

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3248

Appeal PA10-39

University of Ottawa

August 29, 2013

Summary: The appellant submitted an access request for all records about him held by the University of Ottawa. The university located 137 records and disclosed most of them to him. However, it withheld 26 records or parts of these records under an exclusion and various exemptions in the *Act*. The adjudicator finds that some records are excluded from the scope of the *Act* under section 65(6)3 and that other records or parts of these records qualify for exemption under section 49(a), read in conjunction with the solicitor-client privilege exemption in section 19(c), and under the personal privacy exemption in section 49(b). In addition, he rejects the university's claim that the information in one record is not responsive to the appellant's request. He orders the university to disclose two severed records to the appellant.

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"), 2(3), 10(2), 19(c), 21(1), 49(a) and 49(b).

Orders and Investigation Reports Considered: Order PO-2909-I and PO-2852-I.

OVERVIEW:

[1] The appellant is a student who submitted the following access request to the University of Ottawa under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*):

I request 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 December 7, 2009 to present.

I expect records to be in the offices of Legal [Counsel], the Vice-President of Governance Diane Davidson, the President Allan Rock, the Director of Protection Services Claude Giroux, Protection Services, and other offices.

[2] The university initially located 136 records that are responsive to the appellant's request. Most of these records are emails between various university officials that deal with a trespass notice that was issued against the appellant prohibiting him from being on campus. In response to his access request for these records, the university sent him a decision letter and an index of records. It provided him with access to many records and parts of records, but denied access to others, either in whole or in part, under the following provisions:

- the exclusion in section 65(6) (labour relations and employment records);
- the discretionary exemption in section 49(a), read in conjunction with section 19 (solicitor-client privilege); and
- the discretionary exemption in section 49(b) and the mandatory exemption in section 21(1) (personal privacy).

[3] In addition, it claimed that some information in the records is not responsive to the appellant's request.

[4] The appellant appealed the university's decision to the Information and Privacy Commissioner of Ontario (IPC). During the mediation stage of the appeal process, the university issued two revised decision letters to the appellant.

[5] In its first revised decision letter, it disclosed additional records and parts of records to him, including photographs that it located after conducting a new search for records. In addition, it located a video and denied access to it under the personal privacy exemptions in sections 21(1) and 49(b). In its second revised decision letter, the university disclosed two additional records (photographs) to the appellant. A revised index of records accompanied each revised decision letter.

[6] This appeal was not resolved during mediation and was moved to adjudication for an inquiry. The adjudicator assigned to the appeal sought representations from the university and the appellant on all the issues in this appeal, and from two affected parties on whether the personal privacy exemptions in sections 21(1) and/or 49(b) apply to those records that contain information relating to them. He received

representations from the university, the appellant and one affected party, who consented to the disclosure of her personal information to the appellant.

RECORDS:

[7] The following chart, which is based on the university's last revised index of records, the mediator's report and my review of the records, summarizes the 26 records remaining at issue in this appeal:

Record number	General description of record	University's decision	Exclusions/exemptions claimed
39	Email chain re trespass notice issued to appellant	Withheld in part	ss. 49(a), 19
54	Email chain re appellant's arrest at president's office	Withheld in part	ss. 49(a), 19
59	Email chain re security report	Withheld in part	ss. 49(a), 19
63	Email chain re security report	Withheld in part	ss. 49(a), 19
80	Email chain re security report	Withheld in part	Non-responsive
81	Email chain re appellant	Withheld in part	s. 21(1)
84	Email chain re appellant	Withheld in full	ss. 49(a), 19
85	Email chain re appellant	Withheld in full	ss. 49(a), 19
86	Email chain re appellant	Withheld in full	ss. 49(a), 19
89	Email chain re appellant	Withheld in full	ss. 49(a), 19
91	Email chain re appellant	Withheld in part	s. 65(6) ss. 49(a), 19
93	Email chain re "labour relations"	Withheld in full	s. 65(6) ss. 49(a), 19
102	Email chain re draft letter to CUPE about appellant	Withheld in full	s. 65(6) ss. 49(a), 19

