Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3259

Appeal PA12-221

McMaster University

September 30, 2013

Summary: An individual submitted a request for access to all records relating to her in the custody or control of McMaster University's Faculty of Health Sciences, Department of Medicine, an identified specialty division and three named physicians. McMaster identified 636 pages of responsive records, and granted access to them, in part. Brief portions of approximately 31 pages were withheld under sections 21(1) and/or 49(b), together with sections 21(3)(d) and (f), while access to one page was denied in full under section 49(a), with section 19. On filing an appeal to this office, the appellant challenged the university's access decision and the adequacy of the searches conducted for responsive records. In this order, the adjudicator finds that the records contain the personal information of the appellant and other identifiable individuals, but also finds that some of the information fits within section 2(3) as professional information. The adjudicator upholds the personal privacy exemption in section 49(b), in part, with respect to some of the personal information of other identifiable individuals, but finds that the absurd result principle applies to other personal information and that it is not exempt. The adjudicator upholds McMaster's decision to deny access to one record pursuant to the solicitor-client privilege exemption and also upholds the university's exercise of discretion. Finally, the adjudicator finds McMaster's searches for responsive records to be reasonable.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (definition of "personal information"), 2(3), 19(a), 21(1), 21(3)(a), 21(3)(d), 12(3)(f), 24(1), 49(a) and 49(b).

Orders and Investigation Reports Considered: Order MO-1449

OVERVIEW:

[1] This order addresses the issues raised by an individual's request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to her employment with McMaster University (McMaster or the university).[1] The request specifically identified the university's Faculty of Health Sciences, Department of Medicine, a certain specialty Division and three specific individuals: the Director of the named specialty, the Chair of the Department of Medicine, and the Chair of another specified Department.

[2] The university contacted the requester's representative to seek clarification of the request under section 24(1) of the *Act*. The request was subsequently narrowed to include only those records that might be located in certain personal information banks (PIBs) listed by the requester. McMaster identified responsive records and issued an access decision granting the appellant partial access to them. Small portions of some records were withheld on the basis that disclosure of the information would constitute an unjustified invasion of other individuals' personal privacy. The university also relied on the solicitor-client privilege exemption to withhold one page, in its entirety. Upon payment of the required fee, the university sent the disclosed records to the requester.

[3] The appellant appealed the university's decision to this office, challenging both the denial of access and the adequacy of the university's search efforts. A mediator was appointed by this office to explore resolution of the issues. During mediation, the appellant provided additional clarification about the search issue, including raising questions about the adequacy of the university's search of its email servers.

[4] As the appeal could not be resolved through mediation, the issues remaining in dispute were transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. Another adjudicator started an inquiry into this appeal by seeking the representations of the university, initially. In the Notice of Inquiry sent to the university, she stated:

> Given that the records appear to contain the appellant's personal information, I have added the possible application of sections 49(a) and (b) as issues to this appeal. Sections 49(a) and (b) recognize the special nature of request for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their own personal information (Order M-352).

[5] The university provided representations on the exemption claims and the search issue to this office. At that point, the appeal was re-assigned to me to continue the

[1] The appellant is represented by counsel, who submitted representations on her behalf. The appellant and her lawyer are referred to interchangeably in this order.

inquiry, and I sent a modified Notice of Inquiry and certain relevant portions of the university's representations[2] to the appellant, seeking representations in response. The appellant provided representations to me which were, in turn, shared with the university, in their entirety, for the purpose of reply, particularly on the search issue. The university's reply representations were subsequently sent to the appellant for sur-reply, and I received brief submissions in response.

[6] In this order, I uphold the university's search for responsive records. I find that page 636 contains solicitor-client privileged information and that it is exempt under section 49(a), together with section 19. I also find that section 49(b) applies to some of the personal information of other identifiable individuals in the records, excepting the information that I conclude fits within section 2(3) of the *Act*, or to which the absurd result principle applies. I order those two types of information disclosed to the appellant. Finally, I uphold the university's exercise of discretion.

RECORDS:

[7] Remaining at issue are emails, handwritten notes and a spreadsheet (31 pages, in part, and one page, in full).

ISSUES:

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

B. Do the records contain personal information?

C. Does page 636 contain solicitor-client privileged information that is exempt under section 49(a)?

D. Do the rest of the university's severances consist of information that is exempt under section 49(b)?

E. Did the university properly exercise its discretion?

[2] I shared the university's index (to its book of submissions), written representations, sworn search affidavit, and one exhibit. I did not share the copies of correspondence exchanged by the parties.

