Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3257

Appeal PA11-525

University of Ottawa

September 26, 2013

Summary: The appellant made a request to the university for records relating to himself at the university while he was a medical resident. The university granted partial access to the records denying records in part or in full on the basis of the discretionary exemptions in section 49(a) with reference to section 19 (solicitor-client privilege) and 49(b) (personal privacy). The university also claimed that some records were excluded from the *Act* under section 65(6)3 (employment-related records). Lastly, the university claimed that it did not have custody or control of certain records relating to two university professors holding clinical positions at the hospital where the appellant worked as a resident. The adjudicator upholds the university's decision to deny access under section 49(a) and (b). Further, the university's claim of the exclusion in section 65(6)3 on behalf of the hospital is upheld. Lastly, the order requires the university to ask the two named professors to search their records for responsive records relating to the appellant and issue a decision.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 2(1)(definition of "personal information"); 49(a), 19, 49(b), 21(3)(a), (d), (g), 65(6)3

Orders and Investigation Reports Considered: Order PO-2106, PO-3009-F, PO-3216

OVERVIEW:

[1] The appellant, at the time of the request which is the subject of this appeal, was a medical resident who made a request to the University of Ottawa (the university) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

> …all records about me in all offices of the university and with all staff of the university that have records about me. The respondent period is from April 15th, 2006 to present. I expect records to be in the offices of Legal [Counsel], the Dean of the Faculty of Medicine, the Department of Surgery, Division of Neurosurgery, Human Resources, the VP-Academic, the President, the VP-Governance, and other offices.

[2] The university located 1,000 responsive records and issued a decision letter to the appellant granting him partial access to them. The university denied access to records in full or in part on the basis of the discretionary exemptions in section 49(a) in conjunction with section 19 (solicitor-client privilege); the discretionary exemption in section 49(b) (personal privacy); the mandatory exemption in section 21(1) and the discretionary exemption in section 18.1 (information with respect to closed meetings). The university also claimed that some of the records were excluded from the *Act* by section 65(6) (labour relations and employment records). The university also identified some information as not responsive to the appellant's request.

[3] During mediation, the university conducted a further search for records. It located an additional 88 records and issued a revised decision letter and index of records to the appellant and provided him with partial access to these records. It denied access to parts of the record on the basis of section 49(a) read in conjunction with section 19, sections 49(b) and 21(1).

[4] Also during mediation, the appellant indicated that additional responsive records should exist.

[5] I sought representations from the university and the appellant and received representations from the university only. In its representations, the university clarified that it did not claim the application of the exemption in section 18.1 of the *Act*. I also sought and received representations from an organization who represents medical residents, the Professional Association of Residents of Ontario (PARO).

[6] In this order, I uphold the university's decision.

RECORDS:

[7] The records at issue are set out in the index which is in the appendix to this order.

ISSUES:

A. Does section 65(6) exclude the records from the *Act*?
B. Are the records "in the custody" or "under the control" of the university under section 10(1)?
C. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
D. Does the discretionary exemption in section 49(a) in conjunction with section 19 apply to the information at issue?
E. Does the discretionary exemption at section 49(b) apply to the information at issue?
F. Did the university exercise its discretion under sections 49(a) and/or (b)?
G. Did the university conduct a reasonable search for records?

DISCUSSION:

A. Does section 65(6) exclude the records from the *Act*?

[8] The University submits that Records 399, 401-408, 415, 417, 418, 425, 427-430, 432-434, 436, 438, 439, 441, 443, 444, 449, 454, 548, 551, 553, 555, 558, 559, 571, 572, 574, 576, 578, 580-582, 586-602, 605-639, 642-697, 699-713 and 719-726 are excluded from the *Act* pursuant to section 65(6)3 as they relate to the appellant's grievance filed under the Professional Association of Interns and Residents of Ontario (formerly "PAIRO" now "PARO") and the Council of Academic Hospitals of Ontario (CAHO) collective agreement.

[9] Section 65(6)3 states:

> Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

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

[11] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 1, 2 or 3 of this section, it must be reasonable to conclude that there is "some connection" between them.[1]

[12] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.[2]

[13] Section 65(6) may apply where the institution that received the request is not the same institution that originally "collected, prepared, maintained or used" the records, even where the original institution is an institution under the *Municipal Freedom of Information and Protection of Privacy Act.*[3]

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

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

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

Part 1: collected, prepared, maintained or used

[16] The university submissions do not address this issue; however, it is evident that the records were collected, prepared, maintained or used by the university. As the

[1] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).
[2] Order PO-2157
[3] Orders P-1560 and PO-2106

university states the records relate to the appellant's grievance with the hospital and the records are copies of emails and documents sent to and from university personnel, the hospital and the affected party's counsel. These were also collected, prepared, maintained or used by the hospital, in itself an institution under the *Act*. Accordingly, I find part 1 of the test has been established.