112	Email chain re draft letter to CUPE about appellant	Withheld in full	s. 65(6) ss. 49(a), 19
113	Email chain re draft letter to CUPE about appellant	Withheld in full	s. 65(6) ss. 49(a), 19
115	Email chain re draft letter to CUPE	Withheld in full	ss. 65(6) ss. 49(a), 19
121	Email chain about letter from CUPE re appellant	Withheld in part	ss. 65(6) ss. 49(a), 19
123	Email chain re draft letter to appellant	Withheld in full	ss. 49(a), 19
124	Email chain re appellant	Withheld in part	ss. 65(6) ss. 49(a), 19
125	Email chain re appellant	Withheld in part	ss. 65(6) ss. 49(a), 19
126	Email chain re appellant	Withheld in full	ss. 49(a), 19
130	Email chain re appellant	Withheld in part	ss. 65(6) ss. 49(a), 19
131	Single email re appellant	Withheld in full	ss. 49(a), 19
132	Email chain re appellant	Withheld in full	ss. 65(6) ss. 49(a), 19
136	Email chain re appellant	Withheld in full	ss. 49(a), 19 Non-responsive
137	Video of appellant and other individuals	Withheld in full	ss. 49(b), 21(1)

ISSUES:

- A: Does section 65(6) exclude the records from the scope of the *Act*?
- B: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

- C: Does the discretionary exemption at section 49(a) in conjunction with the section 19 exemption apply to the information at issue?
- D: Does the mandatory exemption at section 21(1) or the discretionary exemption at section 49(b) apply to the information at issue?
- E: Is the information in the records responsive to the appellant's request?
- F: Did the university exercise its discretion under sections 49(a) and (b)? If so, should IPC uphold this exercise of discretion?

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

A: Does section 65(6) exclude the records from the scope of the *Act*?

[8] The university claims that emails which comprise the following records are excluded from the scope of the *Act* under section 65(6): 91, 93, 102, 112, 113, 115, 121, 124, 125, 130, and 132.

[9] Section 65(6) 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:

1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
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)¹ 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.²

[12] 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.³

[13] The university claims that the above records or parts of these records are excluded from the scope of the *Act* under sections 65(6)1 and 3 because they "were collected by employees and/or agents on behalf of the University in relation to anticipated proceedings before a tribunal relating to labour relations and the employment of the Appellant and meetings, consultations and discussions about labour relations or employment related matters in which the University has an interest."

[14] To support its claim that sections 65(6)1 and 3 are applicable, the university provided the following submissions:

The relationship between the [university] and its teaching and research assistants is governed by the Collective Agreement . . . between the [university] and the Canadian Union of Public Employees 2626 ("CUPE"). Accordingly, all labour-relations matters between the [university] and CUPE members are dealt with in accordance with the Collective Agreement.

¹ Section 65(7) states:

This Act applies to the following records:

1. An agreement between an institution and a trade union.
2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.
4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

² Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

³ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

At the time of the creation of the records, the appellant was a teaching assistant at the [university].

With respect to the records noted below, the [university] as at all times acting as an employer and terms and conditions of employment were at issue. The records also record/contain provided to management and Legal Counsel regarding labour relations matters.

Records #91, 121, 125 and 130 of the Disclosed Index of Records and Records #93, 102, 112, 113, 115 and 132 of the Undisclosed index of Records relate to discussions between Legal Counsel, Vice-President, Governance, Human Resources and Protection Services which comprise of legal advice being sought from and given by Legal Counsel

The University has without a doubt an interest in matters involving its own workforce and, in particular, matters pursuant to the Collective Agreement, which it strives to abide by.

For the University, as for any employer, disciplinary actions and grievances filed under the Collective Agreement are serious matters which must be solved as efficiently as possible. These will without a doubt affect the working environment, in which the University has an interest.

The University submits that none of the records above fall within any of the exceptions in section 65(7).

[15] In his representations, the appellant cites a passage from Order PO-2852-I, in which Adjudicator Diane Smith stated:

The records concern the appellant, not the individual who is identified in the records and who has an on-going labour relations and employment-related dispute with the University. The University has not identified the relationship between these emails and this ongoing dispute concerning the identified individual in its representations. Based upon my review of the records, I find that there is no more than a superficial connection between the creation, preparation, maintenance and/or use of these records and the labour relations or employment-related proceedings or anticipated proceedings . . .

[16] I will start by considering whether the exclusion in 65(6)3 applies to the records. For section 65(6)3 to apply, the university must establish that:

1. the records were collected, prepared, maintained or used by the university 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 university has an interest.

