that the definition of law enforcement does not extend to internal disciplinary-related matters are distinguishable. It submits:

> In neither of the Orders … was there a tribunal that was authorized to conduct hearings, make decisions, and impose penalties. In contrast to those cases, the investigations conducted by the University could lead to proceedings before tribunals that have been established pursuant to the Board of Governor's powers under section 19(k) of the *University of Western Ontario Act, 1982*.

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[49] Order PO-2040; *Ontario (Attorney General) v. Fineberg*, cited above.

The University explains that pursuant to section 19(k) of the *University of Western Ontario Act, 1982* the University's Board of Governors may establish and enforce regulations for the use of its buildings, grounds and ancillary operations, and for the orderly conduct of persons entering upon the lands and premises of the University. It submits that:

> The Board of Governors delegates its power to regulate student conduct, and impose penalties to the Vice-Provost (Academic Programs and Students) [Registrar], Dean of the student's Faculty and the University Discipline Appeal Committee (UDAC) under the University's Code of Student Conduct [a copy of which the University provided]. The Dean or Vice-Provost is authorized under part VIII, section 4 of the Code to conduct hearings, make decisions regarding whether there have been violations of the Code, and impose penalties. Similarly, UDAC is authorized under part X of the Code to hear appeals and impose penalties. These decision makers are "tribunals".

With respect to Appeal PA09-327-2 the University submits:

- that Records 17 and 28 are e-mail messages that were sent to or from CCPS
- Records 4, 6, 8, 10, 12, 13, 14, 15, 16, 18, 19, 31, 32, 33, 34 and 35 were created or compiled with the intent to share them or the information in them with CCPS officers conducting the investigation.

With respect to appeal PA09-328-2 the University submits that Records 1 and 12 are CCPS occurrence reports and Records 21, 28 and 29 consist of e-mail messages sent to or from CCPS.

In its representations in Appeal PA09-398, the University submits that:

> In addition to the investigations conducted by Campus Police, the University submits that the additional investigation conducted by [the investigator] at the request of the University also meets the definition of "law enforcement". This further investigation could lead to proceedings in a tribunal in which a penalty or sanction may be imposed.

The Representations of the Appellant

The appellant asserts that the CCPS does more than engage in "policing". He submits that:

> They are also involved in mediating, investigating, and enforcing matters related to institutional/administrative policies concerning safety, security, and personal conduct. These are not "policing" or "law enforcement" activities but rather administrative support activities.

The appellant further submits that the CCPS "had concluded and advised that no criminal charges would/could be laid. Thus, no such proceedings will occur/are expected - especially considering that the events in question occurred approximately 14 months ago."

With respect to the investigation conducted by the investigator, the appellant submits that "[a]t no time was the investigation of [the investigator] defined or described as a 'law enforcement' activity" rather, "[i]t was described as a general fact-finding activity."

The University's Reply Representations

In reply the University submits that the appellant's description of the events "is erroneous". It submits that:

> Campus Police did not conclude that criminal charges "were not warranted" and there was no decision by senior administration not to invoke the Code of Student Conduct in late March 2009. It is incorrect to state that earlier complaints had been "investigated and dismissed" and that there was a second investigation.

The University prefers the version of the events that it sets out in its initial representations as well as the confidential affidavit of its counsel. With respect to the appellant's assertion regarding the conclusion of the CCPS investigation, the University submits that:

> … it is incorrect to state that Campus Police concluded that no criminal charges "would/could be laid" and that "no such proceedings will occur/are expected". There is no basis for this assertion. The Appellant and most of the affected students are still registered at the University and the University has an obligation to provide them with a safe and secure environment. The University may deem it necessary to proceed with charges if further incidents arise relating to the interaction of the appellant and the other graduate students involved in the recent incidents.

In support of its position, the University also refers to a matter that was raised in the investigation Report. This matter cannot be disclosed without revealing the content of a portion of that record which I have found to be exempt under section 49(a), in conjunction with 19(c), above.

Analysis and Finding

Section 53(1) of the *Police Services Act* provides that, with the Solicitor General's approval, a municipal Police Services Board may appoint an individual as a special constable for the period, area and purpose that the Board considers expedient. Section 53(3) of the *Police Services Act* sets out that:

> The appointment of a special constable may confer on him or her the powers of a police officer, to the extent and for the special purpose set out in the appointment.