Part 2: meetings, consultations, discussions or communications

[17] Similarly, I find that the university's collection and usage of the records relates to the meetings, discussions and communications held between the university, the hospital and the affected party's counsel relating to the appellant's grievance. Accordingly, I find part 2 of the test has been established.

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

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

- a job competition[4]
- an employee's dismissal[5]
- a grievance under a collective agreement[6]
- disciplinary proceedings under the *Police Services Act*[7]
- a "voluntary exit program"[8]
- a review of "workload and working relationships"[9]
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act.*[10]

[4] Orders M-830 and PO-2123.
[5] Order MO-1654-I.
[6] Orders M-832 and PO-1769.
[7] Order MO-1433-F.
[8] Order M-1074.
[9] Order PO-2057.
[10] *Ontario (Minister of Health and Long-Term Care)* v. *Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.).

[19] The phrase "in which the institution has an interest" means more than a "mere curiosity or concern", and refers to matters involving the institution's own workforce.[11]

[20] The records collected, prepared maintained or used by [an institution] … are excluded only if [the] meetings, consultations, discussions or communications are about labour relations or "employment-related" matters in which the institution has an interest. Employment-related matters are separate and distinct from matters related to employees' actions.[12]

[21] In support of its claim that the records are excluded from the *Act*, the university submits that as a medical resident of its Faculty of Medicine Neurosurgery Program, the appellant has a dual status. The university submits:

> …while they are trainees registered in an approved program at a university leading to registration and licensing with the College of Physicians and Surgeons of Ontario [sic] they are also physicians employed by the teaching hospitals where they undertake their clinical training and where they perform essential service functions for the hospital. The employment conditions of a medical resident at the hospital are also governed by a collective agreement between teaching hospitals (The Council of Academic Hospitals of Ontario "CAHO") and a union representing medical residents (Professional Association of Interns and Presidents of Ontario "PAIRO").

[22] The university submits that it is an "institution having an interest" given the dual status of medical residents as both trainees and physicians employed by the hospital. This dual status is set out in the PAIRO – CAHO Collective Agreement. The university states;

> [The records] relate to the appellant's grievance filed under the PAIRO-CAHO Collective Agreement relating to his treatment in the Program. Therefore, it is clear that the records relate to labour relations matters in which the University is an institution 'having an interest' within the meaning of section 65(6)3 and that the exclusion would apply.

[23] The affected party, formerly known as PAIRO, and now known as PARO (Professional Association of Residents of Ontario) also recognizes the dual status of medical residents. It submits:

> Medical education in Ontario is currently provided by six faculties of medicine housed at the following Ontario universities: McMaster University, Queen's University, University of Ottawa, University of Toronto,

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[11] *Ontario (Solicitor General)* v. *Ontario (Assistant Information and Privacy Commissioner)*, cited above.
[12] *Ministry of Correctional Services*, cited above.

University of Western Ontario and Northern Ontario School of Medicine (a joint program of Lakehead and Laurentian University). Before a medical student becomes a resident, the student must have already completed an undergraduate medical program and received an M.D. degree. In order to practice medicine outside of a teaching hospital, under an independent practice license, a resident must complete a residency in one of a number of specialities. Residency programs generally range from two to seven years in length.

The six Ontario medical schools enter into affiliation agreements with individual teaching hospitals, which become the locus for the delivery of the postgraduate education program. Residents are enrolled in postgraduate medical training programs at the university, and at the same time they are appointed to the hospital medical staff, and assigned to teaching hospitals, pursuant to the university/hospital affiliation agreements.

While providing medical services, residents are supervised by physicians appointed to the staff of the hospital, most of whom are also appointed as faculty members by the university program in which the residents are enrolled. These supervising physicians who are appointed both to the hospital staff and the university faculty are typically known as clinical faculty. Each medical training program at the university has a program director responsible for the progress and evaluation of medical residents enrolled in the university program, usually reporting to the Associate Dean of Postgraduate Medical Education. Typically, each program has a residency training committee made up of some or all of the clinical faculty members in the program in addition to the program director. Residents are regularly evaluated by clinical faculty with input from other hospital staff, and in accordance with university policies, informal feedback and formal evaluations are provided at regular intervals to the residents.

Hospitals are responsible for the quality of medical care provided to the public by their staff, and the quality of the working environment provided to their staff, not limited to residents or clinical faculty, but including nursing staff, paramedical staff and other kinds of staff, and are subject to legislation and regulations in this regard. As a result , on occasion a hospital may conduct its own inquiry into the conduct of a resident, separate from an assessment conducted by the university program, and prepare its own records if, for example, it is alleged that the resident is providing unsafe patient care or poses a physical threat to the public or other staff.