[17] I am satisfied that all of the emails in the above records were collected, prepared, maintained or used by the university, and that this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications. Consequently, I find that parts 1 and 2 of the section 65(6)3 test have been met.

[18] To satisfy part 3 of the section 65(6)3 test, the university must establish that the meetings, consultations, discussions or communications that took place were about labour relations or employment-related matters in which the university has an interest.

[19] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.⁴

[20] As noted above, most of these records consist of emails between various university officials that deal with a trespass notice issued against the appellant that prohibited him from being on campus. Records 91, 93, 102, 112, 113, 115 and 121 are emails that directly discuss the possible impact of the trespass notice on the appellant's contract position as a teaching assistant, which is governed by a collective agreement. In addition, some of these emails discuss correspondence received from the appellant's union (CUPE).

[21] I find that all of these emails have some connection to meetings, consultations, discussions or communications about "labour relations" matters in which the university has an interest, as required by section 65(6)3. Consequently, these emails are excluded from the scope of the *Act* under section 65(6)3. In my view, none of the exceptions in section 65(7) apply to these records.

[22] I am not persuaded, however, that the emails in records 124, 125, 130 and 132 have some connection to meetings, consultations, discussions or communications about labour relations or employment related matters in which the university has an interest. These emails discuss the trespass notice that the university issued against the appellant, but only contain incidental references to the appellant's TA position. The

⁴ *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.). See also Order PO-2157.

general subject matter and substance of these emails is about other issues relating to the trespass notice, not about labour relations or employment related matters.

[23] In my view, the section 65(6)3 requirement that the records have “some connection” to meetings, consultations, discussions or communications about labour relations or employment related matters, should not be interpreted in a manner that sweeps entire records into section 65(6)3 simply because they contain incidental references to an individual’s employment position. In short, I find that the emails in records 124, 125, 130 and 132 are not excluded from the scope of the *Act* under section 65(6)3.

[24] I have also considered whether these emails are excluded from the scope of the *Act* under section 65(6)1, which excludes records collected, prepared, maintained or used by or on behalf of an institution in relation to proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution. In my view, because the emails in records 124, 125, 130 and 132 deal mostly with issues that are not about labour relations or the employment of a person, I find that they do not have some connection to proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations of the employment of a person.

[25] As will be explained under Issue C below, however, although the emails in records 124, 125, 130 and 132 are not excluded from the scope of the *Act* under section 65(6), they qualify for exemption under section 49(a), read in conjunction with the solicitor-client privilege exemption in section 19(c).

PERSONAL INFORMATION

B: Do the records contain “personal information” as defined in section 2(1) and, if so, to whom does it relate?

[26] The discretionary exemptions in sections 49(a) and (b) and the mandatory exemption in section 21(1) of the *Act* apply to “personal information.” Consequently, it is necessary to determine whether the records contain “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;

[27] 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.⁵

[28] Section 2(3) of the *Act* excludes certain information from the definition of personal information. It states:

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.

⁵ Order 11.

[29] In addition, previous IPC orders have found that 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.⁶

[30] However, previous orders have also found that even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.⁷

[31] The university claims that the withheld records and parts of records contain "personal information," as that term is defined in section 2(1). It submits that:

Record #81 of the Disclosed Index is partially disclosed. The severed portion consists of a name of an individual which if it was disclosed would reveal sensitive and personal information of this individual because of the nature of the information contained in the record.

Record #137 of the Undisclosed Index which is a video recording from the University's surveillance cameras. This video was filmed from Financial Aid and Award Service and the image of individuals can be identified.

The above-noted records contain information about other individuals other than the Appellant, which, if disclosed, will allow the Appellant to identify these individuals.

[32] The appellant's representations do not address whether the records and parts of record remaining at issue contain "personal information." I have reviewed the emails and parts of emails withheld by the university and find that most of them contain the appellant's personal information. In addition, some of them contain the personal information of the two affected parties. The type of personal information relating to the appellant and the affected parties falls within paragraph (h) of the definition in section 2(1).

[33] Record 137 is a video that contains the images of various students who were being served by staff at the university's Financial Aid and Award Service (FAAS) office. In addition, the video appears to show the appellant in an area outside the office. In my view, this video contains the personal information of both the appellant and other students.

[34] The names and job titles of various university officials/employees and a union president which appear in the records identify these individuals in a professional or

⁶ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁷ Orders P-1409, R-980015, PO-2225 and MO-2344.

official capacity. In accordance with the exception to the definition of "personal information" in section 2(3) of the *Act*, I find that this information does not qualify as their personal information.