The duties of a police officer are set out at section 42(1) of the *Police Services Act*. They include:

> (a) preserving the peace;

> (b) preventing crimes and other offences and providing assistance and encouragement to other persons in their prevention;
>
> (c) assisting victims of crime;
>
> (d) apprehending criminals and other offenders and others who may lawfully be taken into custody;
>
> (e) laying charges and participating in prosecutions;
>
> (f) executing warrants that are to be executed by police officers and performing related duties;
>
> (g) performing the lawful duties that the chief of police assigns;
>
> (h) in the case of a municipal police force and in the case of an agreement under section 10 (agreement for provision of police services by O.P.P.), enforcing municipal by-laws;
>
> (i) completing the prescribed training.

For the purposes of the *Criminal Code*, it would appear that members of CCPS can be viewed as "peace officers". At section 2 of the *Criminal Code* the definition of "peace officer" includes

> (c) a police officer, police constable, bailiff, constable, or other person employed for the preservation and maintenance of the public peace or for the service or execution of civil process.

Subject to certain limitations, section 495 of the *Criminal Code* provides that a peace officer may arrest without warrant,

> (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;
>
> (b) a person whom he finds committing a criminal offence; or
>
> (c) a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII [of the *Criminal Code*] in relation thereto, is in force within the territorial jurisdiction in which the person is found.

I accept that, in certain circumstances, the CCPS engages in "policing" within the meaning of that term, and that the CCPS can engage in investigations that lead or could lead to proceedings in a court or tribunal where a penalty or sanction could be imposed in those proceedings. An example would be an investigation of an offence under the *Criminal Code* that is within the

jurisdiction of the CCPS. In that regard, there were certain activities conducted by the CCPS as reflected in a number of occurrence reports, some of which were released to the appellant where, in my view, they were engaged in law enforcement. This is because the matters were being investigated as potential breaches of the provisions of the *Criminal Code*, namely assault and/or harassment. When no charges were laid with respect to those events, and no investigations were continued to be conducted by the CCPS with respect to those events, the CCPS was no longer engaged in law enforcement activities pertaining to them. The process then became an investigation and proceeding under the Student Code of Conduct.

In my opinion, proceedings under the Student Code of Conduct and the investigation conducted by the investigator are not law enforcement related activities. The University argues that because proceedings under the Student Code of Conduct that can be heard by tribunals that have been established pursuant to the Board of Governor's powers under section 19(k) of the *University of Western Ontario Act*, 1982 they amount to law enforcement activities. In my view, I cannot agree that proceedings under the Student Code of Conduct and the fact finding process conducted by the investigator which, in my opinion, are more in the nature of internal disciplinary matters, rather than regulatory (in the sense that this includes statutory, public welfare and/or by-law offences) or criminal offences, qualify as law enforcement.

Finally, although the University makes certain assertions and allegations with respect to what it considers to be potential law enforcement matters, I find that, based on the evidence before me, there are no extant or ongoing law enforcement activities pertaining to the matters at issue in these appeals within the definition of law enforcement set out above. Only proceedings related to findings under Student Code of Conduct appear to be ongoing.

Section 14(1)(a): law enforcement matter

Under section 14(1)(a) of the *Act* the University may refuse to disclose a record where the disclosure could reasonably be expected to interfere with a law enforcement matter.

To qualify for exemption under section 14(1)(a) the matter in question must be ongoing or in existence.[50] The exemption does not apply where the matter is completed, or where the alleged interference is with "potential" law enforcement matters.[51] "Matter" may extend beyond a specific investigation or proceeding.[52]

In my view, any policing or law enforcement matter ended when criminal charges were not laid and the matter progressed through the route of a proceeding under the Code of Student Conduct. Thus while for a time law enforcements activities took place, in my view they are at an end. I am not satisfied on the evidence before me that releasing the remaining records at issue could

[50] Order PO-2657.

[51] Orders PO-2085, MO-1578.

[52] *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 4233 (Div. Ct.).

reasonably be expected to interfere with a law enforcement matter. As a result, I find that section 14(1)(a) does not apply.