[24] The affected party goes on to explain the exchange or sharing of records between the university and the affiliated hospital. It states:

> Most documentation relevant to a resident's performance and conduct is shared by the hospital with the university program to the extent that it may be relevant to the student's training progress and status in the university program. However, having said that, sometimes a hospital does not choose to share with the university program all the records in the hospital's possession pertaining to the resident, and on occasion this can pose problems for the resident and for [PARO] which may be assisting the resident, because the resident's status with the hospital may affect the resident's status with the university or vice versa. For example, decisions as to dismissal have both a training and an employment aspect, as can be seen from Article 9 of the [PARO] agreement:
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> > 9.2 It is agreed by the parties that the release of a resident from his/her training program through action of the University and after notification to the hospital by the office of the Dean of Medicine constitutes "just cause" for dismissal by the hospital.
> >
> > 9.3 If a resident has been dismissed by the hospital, in accordance with Article 9.2, and such resident is reinstated to his/her program through successful appeal of the University's release (through the University's appeal process), the resident will be reinstated by the hospital.

[25] Lastly, the affected party submits that while there is an employment relationship between a medical resident and the hospital, there is no employment relationship between the medical resident and the university.

[26] As set out above, the phrase "in which the institution has an interest" has been interpreted to refer to matters involving an institution's own workforce. It is not apparent from the material before me that there is an employment or labour relations relationship between the university and the appellant. However, it is unnecessary to arrive at a determination on this as I am satisfied that the appellant is an employee of the hospital for the purpose of section 65(6).

[27] I have found above that both the university and the hospital "collected, prepared, maintained or used" the records. As stated above, section 65(6) may apply where the institution that received the request is not the same institution that originally "collected, prepared, maintained or used" the records.[13] In this case, the university

[13] See Order PO-2106.

may claim the exclusion on behalf of the hospital where I find the hospital has an interest in the records. The materials before me, including the parties' submissions, establish that medical residents are employed by the teaching hospitals and this employment relationship is subject to the collective agreement between PARO and the hospitals. The appellant is an employee of the hospital for the purposes of section 65(6)3 and the grievance between the hospital and the appellant is a matter involving the hospital's own workforce. In the circumstances of this appeal, I find that the appellant's grievance is a labour-relations matter in which the hospital has an interest. Accordingly, the university can claim the exclusion on behalf of the hospital, and the records listed above are excluded from the application of the *Act* under section 65(6)3.

[28] At the same time, I find that the university has not established that there is an employment or labour relations relationship between itself and the appellant. The medical resident's "dual status" as both a student in the university's post-graduate program and employee of the teaching hospital results in a complex relationship between the three parties. While I accept that a medical resident's employment with the hospital is contingent upon his or her enrollment in the university's program, I am still left with the fact that the medical resident's status with the university is that of student and not employee. Moreover, the university has not established that its relationship with the medical resident is akin to a labour-relations or an employee-employer relationship. Instead, it is clear that the medical resident is a student and not a member of the university's workforce. As such, I find that the university is not an institution with "an interest" for the purposes of section 65(6)3 and thus not able to claim the exclusion for the records.

B. Are the records "in the custody" or "under the control" of the university under section 10(1)?

[29] Section 10(1) reads, in part:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless . . .

[30] Under section 10(1), the *Act* applies only to records that are in the custody or under the control of an institution.

[31] A record will be subject to the *Act* if it is in the custody OR under the control of an institution; it need not be both.[14]

[32] A finding that a record is in the custody or under the control of an institution does not necessarily mean that a requester will be provided access to it (Order PO-2836). A record within an institution's custody or control may be excluded from the

[14] Order P-239, *Ministry of the Attorney General* v. *Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

application of the *Act* under one of the provisions in section 65, or may be subject to a mandatory or discretionary exemption (found at sections 12 through 22 and section 49).

[33] The courts and this office have applied a broad and liberal approach to the custody or control question.[15]

Factors relevant to determining "custody or control"

[34] Based on the above approach, this office has developed a list of factors to consider in determining whether or not a record is in the custody or control of an institution, as follows.[16] The list is not intended to be exhaustive. Some of the listed factors may not apply in a specific case, while other unlisted factors may apply.