[35] I will now determine whether the "personal information" in the records qualifies for exemption under sections 49(a), 49(b) and 21(1) of the *Act*.

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

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

Section 49(a)

[36] Under section 49(a), the institution has the discretion to deny an individual access to his or her own personal information where the exemptions in sections 12, 13, 14, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that information.

[37] The university is withholding the following records or parts of these records under section 49(a), read in conjunction with the solicitor-client privilege exemption in section 19: 39, 54, 59, 63, 84, 85, 86, 89, 123, 124, 125, 126, 130, 131, 132 and 136. These records, which are emails chains, contain the appellant's personal information.

[38] The university is also withholding various emails in records 91, 93, 102, 112, 113, 115 and 121 under section 49(a) in conjunction with section 19, but I have already found that these emails are excluded from the scope of the *Act* under section 65(6)3. Consequently, it is not necessary to also consider whether they also qualify for exemption under the *Act*.

Section 19(c)

[39] In its representations, the university claims that the emails in the above records qualify for exemption under the statutory solicitor-client communication privilege aspect of section 19(c). This provision states:

A head may refuse to disclose a record,

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.
[emphasis added]

[40] Section 19(c) is a statutory exemption that is available in the context of counsel employed or retained by an educational institution giving legal advice or conducting litigation. The part of section 19(c) that refers to a record that was prepared by or for counsel for an educational institution “for use in giving legal advice,” is the statutory solicitor-client communication privilege aspect of this exemption.

[41] 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.⁸

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

[43] 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.¹⁰

[44] The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice.¹¹

[45] 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.¹²

[46] The university submits that some emails in the above records relate to legal advice being sought and provided by the university’s legal counsel, while others are part of the “continuum of communication” to legal counsel. It further submits that:

The solicitor-client privilege is crucial to individuals within the University, as it allows them to freely make requests to obtain legal advice, knowing it will remain confidential. In order to protect the integrity of legal services, including the continuum of communications between the legal counsel and the University personnel, the records must be exempt from disclosure.

⁸ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

⁹ Orders PO-2441, MO-2166 and MO-1925.

¹⁰ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

¹¹ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

¹² *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

Further, the University did not take any action that constitutes waiver of its common law and statutory solicitor-client privilege either implicitly or explicitly. The records have not been disclosed to outsiders either by the University legal counsel or the officers receiving the advice, nor has the University, knowing of the existence of the privilege, voluntarily evinced an intention to waive privilege.

Hence, the University submits that the discretionary exemption at section 49(a), read in conjunction with the section 19 exemption does not apply to the information at issue in the records above and, therefore, must not be disclosed.

[47] In his representations, the appellant cites a passage from Order PO-2909-I, in which Adjudicator Diane Smith stated:

Based upon my review of the information at issue, I find that even though there may have existed a continuum of communication between the University and the law firm about an ongoing labour relations matter involving the professor named in the record, the record also concerns the appellant and his educational position at the University. Although two lawyers at the law firm were sent this email, the email was also sent to two other University officials and was copied to seven other individuals. There is no indication in this email that legal advice is being sought or given. Merely sending a copy of a record to a solicitor in and of itself does not automatically result in privilege being attached to it.

[48] I have reviewed the above emails, which are all between the university's in-house legal counsel and various university officials. In most of these emails, legal counsel is either giving advice or advice is being sought from him about certain matters relating to the appellant. In my view, these emails constitute direct communications of a confidential nature between a solicitor and his clients made for the purpose of obtaining or giving professional legal advice, and they are therefore protected from disclosure by the statutory solicitor-client communication privilege aspect of the section 19(c) exemption.

[49] In a few emails, although legal advice is not being directly given or sought, information is being passed between the in-house legal counsel and his clients as part of the continuum of communications aimed at keeping both informed so that advice may be sought and given as required. Consequently, the statutory solicitor-client communication privilege aspect of the section 19(c) exemption applies to this "continuum of communications" between the university's in-house legal counsel and his clients.

[50] In short, I find that all of these emails were prepared by or for counsel employed by the university for use in giving legal advice, as required by section 19(c). There is no evidence before to suggest that the university waived the privilege attached to these records in any way. Consequently, the following records or parts of these records, which contain the appellant's personal information, qualify for exemption under section 49(a), read in conjunction with section 19(c): 39, 54, 59, 63, 84, 85, 86, 89, 123, 124, 125, 126, 130, 131, 132 and 136.