Section 14(1)(b): law enforcement investigation

Under section 14(1)(b) of the *Act* the University may refuse to disclose a record where the disclosure could reasonably be expected to interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result.
The law enforcement investigation in question must be a specific, ongoing investigation. The exemption does not apply where the investigation is completed, or where the alleged interference is with "potential" law enforcement investigations.[53]

For the reasons set out in my analysis above, in my view, there is no law enforcement investigation that is ongoing or in existence. While there appears to be a proceeding related to the Code of Student Conduct, the University has failed to provide sufficient evidence to satisfy me that there is currently a specific, ongoing investigation as contemplated by section 14(1)(b) of the *Act*. As a result, I find that section 14(1)(b) does not apply.

Section 14(1)(d): confidential source

Under section 14(1)(d) of the *Act*, the University may refuse to disclose a record where the disclosure could reasonably be expected to disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source.

The institution must establish a reasonable expectation that the identity of the source or the information given by the source would remain confidential in the circumstances.[54]

The Representations of the University

The University submits that CCPS officers and senior University officers and administration keep complainants' and witnesses' personal information private and complainants and witnesses have a right to expect confidentiality.

It submits that there is a reasonable expectation within the University community that individuals who approach CCPS with concerns will have their confidentiality protected. It submits that widely disseminated University policies and documents such as the Safe Campus Community Policy and Safe Campus Violence Continuum give explicit assurances that the University will protect such information to the fullest extent possible.

The University submits that the complainants' and witnesses' names, addresses and phone numbers (and contact information) qualify for exemption under section 14(1)(d) of the *Act*. The

[53] Order PO-2085.
[54] Order MO-1416.

University provides specific examples of records containing information relating to incidents that involve only one other individual and the appellant. It submits, however, that even if names, addresses, phone numbers and dates were severed, the content of the complaints themselves would provide identifying information about some complainants or witnesses since only those individuals would know about the actions or events that triggered the complaint. Furthermore, the University submits that with respect to certain records at issue, even if the names and complaints were severed, the appellant could refer to the dates on which he sent specific correspondence and infer who was corresponding with CCPS or senior University officers. The University submits, therefore, that the dates of the correspondence also qualify for exemption under section 14(1)(d) of the *Act*.

In addition, the University submits that some of the records noted contain explicit references to confidentiality. In that regard the University refers to references to individuals requesting confidentiality in Records 8 and 37 in appeal PA09-327-2; Records 1 (at pages 11, 12, 14 and 15) and 29 in Appeal PA09-328-2; and Record 33 (page 1034) in Appeal PA09-398.

In addition, with respect to Appeal PA09-398, the University further submits that disclosure of the records in that appeal in whole or in part, would:

> … identify individuals who gave information to Campus Police and/or reveal sensitive details about the Campus Police investigation because many of the individuals who provided information to [the investigator] also provided information to Campus Police.
>
> …
>
> [University solicitor's] affidavit also attests that [the investigator] was instructed to advise those persons with whom she met and obtained information from that their communications with her would be confidential.

In support of its submissions the University relies on Orders MO-1805 and MO-2043.

In summary, the University submits that the records at issue contain confidential information provided as part of the investigations described above and that there was a reasonable expectation that those named in the records and/or the information contained in the records would be kept confidential. The University submits that the statements were provided by the complainants and witnesses on the understanding that they would be retained in confidence and not released to the appellant.

I have found that for the short period of time that the CCPS were engaged and conducting their investigation with a view to possible *Criminal Code* proceedings, they were engaged in law enforcement activities. Accordingly, I will examine the records that were generated in the context of the law enforcement activities conducted by the CCPS to determine if information in those records falls within section 14(1)(d) of the *Act*.

The purpose of the section 14(1)(d) exemption is to protect confidential informants.[55] I accept that in many law enforcement situations, such as when an individual directly makes an anonymous complaint regarding a by-law infringement, section 14(1)(d) can apply.[56] However, many of the records at issue in the appeals are emails that were exchanged amongst a number of participants and then forwarded on to the CCPS.

In addition, as stated by the University in its reply representations, the appellant "received copies of all of the e-mail messages that were the subject of the complaints under the Code of Student Conduct" and the appellant also included with his representations a number of emails from individuals regarding his conduct. In this way it could not be said that the source of the bulk of the information is confidential or that disclosing this information would disclose information furnished only by a confidential source. Furthermore, a great deal of information in the records at issue originated with the appellant himself.

Finally, much of the information consists of perspectives of events from the vantage point of a number of individuals, only a limited number of which actually requested confidentiality or anonymity. As such, it could not be said that disclosing that information would disclose information furnished only by a confidential source.