- Was the record created by an officer or employee of the institution?[17]
- What use did the creator intend to make of the record?[18]
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?[19]
- Is the activity in question a "core", "central" or "basic" function of the institution?[20]
- Does the content of the record relate to the institution's mandate and functions?[21]
- Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?[22]

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[15] *Ontario (Criminal Code Review Board)* v. *Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072 *Canada Post Corp.* v. *Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.), and Order MO-1251.
[16] Orders 120, MO-1251, PO-2306 and PO-2683.
[17] Order 120.
[18] Orders 120 and P-239.
[19] Order P-912, upheld in *Ontario (Criminal Code Review Board)* v. *Ontario (Information and Privacy Commissioner)*, above.
[20] Order P-912.
[21] *Ministry of the Attorney General* v. *Information and Privacy Commissioner*, cited above; *City of Ottawa* v. *Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.); Orders 120 and P-239.
[22] Orders 120 and P-239.

- If the institution does have possession of the record, is it more than "bare possession"?[23]

- If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?[24]

- Does the institution have a right to possession of the record?[25]

- Does the institution have the authority to regulate the record's content, use and disposal?[26]

- Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?[27]

- To what extent has the institution relied upon the record?[28]

- How closely is the record integrated with other records held by the institution?[29]

- What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances?[30]

[35] The following factors may apply where an individual or organization other than the institution holds the record:

- If the record is not in the physical possession of the institution, who has possession of the record, and why?[31]

- Is the individual, agency or group who or which has physical possession of the record an "institution" for the purposes of the *Act*?

- Who owns the record?[32]

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[23] Order P-239; Ministry of the Attorney General v. Information and Privacy Commissioner, cited above.
[24] Orders 120 and P-239.
[25] Orders 120 and P-239.
[26] Orders 120 and P-239.
[27] *Ministry of the Attorney General* v. *Information and Privacy Commissioner*, cited above.
[28] *Ministry of the Attorney General* v. *Information and Privacy Commissioner*, cited above; Orders 120 and P-239.
[29] Orders 120 and P-239.
[30] Order MO-1251.
[31] Order PO-2683.
[32] Order M-315.

- Who paid for the creation of the record?[33]

- What are the circumstances surrounding the creation, use and retention of the record?[34]

- Are there any provisions in any contracts between the institution and the individual who created the record in relation to the activity that resulted in the creation of the record, which expressly or by implication give the institution the right to possess or otherwise control the record?[35]

- Was there an understanding or agreement between the institution, the individual who created the record or any other party that the record was not to be disclosed to the Institution?[36] If so, what were the precise undertakings of confidentiality given by the individual who created the record, to whom were they given, when, why and in what form?

- Is there any other contract, practice, procedure or circumstance that affects the control, retention or disposal of the record by the institution?

- Was the individual who created the record an agent of the institution for the purposes of the activity in question? If so, what was the scope of that agency, and did it carry with it a right of the institution to possess or otherwise control the records? Did the agent have the authority to bind the institution?[37]

- What is the customary practice of the individual who created the record and others in a similar trade, calling or profession in relation to possession or control of records of this nature, in similar circumstances?[38]

- To what extent, if any, should the fact that the individual or organization that created the record has refused to provide the institution with a copy of the record determine the control issue?[39]

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[33] Order M-506.
[34] Order PO-2386.
[35] *Greater Vancouver Mental Health Service Society* v. *British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.).
[36] Orders M-165 and MO-2586.
[37] *Walmsley* v. *Ontario (Attorney General) (1997), 34 O.R. (3d) 611 (C.A.); David v Ontario (Information and Privacy Commissioner) et al* (2006), 217 O.A.C. 112 (Div. Ct.).
[38] Order MO-1251.
[39] Order MO-1251.

[36] In determining whether records are in the "custody or control" of an institution, the above factors must be considered contextually in light of the purpose of the legislation: *City of Ottawa v. Ontario*, above.

[37] The appellant specifically identified two doctors, who are on the faculty of the university, who should have responsive records. The university submits that it does not have control or custody of the records generated by the two doctors about the appellant for the following reasons:

- Physicians in teaching hospitals have a dual status in that they are physicians with medical privileges carrying out their clinical duties but they also hold an academic appointment with the university in that they carry out academic duties to supervise and evaluate medical residents.

- The two named professors are both physicians and clinical faculty members with the university.

- The university does not have physical possession or does not have the authority to regulate the content or systems of the hospital's paper records or servers housing electronic records.

- Communications about medical residents exchanged by the professors and hospital employees are often created, received or disseminated in the exercise of their professional and clinical duties and hospital responsibilities and not necessarily in purely the exercise of their academic duties.

- Content of these communications would contain information about the clinical duties and the clinical setting (for example, personal health information of the hospital's patients or other personal information in connection with the hospital's activities) in which case, this kind of information is unrelated to the university's mandate and not accessible to it by custom or practice.