PERSONAL PRIVACY

D: Does the mandatory exemption at section 21(1) or the discretionary exemption at section 49(b) apply to the information at issue?

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

[52] 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.

[53] Record 81 is an email between two university officials that refers to the appellant and another student. The university has disclosed this record in full to the appellant, except for the name of the other student, which it has withheld under section 21(1). It submits that disclosing the name of the individual in record 81 would reveal sensitive information about him "because of the nature of the information contained in the record."

[54] Record 137 is a video that contains footage of various students who were being served by staff at the university's FAAS office. In addition, the video appears to simultaneously show the appellant in an area outside the office. The university has withheld this video in full under section 49(b). It states that the FAAS office provides financial counselling to students and handles applications from students seeking financial aid. It submits, therefore, that disclosing this record would constitute an unjustified invasion of the personal privacy of the students who attended this office and may not wish to be identified.

[55] The appellant's representations do not address whether section 21(1) or 49(b) applies to the withheld name or the personal information in the video.

[56] I have reviewed these records and find that each of them contains the personal information of both the appellant and other individuals. Consequently, it must be

determined whether the withheld name and the personal information in the video qualify for exemption under section 49(b). This provision states:

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

if the disclosure would constitute an unjustified invasion of another individual's personal privacy.

[57] Because of the wording of section 49(b), the correct interpretation of "personal information" in the preamble is that it includes the personal information of other individuals found in records which also contain the requester's personal information.¹³

[58] In other words, where a record contains personal information of both the appellant and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the university may refuse to disclose that information to the appellant under section 49(b).

[59] In the circumstances of this appeal, it must be determined:

- whether disclosing the name of the other individual in the email (record 81) to the appellant would constitute an unjustified invasion of that individual's personal privacy under section 49(b); and
- whether disclosing the personal information of the appellant and the other individuals in the video (record 137) to the appellant would constitute an unjustified invasion of the other individuals' personal privacy under section 49(b).

[60] Sections 21(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold under section 49(b) is met:

- if the information fits within any of paragraphs (a) to (e) of section 21(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b);
- section 21(2) lists "relevant circumstances" or factors that must be considered;
- section 21(3) lists circumstances in which the disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy; and

¹³ Order M-352.

- section 21(4) lists circumstances in which the disclosure of personal information does not constitute an unjustified invasion of personal privacy, despite section 21(3).

[61] Neither the university nor the appellant has cited any of the exceptions, factors or presumptions listed in sections 21(1) to (4). Based on my review of the nature of the personal information in the records, I find that disclosing the name of the other individual in the email (record 81) and the footage of the other students in the video (record 137) to the appellant would constitute an unjustified invasion of their personal privacy. Consequently, the personal information of these other individuals qualifies for exemption under section 49(b).

[62] Section 10(2) of the *Act* requires the university to disclose as much of a record as can reasonably be severed without disclosing the information that falls under one of the exemptions. As noted above, the video contains footage of various students who were in the FAAS office. However, the video appears to simultaneously show the appellant in an area outside the office.

[63] Consequently, it must be determined whether the video can reasonably be severed in a manner that provides the appellant with his own personal information without disclosing the personal information of other individuals that is exempt under section 49(b).

[64] The IPC has found that it is not reasonable to sever a record containing the personal information of both a requester and other individuals if this information is too closely intertwined. In addition, it is not reasonable to sever a record if doing so would result in the disclosure of only disconnected snippets of information or worthless, meaningless or misleading information.¹⁴

[65] In my view, the video can reasonably be severed by applying face-blurring or other obscuring technology to protect the identity of those individuals who were in the FAAS office. Severing the video in this manner would provide the appellant with the part of the video that shows him outside the office while protecting the privacy of those individuals who were inside the office. Consequently, I will order the university to disclose a severed version of the video to the appellant.

RESPONSIVENESS OF RECORDS

E: Is the information in the records responsive to the appellant's request?

¹⁴ Orders PO-2033-I, PO-1663 and PO-1735 and *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.).