That said, I am satisfied that section 14(1)(d) applies to information pertaining to one individual who directly supplied their information to the CCPS. This individual requested confidentiality and in my view, in the circumstances, had a reasonable expectation of confidentiality. I find therefore that disclosing the information in the following records would disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source:

Appeal PA09-327-2	Record 37
Appeal PA09-328-2	Records 1 and 29
Appeal PA09-398	Record 5

I have highlighted this information in a copy of the records provided to the University along with this order. I find that this information is therefore subject to exemption under section 49(a) of the *Act*.

In my view, disclosure of the balance of the information provided to the CCPS could not reasonably be expected to disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source. Accordingly, I find that section 14(1)(d) does not apply to this other information.

[55] See Order MO-2424.
[56] See, for example Orders MO-1805 and MO-2043.

Section 14(2)(a): law enforcement report

In order for a record to qualify for exemption under section 14(2)(a) of the *Act*, the University must satisfy each part of the following three-part test:

1. the record must be a report; and

2. the report must have been prepared in the course of law enforcement, inspections or investigations; and

3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

The word "report" means "a formal statement or account of the results of the collation and consideration of information". Generally, results would not include mere observations or recordings of fact.[57]

The title of a document is not determinative of whether it is a report, although it may be relevant to the issue.[58]

Section 14(2)(a) exempts "a report prepared in the course of law enforcement *by an agency which has the function of enforcing and regulating compliance with a law*" (emphasis added), rather than simply exempting a "law enforcement report." This wording is not seen elsewhere in the *Act* and supports a strict reading of the exemption.[59]

An overly broad interpretation of the word "report" could create an absurdity. If "report" means "a statement made by a person" or "something that gives information", all information prepared by a law enforcement agency would be exempt, rendering sections 14(1) and 14(2)(b) through (d) superfluous.[60]

The Representations of the University

The University submits that the occurrence reports that it identified as Records 1 and 12 in Appeal PA09-328-2 qualify for exemption under section 14(2)(a) because they are "reports" that were prepared in the course of law enforcement, inspections or investigations.

[57] Orders P-200, MO-1238, MO-1337-I.

[58] Orders MO-1238, MO-1337-I.

[59] Order PO-2751.

[60] Order MO-1238.

The University submits that Records 1 and 12 in appeal PA09-328-2 contain highly detailed accounts that document the thought processes and conclusions of the investigating officers. It takes the position that the occurrence reports are exempt under section 14(2)(a) because:

- They contain analyses of information pertaining to the appellant, investigative opinions, summaries, and extensive e-mail appendices of supplementary information found to be relevant that goes beyond mere observation.

- The collaborative entries of the investigating officers constitute the formal statements contained in these reports and the discussions between the officers and the Director of CCPS, constitute the consideration of the information.

- Certain identified entries document the analysis of the situation. The University submits that this is not merely a recording of what another individual has said but there are critical judgments based on the facts at hand.

- Record 1 also contains the conclusion drawn by CCPS as a result of the consideration of the investigations that is reflected in the information contained in the records.

- Certain entries show that the officers were not just recording facts in these reports but also recorded their analyses and conclusions based on active, analytical and probing assessments of the information in order to determine the appropriate course of action.

- Record 12 also contains a number of analyses provided by a senior University officer. While the individual is not a CCPS officer, the University submits that the practice of the CCPS is to enter analyses related to investigations into the report and treat them as integral parts of the report.

The University submits:

> With multiple complainants and witnesses, some analysis was required. This is categorically different from the type of occurrence report that would have resulted from a less serious incident such as, for example, a parking-related infraction.

In Order MO-1238, Senior Adjudicator Goodis made it clear that the title of a document will not necessarily determine whether or not it is a "report". For example, he found that section 8(2) of the *Municipal Freedom of Information and Protection of Privacy Act*, an equivalent provision to the one before me, did not apply to a Field Inspection Report or an Inspection Record of a municipal building department, both of which contained entries made over a period of time, on the basis that documents of this kind did not satisfy the first requirement of the section 8(2)(a) exemption test. Generally, occurrence reports and supplementary reports and similar records of various police agencies have been found not to meet the definition of "report" under the *Act*,

because they have been found to be more in the nature of recordings of fact than formal, evaluative accounts of investigations.[61]