[38] To summarize, the university submits that it does not have custody of the records because it does not have access to the hospital's paper or electronic records. The university does not have control of the responsive records as the professors, besides being part of the clinical faculty, are also physicians at the hospital.

[39] Recently in Order PO-3216, Adjudicator Diane Smith considered whether academic and non-academic records relating to the appellant were within the custody or control of the university.[40] In finding that the university would have some control

[40] The University of Ottawa was also the institution in Order PO-3216.

over the academic records held by professors who were employees of Algonquin College, Adjudicator Smith cited her Order PO-3009-F, where she found that the following types of records may be in the custody of university professors and also within the control of the university:[41]

1. records or portions of records in the possession of an APUO member [Association of Professors of the University of Ottawa] that relate to the personal matters or activities that are wholly unrelated to the university's mandate, are not in the university's custody or control;

2. records relating to teaching or research are likely to be impacted by academic freedom, and would only be in the university's custody and/or control if they would be accessible to it by custom or practice, taking academic freedom into account;

3. administrative records are prima facie in the university's custody and control, but would not be if they are unavailable to the university by custom or practice, taking academic freedom into account.

[40] Adjudicator Smith, in Order PO-3216, goes on to find the following:

> The appellant identifies several university staff by name, including professors, in her request. Based on the short time frame of the request and its wording, I find the appellant is primarily seeking records relating to herself concerning an issue that was brought before one of the university's committees. The records that the appellant is seeking do not relate to the named professors' own personal matters, nor are these records related to teaching or research that are likely to be impacted by academic freedom.
>
> It appears to me that the records the appellant is seeking are primarily administrative records, which are *prima facie* in the university's custody and control.

[41] I adopt the approach taken by Adjudicator Smith in these appeals.

[42] In the current appeal, the two doctors identified by the appellant hold both faculty positions with the university and are doctors with the hospital. Although many of their records may not be in the university's custody or control, they may potentially hold records relating to academic matters in which the university has an interest.

[41] See paragraph 181 of Order PO-3009-F.

[43] I find the following factors should be given some weight in my consideration of whether the university exercises control of the physician's records, insofar as they are faculty members of the university:

- The physicians identified by the appellant have an academic appointment with the university and carry out academic duties to supervise and evaluate medical residents enrolled in the postgraduate medical training programs.

- Some of the records relating to the appellant could therefore relate to the appellant's academic performance during his residency.

- The university would have the right to request records relating to the appellant's academic performance during his medical residency and regulate its use and disposal.

- The university could rely on those records in its determination of whether the appellant had successfully completed his postgraduate medical training.

[44] The university submits that it is not its custom or practice to collect information relating to physicians clinical duties within the clinical setting as it does not relate to the university's mandate. I accept the university's position that this type of information would not be in its custody or control. However, as clinical faculty members, these physicians are also involved in evaluating the appellant's performance as a resident for the purpose of postgraduate medical training, and this factor is indicative of control.

[45] Having considered the circumstances of the appeal, including the factors set out above, I find that the records relating to the appellant's enrollment and performance in postgraduate medical training provided by the university are prima facie under the university's control.

[46] Accordingly, I will order the university to request that the named physicians search for and provide it with any records relating to the appellant's academic performance in the university's postgraduate medical training program.

C. Do the records contain "personal information" within the meaning of section 2(1), and if so, to whom does it relate?

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

"personal information" means recorded information about an identifiable individual, including,

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except if they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

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

[48] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[42]

[42] Order 11.

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

> (2) Personal information does not include information about an individual who has been dead for more than thirty years.
>
> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[50] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[43]

[51] 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.[44]

[52] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[45]

[53] The university submits that the records contain the personal information of individuals other than the appellant including:

- Information that forms part of various other academic files belonging to other residents or fellow:
- Personal contact information;
- Information relating to personal activities or personal circumstances unrelated to the individual's professional capacity or employment duties;
- Information about the appellant provided in confidence.

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[43] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[44] Orders P-1409, R-980015, PO-2225 and MO-2344.
[45] Order PO-1880, upheld on judicial review in *Ontario (Attorney General)* v. *Pascoe*, [2002] O.J. No. 4300 (C.A.).

[54] While not addressed by the university's representations, the university did confirm with the mediator that the records relate to the appellant and thus contain information which would be his "personal information" within the meaning of the *Act*.

[55] Based on my review of the records, I find that the records at issue all relate to the appellant and as such contain recorded information about him which would constitute his personal information for the purposes of section 2(1) of the *Act*. Specifically, the records contain:

- Information relating to the appellant's national and ethnic origin (paragraph (a) of the definition of "personal information")
- Information relating to the appellant's education and employment history (paragraph (b) of the definition of "personal information")
- The views or opinions about the appellant (paragraph (g) of the definition of "personal information")
- The appellant's name where it appears with other personal information relating to the appellant (paragraph (h) of the definition of "personal information")

[56] The records also contain recorded information about the appellant's treatment of patients. I find that this information is the patients' personal information within the meaning of paragraph (b) of the section 2(1) definition of that term.