[66] The university claims that some of the information in records 80 and 136 is not responsive to the appellant request. I have already found that the emails in record 136 qualify for exemption under section 49(a), read in conjunction with section 19(c) of the *Act*. Consequently, it is not necessary to determine whether any of the information in record 136 is responsive to the appellant's request. However, it must be determined whether the withheld information in record 80 is responsive.

[67] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.¹⁵ To be considered responsive to the request, records must "reasonably relate" to the request.¹⁶

[68] In his request, the appellant asked for "all records about me in all offices of the university and with all staff of the university that have records about me." The university submits that given that the appellant only asked for records about himself, the information about two other individuals in record 80 is not responsive to his request.

[69] I am not persuaded that the information about the two other individuals is not responsive to the appellant's request. Although the appellant's request asks for "all records" about himself, there is no suggestion in the wording of his request that he is not seeking information relating to other individuals in such records. Moreover, it is evident from the substance of record 80 that the appellant and these two other individuals have some connection or relationship. In my view, the information in this record relating to these two other individuals reasonably relates to the appellant's request and is, therefore, responsive.

[70] The adjudicator previously assigned to this appeal sought representations from the two other individuals identified in record 80, who are affected parties, on whether the personal privacy exemptions in sections 21(1) and/or 49(b) apply to those records that contain information relating to them. The IPC received a response from one affected party, who consented to the disclosure of her personal information to the appellant.

[71] I will order the university to disclose those parts of record 80 that contain the information of the affected party who consented to the disclosure of her personal information to the appellant. However, I found under Issue D above that the name of the other affected party qualifies for exemption under section 49(b), because its disclosure to the appellant would constitute an unjustified invasion of that individual's personal privacy. In the circumstances, I find that the personal information of the same individual in record 80 also qualifies for exemption under section 49(b).

¹⁵ Orders P-134 and P-880.

¹⁶ Orders P-880 and PO-2661.

EXERCISE OF DISCRETION

F: Did the university exercise its discretion under sections 49(a) and (b)? If so, should IPC uphold this exercise of discretion?

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

[73] In addition, the IPC 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; or
- it fails to take into account relevant considerations.

[74] In either case the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁷ The IPC may not, however, substitute its own discretion for that of the institution.¹⁸

[75] The university states that in exercising its discretion to withhold some records or parts of these records under sections 49(a) and (b), it took into account a number of factors, including the purposes of the *Act*, whether the requester was seeking access to his own personal information, whether he had a sympathetic or compelling need to receive the information, and whether disclosure would increase public confidence in the operation of the university.

[76] It further submits that it exercised its discretion to refuse disclosure of some records or parts of these records to protect information that is subject to solicitor-client privilege and to protect the privacy of individuals other than the appellant.

[77] The appellant's representations do not address whether the university exercised its discretion properly in applying sections 49(a) and (b) to the withheld information in some records or parts of these records.

[78] The university located 137 records that are responsive to the appellant's request. It disclosed a substantial number of these records to him, but denied access to 26 remaining records or parts of these records under various provisions in the *Act*, including the discretionary exemptions in sections 49(a) and (b).

¹⁷ Order MO-1573.

¹⁸ Section 43(2) of the *Act*.

[79] In my view, the university exercised its discretion properly in withholding these records or parts of records under sections 49(a) and (b). It conducted a thorough review of the records that it located in response to the appellant's request and decided to disclose a substantial number to him, while exercising its discretion to withhold some records and parts of records that fall within the purview of these exemptions. I am not persuaded that it failed to take relevant factors into account or that it considered irrelevant factors. Consequently, I uphold the university's exercise of discretion under sections 49(a) and (b).

ORDER:

1. I order the university to disclose to the appellant those parts of record 80 that contain the information of the affected party who consented to the disclosure of her personal information to the appellant. I have provided the university with a copy of this record and have highlighted the exempt parts in green. To be clear, the university must not disclose the green highlighted parts of this record to the appellant. The university must disclose this severed record to the appellant by **September 30, 2013**.
2. I order the university to disclose to the appellant the parts of the video (record 137) that contain his own personal information. This video must be severed in the manner described in paragraph 65 of this order. The university must disclose this severed video to the appellant by **October 30, 2013**.
3. I uphold the university's decision to withhold the remaining records or parts of these records from the appellant.
4. In order to verify compliance with the provisions of this order, I reserve the right to require the university to provide me with a copy of the records that it sends to the appellant.

Original Signed By: _____
Colin Bhattacharjee
Adjudicator

_____ August 29, 2013