In Order PO-1959, Adjudicator Sherry Liang considered the Ministry of the Attorney General's position in that appeal that the entire file of the Special Investigation Unit (SIU) should be considered to qualify as a "report" for the purposes of section 14(2)(a). In the course of addressing that issue, Adjudicator Liang wrote:

> I accept, and it is not seriously disputed by the appellant, that Record 2 qualifies as a "report" for the purposes of section 14(2)(a), in that it consists of a formal statement of the results of the collation and consideration of information. I also find that Record 4, the cover letter to Record 2, qualifies for exemption, as the two records together can reasonably be viewed as forming the report to the Attorney General from the SIU Director.
>
> …
>
> I find that none of the remaining records at issue meet the definition of a "report". To elaborate further on some of these, Records 15, 19, 23 to 27 and 29 to 37 consist of either Sarnia Police Service incident reports, supplementary reports, or excerpts from police officers' notebooks. Generally, occurrence reports and similar records of other police agencies have been found not to meet the definition of "report" under the *Act*, in that they are more in the nature of recordings of fact than formal, evaluative accounts of investigations: see, for instance, Orders PO-1796, P-1618, M-1341, M-1141 and M-1120. In Order M-1109, Assistant Commissioner Tom Mitchinson made the following comments about police occurrence reports:
>
> > An occurrence report is a form document routinely completed by police officers as part of the criminal investigation process. This particular Occurrence Report consists primarily of descriptive information provided by the appellant to a police officer about the alleged assault, and does not constitute a "report".

I agree with this approach and adopt it here. On my review of the records at issue, I am satisfied that even with the small amounts of what may be viewed as analysis they simply do not meet the definition of a "report" under section 14(2)(a) of the *Act*, in that they primarily consist of observations, recordings of fact and collection of information rather than formal, evaluative accounts, evaluative accounts of investigations.[62] Accordingly, I find that section 14(2)(a) of the *Act* does not apply.

[61] See Orders M-1109, MO-2065 and PO-1845.

[62] See Orders M-1109, MO-2065 and PO-1845.

Section 14(2)(c): exposure to civil liability

The purpose of section 14(2)(c) is to protect individuals who have provided information to a law enforcement agency during a law enforcement investigation, or who have authored a record in this context, the nature of which may expose them to civil liability. This may include information of a speculative nature, innuendo and hearsay.

The University submits that disclosure of certain specified records could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability.

The University submits that "Civil liability" would include an action for defamation and that it is clear that the complainants and witnesses are very concerned by the appellant's threats of legal action. The University submits that the records demonstrate that the appellant issued a Notice of Libel to specific individuals and has threatened action for allegedly libelous remarks. In the portion of the University's representations that were withheld due to confidentiality concerns, the University provided an example of the appellant's conduct that it submits would support the application of this exemption. In light of this, the University says, individuals named in the records could reasonably expect that they would be subject to legal action should the records be released.

The appellant submits that:

> If I was charged under the Code of Student Conduct based upon truthful information without malice, then there should be no concern about "exposure to civil liability." Indeed, my Purpose is, in part, to determine whether defamatory and/or libelous "statements - i.e., false and malicious statements - in any way biased the institution's decision-making against me.

Analysis and Finding

The evidence before me supports an inference that the appellant is not hesitant to take steps to assert his position. That said, as noted above, it would appear that the appellant is already in possession of a number of emails setting out the positions of various complainants and the only proceedings that the appellant has commenced to date regarding this matter is a judicial review of the Code of Student Conduct decision. While the appellant did serve Notice of Libel at the early stages of the events unfolding, there is no evidence before me that any action was commenced as a result of the notices. In my view, the representations of the University fall short of establishing that that anyone quoted or paraphrased in the records at issue could reasonably be expected to be exposed to civil liability as a result of their involvement in the law enforcement investigation.

Accordingly, in my view section 14(2)(c) does not apply.

As no other exemptions were claimed for information in the following records:

Appeal PA09-327-2	Records 4 and 17 and the remaining responsive portion of Record 28
Appeal PA09-328-2	The responsive portions of Records 21, 22 and 28
Appeal PA09-398	Records 2, 3, 6 (page 725), 7, 8, 9, 11, 23 (page 855), 24, 25 and 27 (page 961)

I will order that this information be disclosed to the appellant.

Although the University did not claim that Records 21, 26 or 30 at issue in Appeal PA09-398 contains personal information, in my view it does. Accordingly, as section 21(1) is a mandatory exemption, I will address the application of this exemption to certain information in this record, below.