[57] I further find that the records contain recorded information about other individuals, specifically other residents, and staff members at the hospital. The records also include recorded information about the university administration officials or hospital officials. As stated above, to qualify as personal information, the information must be about the individual in a personal capacity and not about them in their professional or official capacity. In regard to the information about the other residents, I find that the information in the record relates to their performance in their clinical positions as well as information relating to their postgraduate training relationship with the hospital and the university. I find this information to be the residents' personal information for the purposes of section 2(1) of the *Act*.

[58] Regarding the information of hospital staff, university and hospital officials, I also find the recorded information about these individuals to be their personal information. The recorded information contains the following types of information:

- Information relating to address, telephone number (paragraph (d) of the definition of "personal information") ;
- The personal opinions or views of the individuals (paragraph (e) of the definition of "personal information");

- The individual's name where it appears with other personal information relating to the individual (paragraph (h) of the definition of "personal information")

[59] I find that the university has disclosed much of the appellant's personal information to him and the remaining personal information relating to the appellant is so intertwined with the personal information of other individuals that it cannot be easily severed. Furthermore, it is evident that severing the names of the individuals would not render the individuals unidentifiable as the appellant and individuals are well known to one another and the incidents which are discussed would be known to the appellant.

[60] Accordingly, as the records at issue relate to the appellant and contain his personal information and the personal information of other individuals, I will now proceed to consider the application of the discretionary exemptions in section 49(a) and (b).

D. Does the discretionary exemption in section 49(a) in conjunction with section 19 apply to the information at issue?

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

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

[62] Section 49(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information [Order M-352].

[63] Where access is denied under section 49(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[64] In this case, the university relies on section 49(a) in conjunction with section 19 which states:

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

> (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or
>
> (c) that was prepared by or for counsel employed or retained by an educational institution or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

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

Branch 1: common law privilege

[66] 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.[46]

Solicitor-client communication privilege

[67] 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.[47]

[68] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[48]

[69] 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.[49]

[70] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[50]

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[46] 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).
[47] *Descôteaux* v. *Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[48] Orders PO-2441, MO-2166 and MO-1925.
[49] *Balabel* v. *Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[50] *Susan Hosiery Ltd.* v. *Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

[71] 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.[51]

Litigation privilege

[72] Litigation privilege protects records created for the dominant purpose of litigation, actual or reasonably contemplated.[52]

[73] In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

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

Branch 2: statutory privileges

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

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[51] *General Accident Assurance Co.* v. *Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).
[52] Order MO-1337-I; *General Accident Assurance Co.* v. *Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank* v. *Canada (Minister of Justice)* (cited above).

Statutory solicitor-client communication privilege

[75] Branch 2 applies to a record that was prepared by or for Crown counsel, or counsel for an educational institution or hospital, "for use in giving legal advice."

Statutory litigation privilege

[76] Branch 2 applies to a record that was prepared by or for Crown counsel, or counsel for an educational institution or hospital, "in contemplation of or for use in litigation."

[77] Records that form part of the Crown brief, including copies of materials provided to prosecutors by police, and other materials created by or for counsel, are exempt under the statutory litigation privilege aspect of branch 2.[53] However, "branch 2 of section 19 does not exempt records in the possession of the police, created in the course of an investigation, just because copies later become part of the Crown brief."[54]

[78] Documents not originally created in contemplation of or for use in litigation, which are copied for the Crown brief as the result of counsel's skill and knowledge, are exempt under branch 2 statutory litigation privilege.[55]

[79] Termination of litigation does not affect the application of statutory litigation privilege under branch 2.[56]

[80] Branch 2 includes records prepared for use in the mediation or settlement of actual or contemplated litigation.[57]

[81] The university submits that both branch 1 and 2 privileges of the section 19 exemption apply in this appeal as the records contain legal advice sought and received by both university counsel and external counsel retained by the university. The university submits:

> The records mentioned in [above paragraph] generally relate to advice being sought from and given by counsel for the university in relation to the appellant's various academic appeals of his status in the medical residency program and other litigation involving the appellant. These records fall into one or more of the following four general categories:

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[53] Order PO-2733.
[54] Orders PO-2494, PO-2532-R and PO-2498, upheld on judicial review in *Ontario (Attorney General)* v. *Ontario (Information and Privacy Commissioner)*, [2009] O.J. No. 952
[55] *Ontario (Ministry of Correctional Services)* v. *Goodis* (2008), 290 D.L.R. (4th) 102, [2008] O.J. No. 289; and Order PO-2733.
[56] *Ontario (Attorney General)* v. *Ontario (Information and Privacy Commission, Inquiry Officer)*, (cited above).
[57] *Liquor Control Board of Ontario* v. *Magnotta Winery Corporation*, 2010 ONCA 681.