DISCUSSION:

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

[8] The appellant believes that additional records responsive to her request should exist. She challenges the adequacy of the searches conducted by the university, in part, because she obtained records (through the discovery process in a concurrent civil matter) that she believes are responsive to her access request, but which were not located by the university as a result of its searches under the *Act.*

[9] In appeals, such as this one, that involve a claim that additional responsive records exist, the issue to be decided is whether the institution has conducted a reasonable search for the records as required by section 24 of the *Act*. To be considered responsive, a record must be "reasonably related" to the request.[3] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[4]

[10] If I am satisfied that the search carried out by the university was reasonable in the circumstances, I will uphold it. However, I may order further searches if I am not satisfied by the university's evidence that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[5]

Representations

[11] The university provided affidavit evidence in support of its position that experienced and knowledgeable employees made reasonable efforts to locate records which were reasonably related to the request. The five-page affidavit was sworn by the acting University Secretary and Head (the affiant), who organized the searches. An exhibit to the affidavit consisted of internal tracking forms related to the request.[6]

[12] McMaster (the affiant, specifically) contacted the following individuals and departments and asked them to search for responsive records:

- Director of Administration, Department of Surgery
- Security Manager, Security Services
- Chair, Department of Pediatrics[7]
- Director of Administration, Department of Pediatrics

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[3] Order PO-2554.
[4] Orders M-909, PO-2469 and PO-2592.
[5] Order MO-2185.
[6] Seven pages containing information from six individuals.
[7] The current chair of this department (as identified in the affidavit) replaced the individual named in the request, who left McMaster in 2009.

- Director, Human Resource Services, Faculty of Health Sciences
- Director, Human Resource Services, Central
- Chair, Department of Medicine
- Director of Administration, Department of Medicine
- Dean and Vice President, Faculty of Health Sciences and
- Director of the named specialty

[13] The university notes that the searches were mostly conducted by the staff of the identified directors and chairs. The internal tracking forms were completed by individuals with the following titles: office manager, director of administration, security manager, executive assistant, manager, and HR consultant. According to the affiant:

> We searched, inter alia, human resource (personnel) files at the departmental, faulty and central university levels, financial records, research records and teaching records. Our search, depending upon the PIB [personal information bank], included searches of email, electronic files, paper files and file lists.[8]

[14] The affiant notes that certain PIBs listed in the clarified request were not searched because "I developed the index of these PIBs and therefore know that staff personnel files referred to in these PIBs relate only to staff employed in those specific offices."[9]

[15] McMaster indicates that some responsive email records may no longer exist due to the 14-day limit for the retention of emails (in back-up) once they have been deleted from a user's desktop. According to the affiant, this 14-day period is not dictated "by retention schedules but by the capacity of McMaster's servers." Further, the university admits that the emails of the former Chair of Pediatrics may also have been deleted when he left the country in 2009. A search of the records "that were included in the handover from one Chair [of Pediatrics] to the next" was conducted, but no records related to the request were identified.

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[8] The internal tracking forms specify the following: Office of the Dean and Vice President, Faculty of Health Sciences - email, electronic files, paper files, and file lists; Department of Medicine, Administration and Chair's office - electronic files, paper files, and file lists; Security Services reporting system - electronic files; Department of Medicine faculty working files (part and full time), in the identified specialty and surgery, including a specific program area in which the appellant worked and the Chair of that specialty - email, electronic files, paper files; residents in the same specialty - email search; Department of Surgery working staff files (named specialty only) and Director of Administration - email, paper files; Faculty of Health Sciences, Human Resources office - paper files; and McMaster's Human Resources Service Centre employee file-specific - email, HRIS database.

[9] Administration (Office of the President), Financial Services, Office of the Registrar, University Secretariat, Professorship database (relates only to endowed professorships); and Faculty Appeal Files (relates only to appeals by faculty regarding tenure/promotion).

[16] The appellant seeks an order for McMaster to conduct a "further and better search for responsive documents" because she believes that additional responsive documents exist but are being withheld. The appellant explains that she has initiated civil actions in the Superior Court of Justice naming, among other parties, McMaster University Medical Centre. According to the appellant, as a result of documentary production in those suits, she received emails which were sent or received by one of the physicians named in the access request, but which were not identified as responsive to the request. The appellant points out that there is at least one McMaster email address copied on each of the emails.

[17] The appellant submits that when her concerns about the identification of responsive records were brought to the university's attention, she specifically requested that "McMaster make inquiries of its IT department to have the emails retrieved from the servers." The appellant explains her understanding that even though emails may be deleted (and even purged) from a user's desktop computer, "the emails remain on the servers." The appellant mentions another access request filed with the Hamilton Health Sciences Corporation that did not produce "one single email."

[18] In reply, the university states:

> MUMC is operated by the Hamilton Health Sciences Corporation ("HHSC") and is a separate legal entity with a different governance structure carrying on a separate undertaking from McMaster. Moreover, the two entities have different information and personal information banks in their respective custody or control. The assertion that because both entities share the word "McMaster" in their name means that they have custody or control of identical information is factually inaccurate as these are arms-length entities.

[19] Regarding the appellant's request that McMaster make inquiries with its IT department about the retrieval of emails from its servers, the university reiterates the affiant's statements regarding the very limited period of time (14 days) that deleted emails are stored on the server. According to the university,

> The documents that the appellant states would have been purportedly responsive to her … request that she received through the course of litigation would certainly have been purged from McMaster's servers prior to the appellant's revised request. Accordingly, a search for responsive emails from McMaster's servers would have been futile, as no purportedly responsive emails could have been retrieved. Therefore, after consulting with its technical department, McMaster did not include a search of its servers in responding to the Revised Request as McMaster reasonably determined that such a search would yield no responsive records.