PERSONAL PRIVACY

I have found that the bulk 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 some of these records are exempt pursuant to section 49(a) of the *Act*, in conjunction with sections 14(1)(d), 19 and 20. Therefore, they are no longer at issue.

The University claimed that information in the following remaining records is subject to exemption under sections 21(1) or 49(b) of the *Act*:

Appeal PA09-327-2:	Records 2, 3, 5, 6, 9, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 31, 32, 33, 34 and 35
Appeal PA09-328-2:	Records 1, 2, 3, 5, 7, 8 and 12
Appeal PA09-398:	Records 4, 5, 10, 12, 17, 18, 19, 31, 32, 33, 34 and 35

As set out above, I will also examine whether any information in Records 21, 26 or 30 at issue in Appeal PA09-398 also qualifies for exemption under section 21(1) or 49(b), as the case may be.

Under section 49(b), where a record contains personal information of the appellant and another identifiable individual, and disclosure of that information would constitute an unjustified invasion of the other individual's personal privacy, the University may also refuse to disclose it to the appellant.

As set out in the background above, one of the individuals whose personal information is contained in the remaining records has consented to the release of any information in those records relating to him. Accordingly, disclosing this individual's personal information to the appellant would not constitute an unjustified invasion of this individual's personal privacy. As well, to the extent that any of the information remaining at issue is the personal information of

the appellant only, disclosing it to the appellant would not constitute an unjustified invasion of any other individual's personal privacy. Finally, some information is of such a nature that it would be absurd to withhold it.[63] Accordingly, disclosing information in the following records would not result in an unjustified invasion of personal privacy or it would otherwise be absurd to find it exempt under section 49(b):

Appeal PA07-328-2: Records 1, 2, 3, 5, the responsive portion of 6, 7 and 12

Appeal PA09-398: Records 30, 31, 32, 33 and the responsive portion of 35

I will order that this information be disclosed to the appellant. I will now address the balance of the personal information remaining at issue.

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

Sections 21(2), (3) and (4) of the *Act* 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.[64] The "public interest 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.

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.

The submissions of the University and the appellant raise the potential application of the presumption at section 21(3)(b) and the factors at sections 21(2)(a), (d), (e), (f), (h) and (i).

[63] Where the requester originally supplied the information or the requester 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. See in this regard Orders M-444, M-451, M-613, MO-1323, PO-2498 and PO-2622.
[64] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

Those sections read:

> (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;
>
> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (f) the personal information is highly sensitive; and
>
> (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 continue the investigation.

Section 21(3)(b)

The University submits that the personal information in the records at issue was compiled and is identifiable as part of an investigation into a possible violation of law. The University submits that the records themselves demonstrate that CCPS investigated "serious and sustained allegations of misbehaviour."

The University submits generally that the records that it claims are subject to the section 21(3)(b) presumption were compiled and are identifiable as part of an investigation into a possible violation of law by the CCPS, namely, a possible trespass and assault matter, allegations of intimidation and harassment, as well as whether there were grounds for safety concerns, all of which, the University submits, could lead to criminal charges or proceedings in a court or tribunal.

With respect to the records at issue in Appeal PA09-328-2, the University submits in particular that Records 1 and 12 consist of CCPS occurrence reports and Records 3, 5 and 8 consist of CCPS officers' notes.

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).[65] 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.[66] Section 21(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law.[67]

Based on my careful review of the records I find that the personal information of identifiable individuals (other than the appellant and the individual who consented to disclosure and the information that I have found would be absurd to withhold) in the following records fall within the presumption at section 21(3)(b) of the *Act*:

Appeal PA09-328-2: Records 1, 3, 5, 8 and 12

This is because I find that the information was compiled and is identifiable as part of an investigation into the matters involving the appellant undertaken by the University's campus police with a view to determining whether violations of the *Criminal Code* had occurred.

As the presumption at 21(3)(b) applies, disclosure of the personal information of identifiable individuals other than the appellant and the individual who consented to disclosure (or that which I have found absurd to withhold) is presumed to constitute an unjustified invasion of the personal privacy of the individuals to whom the information relates. Accordingly, this information is exempt under section 49(b) of the *Act*.

I have highlighted the exempt information in a copy of the records that I have provided to the University with a copy of this order.