(a) Emails and other communications between or among counsel for the university, university employees and physicians who hold an academic appointment granted by the university as explained below in paragraph 45 and their administrative staff for the purpose of legal advice being sought from and/or given by counsel;

(b) Drafts and other related records drafted by counsel for the university;

(c) Emails or other communications including drafts prepared by university employees and/or physicians who hold an academic appointment granted by the university and their administrative staff, with regard to which legal advice is sought from counsel for the university;

(d) Emails or other communications that form part of the "continuum of communications" and that were exchanged for the purpose of keeping counsel for the university, university employees and physicians who hold an academic appointment granted by the university and their administrative staff informed so that advice may be sought or given as required.

[82] The university submits that the litigation privilege applies to all records where section 19 was claimed as the appellant had hired his own legal counsel during his academic appeal of his status in the medical residency program. The university submits that litigation was reasonably contemplated for the following reasons:

- A final decision on an academic appeal can lead to a filing of an application for judicial review of the university's final decision and given that the appellant had hired his own legal counsel at early stages of the academic appeal process, litigation was reasonably contemplated.

- In 2009, the appellant filed a grievance against the hospital under the PAIRO-CAHO agreement and if it was not resolved, would lead to arbitration proceedings and thus litigation was reasonably contemplated.[58]

- In October 2010, the appellant did in fact file an application against the university and others with the Ontario Human Rights Tribunal.

[58] The university notes that while it is not a party to the PAIRO-CAHO agreement, the grievance would have legal implications for the university and the medical program given the dual status of medical residents.

[83] The university submits that the records themselves are marked privileged and confidential and represent an exchange of confidential communications between counsel for the university and university and physicians who hold an academic appointment with the university and their administrative staff. These communications and the continuum of communications were for the purpose of obtaining or giving legal advice.

[84] Lastly, the university submits that it did not take any action that would constitute waiver of either its Branch 1 or Branch 2 solicitor-client privilege either implicitly or explicitly. The university submits that the records have not been disclosed to outsiders either by counsel for the university or the recipients of the legal advice.

[85] Based on my review of the records for which section 19 has been claimed, I find that the exemption applies. The records for which the university has claimed section 19 predominantly consist of email chains between staff at the medical school, hospital and then university counsel and/or outside counsel hired by the university. These emails relate to the appellant's status as a resident at the hospital and student in the medical program at the university and the various proceedings that arose during his residency. I find that the email exchanges were confidential communications between client (university) and the solicitor, for the purpose of obtaining or providing legal advice and as such qualify as Branch 1 and 2 solicitor-client privilege. I further find that the university has not waived this privilege.

[86] I further find that some of the records were also created for the dominant purpose of actual and reasonably contemplated litigation including the appellant's appeal of the hospital's decision regarding his residency, his grievance under the PARO-CAHO agreement and the OHRT proceeding. I find that these records are exempt as litigation privileged under section 19.

[87] Accordingly, as I have found that section 19 applies, I uphold the university's decision to withhold the records pursuant to section 49(a), subject to my finding on its exercise of discretion.

E. Does the discretionary exemption at section 49(b) apply to the information at issue?

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

[89] Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an

"unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

[90] 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.

[91] Sections 21(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met. In this case, section 21(4) does not apply and only section 21(1)(f) is relevant which permits a head to disclose personal information if disclosure does not constitute an unjustified invasion of personal privacy.

[92] If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 49(b). With respect to records claimed to be exempt under section 49(b), in *Grant* v. *Cropley*, [2001] O.J. 749, the Divisional Court said the Commissioner could:

> …consider the criteria mentioned in s. 21(3)(b) in determining, under s. 49(b), where disclosure…would constitute an unjustified invasion of [a third party's] personal privacy.

[93] In the circumstances, I find that the presumptions in section 21(3)(a), (d) and (g) are relevant which state:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
>
> (d) relates to employment or educational history;
>
> (g) consists of personal recommendations or evaluations, character references or personnel evaluations; or

[94] Some of the records for which section 49(b) is claimed, contains the information relating to the medical conditions of patients treated by the appellant and as such the presumption in section 21(3)(a) is relevant. Furthermore, the presumption in section 21(3)(d) is relevant as some of the records also contain the employment and educational history of other residents enrolled in the medical program at the university. Lastly, the records contain the personal evaluations of other medical residents and as such the presumption in section 21(3)(g) is also relevant.