Section 21(2)

I must now weigh the possible application of the considerations listed in section 21(2) to information in the following remaining records:

Appeal PA09-327-2: Records 2, 3, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 32, 33, 34 and 35

Appeal PA09-398: Records 4, 5, 10, 11, 12, 17, 18, 19, 21, 26 and 34

[65] Orders PO-2642 and PO-2722.

[66] Order P-242.

[67] Orders M-734, M-841, M-1086 and PO-1819.

Considerations weighing in favour of privacy protection

The University submits that three considerations weighing in favour of privacy protection are relevant to the disclosure of the information at issue: sections 21(2)(e) (unfair exposure to harm), 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)(e)

In order for this section to apply, the evidence must demonstrate that the damage or harm envisioned by the clause is present or foreseeable, and that this damage or harm would be "unfair" to the individual involved.

Relying on its submissions with respect to the application of section 20, the University submits that disclosure of the records at issue would unfairly expose the affected individuals to further confrontation, increased tensions and resultant harm as a result of their having participated in the complaints process.

In my view this factor applies in this case and is a factor weighing in favour of a finding that disclosure would constitute an unjustified invasion of personal privacy based on these circumstances.

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.[68]

Again relying on its submissions on the application of section 20 of the *Act*, the University submits that disclosure of the withheld information could reasonably be expected to cause significant personal distress to the individuals identified in the records. In that regard, the University submits that information about an individual's involvement with CCPS and/or Code of Student Conduct investigations, or even the fact of such involvement, in and of itself, can be highly sensitive depending upon the nature of the complaints and concerns. The University states that the matters at issue concern allegations of intimidation and harassment. The University submits that it is concerned that disclosure of the withheld information would result in an escalation of tensions between certain individuals and the appellant.

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. In my view this factor applies in this case and is a factor weighing in favour of a

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

finding that disclosure would constitute an unjustified invasion of personal privacy based on these circumstances.

Section 21(2)(h)

The University submits that a number of individuals shared information with the expectation that the details of the communications and/or their identities would not be disclosed. The University states that some individuals were quite explicit that their communications be maintained in confidence and that both the University Safe Campus Community Policy and Safe Campus Violence Continuum gave assurances that the information in the records would be treated confidentially. Furthermore, the University submits that its counsel instructed the investigator that all the information that she received in the course of her investigation was to be kept confidential and was only to be disclosed to University counsel "or in accordance with his instructions".

The University refers to the portions of the following records as demonstrating that some individuals whose personal information is contained in the records remaining at issue expected or requested confidentiality:

- In Appeal PA09-327-2: Records 5 (page 5) and 8 (page 11)
- In Appeal PA09-398: Record 4 (pages 714 to 716), 5 (pages 718 and 719) and 33 (page 1034).

This factor applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 21(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.[69]

I accept that the context and the surrounding circumstances of the University's investigation into the matter involving the appellant as a result of the complaints that were made are such that a reasonable person would expect that the information supplied in this context by at least the limited number of individuals who requested confidentiality, would be subject to a degree of confidentiality.[70] 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.[71] 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):

[69] Order PO-1670.

[70] Order PO-1910.

[71] Orders M-82 and P-1014.

> 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."[72] Senior Adjudicator John Higgins reached the same conclusion in Order P-1014 that the factor in section 21(2)(h) applied to "all personal 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 requester in that appeal himself.

Although these orders deal with investigations into workplace conduct, given that the current appeal relates to investigations conducted by the CCPS, the University, or the investigator 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, unless it is so intertwined with their personal information that it can not be reasonably severed, the information they provided respecting the subject matter of the investigations.

In my view this factor applies in this case and is a factor weighing in favour of a finding that disclosure of only certain information would constitute an unjustified invasion of personal privacy, based on these circumstances.

Considerations weighing in favour of disclosure

Although not raised specifically by the appellant, in my view, there are two considerations in section 21(2) which may be considered to be relevant to the disclosure of the information at issue: section 21(2)(a) (public scrutiny) and section 21(2)(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.[73] 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.

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[72] Institution's application dismissed February 9, 1995 in *Hamilton (City) v. Ontario (Information and Privacy Commissioner)*, Hamilton Doc. D246/93 (Ont. Div. Ct.).
[73] Order P-237.

21(2)(a): public scrutiny

The objective of section 21(2)(a) of the *Act* 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 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 investigations conducted by an institution. In the circumstances of this appeal, the records relating to the incidents involving the appellant resulted in an investigation by the investigator and a Student Code of Conduct proceeding.