[95] The university severed the records to disclose most of the appellant's personal information to him. The remaining personal information either relates solely to other individuals or is inextricably intertwined. I find that the presumptions in sections 21(3)(a), (d) and (g) are relevant in the circumstances. I have not been referred to any factors in section 21(2) which favour disclosure of the information to the appellant. Accordingly, I find that disclosure of the personal information in the records relating to other individuals would constitute an unjustified invasion of personal privacy and as such section 49(b) applies, subject to my finding on the university's exercise of discretion.

F. Did the university exercise its discretion under sections 49(a) and (b)?

[96] The section 49(a) and (b) exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[97] 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.

[98] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[59] This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

[99] The university submits that in exercising its discretion to apply sections 49(a) and (b), it took into consideration the following factors:

- the purpose of the *Act*
- whether the requester was seeking his own personal information
- whether the requester had a sympathetic or compelling need to receive the information
- whether disclosure would increase public confidence in the operation of the university

[59] Order MO-1573.

[100] The university submits that the records at issue consist of either confidential communications between a solicitor and client for the purpose of providing legal advice or the receipt of confidential information by a solicitor in order for the solicitor to provide advice on an ongoing legal matter. Furthermore, the university notes that these records also include the personal information of other individuals that relate to the appellant and were provided on a confidential basis.

[101] The university surmises that there was no sympathetic or compelling need for the appellant to receive the information and this fact was balanced against the confidential legal communications and confidential personal information. The university states:

> Historically, the university has never disclosed solicitor-client communications as such communications are regarded as privileged, thereby increasing public confidence in the operation of the University of Ottawa.
>
> Hence, in an attempt to protect the integrity of the university's legal services and privacy of individuals, the university sought to exercise its discretion and not disclose the relevant records.

[102] In the circumstances, I find that the university properly considered the relevant factors and did not take into consideration any irrelevant factors. I uphold the university's exercise of discretion to withhold the records at issue under sections 49(a) and (b).

G. Did the university conduct a reasonable search for records?

[103] 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.[60] 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.

[104] 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.[61] To be responsive, a record must be "reasonably related" to the request.[62]

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[60] Orders P-85, P-221 and PO-1954-I.
[61] Orders P-624 and PO-2559.
[62] Order PO-2554.

[105] 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.[63]

[106] 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.[64]

[107] 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.[65]

[108] The university was asked to provide a written summary of the steps taken in response to the request and to address whether clarification was sought from the appellant regarding his request.

[109] The university submits that it did not contact the requester as the scope of the request was set out in great detail. Upon receipt of the request, the coordinator contacted the Office of the President, Vice-President, Governance, Human Resources, Legal Counsel, Dean of the faculty of Medicine and Associate Dean to inform them that an access request had been made. A search was conducted by the following individuals:

- Executive Legal Assistant, Legal Services
- Administrative Assistant to the Vice-President Academic and Provost
- Vice-President, Governance
- Administrative Assistant to Vice-President of Governance
- Administrative Assistant, Human Resources Service
- Special Assistant to the President
- Manager of Postgraduate Medical Education, Faculty of Medicine
- Faculty and Corporate Affairs Advisor of the Faculty of Medicine
- Program Administrator, Division of Neurosurgery, Faculty of Medicine

[110] The university also provided an affidavit from the administrative assistant at the university's Access to Information and Privacy Office. She attached to her affidavit the search forms completed by the various individuals listed above. These search forms set out location, records and amount of search time.

[111] As stated above, I did not receive representations from the appellant and it is not evident to me based on my review of the file what the appellant's reasonable basis is for his view that additional responsive records should exist. I find the appellant's

[63] Orders M-909, PO-2469, PO-2592.
[64] Order MO-2185.
[65] Order MO-2246.

request was clear and provided sufficient detail so that clarification by the university was unnecessary. I further find the university's search for records to be reasonable in the circumstances, with the exception of my discussion above on custody and control of some of the records. Accordingly, I uphold the university's search for responsive records to be reasonable.

ORDER:

1. I uphold the university's decision on the application of the exclusion in section 65(6), and the exemptions in sections 49(a) and (b).

2. I uphold the university' search for records as reasonable and dismiss the appeal.

3. I order the university to request that the two named physicians search for and provide it with any records relating to the appellant's academic performance in the university's postgraduate medical training program. The university is to conduct this search within the time period specified in section 26 of the *Act*, treating the date of this order as the date of the request and without recourse to a time extension under section 27 of the *Act*.

4. I order the university to provide a decision letter to the appellant regarding the results of this search in accordance with the provisions of the *Act*.

September 26, 2013

Stephanie Haly
Adjudicator