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 matters involving the appellant were 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.[74] Accordingly, I find that the factor in section 21(2)(a) does not apply to the information that remains at issue.

21(2)(d): fair determination of rights

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;

[74] 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.

(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.[75]

Although the appellant made no specific representations on the application of section 21(2)(d), in his correspondence with this office he indicates that he has commenced certain proceedings against the University and that he is in need of whatever records he "can secure as soon as possible".

As set out above, the University states that the appellant received full particulars of the allegations upon which the senior administrator relied in making his findings against the appellant in the Code of Student Conduct proceedings. Furthermore, the University submits that the appellant received copies of all of the email messages that were the subject of the complaints under the Code of Student Conduct and was given a full opportunity to dispute those allegations both before the senior administrator and on appeal before the University Discipline Appeal Committee. In addition, I have noted above that the appellant was already in possession of certain email exchanges, which he attached to his representations.

Finally, although the appellant asserts that he is in need of the information in the records, generally, he has not provided sufficient evidence about how the information in the records that he seeks will have some bearing on or is significant to the determination of the court proceeding or how the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

Accordingly, while I am prepared to accept that section 21(2) has some relevance in a determination whether disclosure of that information would constitute an unjustified invasion of personal privacy, in the circumstances the weight accorded to this factor is reduced.

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.[76]

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:

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[75] 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.).

[76] Order P-237.

> 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 a factor favouring disclosure. 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.

Balancing of the factors for and against disclosure

In summary, I have concluded that, of the sections 21(2) factors and circumstances reviewed above, only sections 21(2)(d), (e), (f) and (h) and "public confidence in the integrity of the institution" are applicable.

In balancing the interests of identified individuals to privacy protection against the appellant's interests in disclosure, I find that the factors in sections 21(2)(e), (f) and/or (h) outweigh the factor in 21(2)(d) and the unlisted consideration of "public confidence in the integrity of the institution" for the balance of the personal information of identifiable individuals in the remaining records other than that of the appellant and the individual who consented to disclosure. Accordingly, subject to my discussion on severance and the exercise of discretion this information qualifies for exemption under section 49(b) or 21(1) of the *Act*, as the case may be. I have highlighted this exempt information in a copy of the records provided to the University along with this order.

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.[77]

In my view it is possible to sever some of the personal information in the following records, without disclosing the information that I have found be exempt:

Appeal PA09-327-2: Records 9 and 10

I have highlighted the information to be withheld, on a copy of those records provided to the University along with this order.

Based upon my review of the information in the records that I have not ordered to be disclosed, in the circumstances of this case, any remaining possible 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 sections 49(a) and (b) of the *Act* to all of the records and portions of records at issue for which I have upheld those exemptions.

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.[78] 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.

I find that the University applied the exemptions appropriately to the records or parts of records that I have not ordered to be disclosed. Accordingly, I find that the information for which I have found section 49(a), read in conjunction with sections 14(1)(d), 19, 20 or section 49(b) applies, is properly exempt from disclosure under the *Act*.

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

[78] Order MO-1573

ORDER

1. I uphold the University's exemption claim under sections 49(a) in conjunction with sections 14(1)(d), 19(a) and (c) and 20, or sections 21(1) and 49(b), as the case may be, in relation to the following records or portions of them:

   Records:

   Appeal PA09-327-2: 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 22, 24, 28, 29, 30, 31, 32, 33, 34, 35, 37, 38, 39, 41 and 42

   Appeal PA09-328-2: 1, 2, 3, 5, 8, 12, 21, 22, 26, 27 and 29

   Appeal PA09-398: 1, 4, 5, 6, 10, 11, 12, 13, 17, 18, 19, 21, 23, 26 and 27

   I have marked the withheld portions of the pages of records not to be disclosed to the appellant in green highlighter on the copy of the pages of records sent to the University with this order. Copies of the pages of records to be withheld in their entirety are not included with this order.

2. I order the University to disclose the withheld pages of records or withheld portions of the pages of records which I have not highlighted and found do not qualify for exemption to the appellant by **June 8, 2011** but not before **June 3, 2011**.

3. In order to verify compliance with this order, I reserve the right to require the University to provide me with a copy of the pages of records disclosed to the appellant pursuant to provision 2.

Original Signed by: May 2, 2011
Steven Faughnan
Adjudicator