[20] McMaster also submits that the circumstances of the appellant's access request with the HHSC are not relevant to this appeal since they are distinct entities; "the records within HHSC's custody or control are not within McMaster's custody or control" (emphasis in original).

[21] The university reiterates the principle that the *Act* does not require an institution to prove with absolute certainty that further records do not exist, only to provide sufficient evidence to establish that it made a reasonable effort to identify and locate responsive records. McMaster submits that it has provided such evidence.

[22] In sur-reply submissions, the appellant challenges McMaster's position that responsive emails do not exist on its servers. The appellant submits that:

> While the emails in question may have been deleted from individual desktop computers after a prescribed period of time, the emails would remain on the servers unless the servers were completely wiped of all data. The evidence of McMaster that the emails are no longer on the servers is not supported by any evidence from the IT department at McMaster and not dealt with by way of any affidavit evidence.

Analysis and findings

[23] As previously stated, in appeals involving a claim that additional records exist, the issue to be decided is whether an institution has conducted a reasonable search for responsive records as required by section 24 of the *Act*. The *Act* does not require McMaster to prove with absolute certainty that further records do not exist, but it must provide sufficient evidence to show that a reasonable effort was made to identify and locate responsive records.[10]

[24] In turn, an appellant who challenges the adequacy of a search must establish a reasonable basis for concluding that additional responsive records might exist. In this appeal, the appellant believes that she has provided such a basis.

[25] On the basis of the evidence provided in this appeal, I am persuaded that the university made a reasonable effort to identify and locate any existing records that are responsive to the appellant's request. Moreover, I accept that appropriate university staff conducted searches and that they possessed knowledge of the nature of the records said to exist, as the appellant's interests were conveyed through the request, during earlier stages of the appeal, and in this inquiry.

[26] Although the appellant questions the searches conducted in relation to McMaster's back-up servers, I accept the university's evidence regarding the time

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

periods for retaining deleted emails and I conclude that appropriate databases and servers were searched for responsive records. I am satisfied that the questions raised about the search of McMaster's back-up servers, in particular, were adequately addressed in its representations. Specifically, I accept the university's evidence that responsive records of the type described by the appellant, namely those not of an administrative nature, but rather relating to certain other matters involving the appellant, simply may not exist for the reasons suggested.

[27] Specifically, I accept the explanation provided by McMaster respecting responsive records that may have been created by the former Chair of Pediatrics who left the university in 2009. Given the deletion of this individual's email account with the university, it is reasonable to conclude that any responsive records that may have existed at one time likely no longer exist.

[28] Although the appellant alleges that McMaster's evidence is "not supported by any evidence from the IT department" respecting the issue of searches of its back-up server, I note that McMaster's reply representations state that the university did, in fact, consult with its technical department about the issue prior to concluding that a search of its back-up servers for responsive records would be futile. In saying this, I also note that the documents submitted by the appellant as evidence that further records ought to exist date back to August and September 2008. I accept that it was reasonable to conclude that emails from that year and up to the end of the time period included in the request no longer exist on McMaster's servers. Finally, I also agree with the university that the outcome of searches conducted by HHSC in response to the request submitted to it is not relevant in this appeal. In the context of the evidence provided, I conclude that it was reasonable for McMaster to take the approach it did to search for responsive records in its custody or under its control.

[29] Accordingly, based on the information provided by McMaster and the circumstances of this appeal, I find that the search for records responsive to the request was reasonable for the purposes of section 24 of the *Act*, and I dismiss this part of the appeal.

B. Do the records contain personal information?

[30] Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution, but this right of access is qualified by section 49, which states, in part:

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

> (a) where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, **19**, 20 or 22 would apply to the disclosure of that personal information [emphasis added];
>
> (b) where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

[31] Most of the information severed from the responsive records in this appeal has been withheld by McMaster on the basis that its disclosure would constitute an unjustified invasion of another individual's personal privacy under section 21(1) (personal privacy) or section 49(b) (discretion to refuse requester's personal information). The university has also denied access to one email (page 636) pursuant to section 19.

[32] In order to determine if sections 49(a) or 49(b) apply, together with the solicitor-client privilege and personal privacy exemptions claimed by McMaster, I must first decide whether the records contain "personal information" and, if so, to whom it relates.

[33] "Personal information" is defined in section 2(1) of the *Act* as "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 where they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that

> correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

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

[35] Sections 2(3) and (4) also relate to the definition of personal information and state:

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

[36] 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.[11] 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.[12]

Representations

[37] According to the university, the records contain the personal information of individuals other than the appellant that fits within paragraphs (b) (education and employment history), (g) (view or opinions about them) and (h) (name along with other personal information). McMaster submits that the information in the records relates to the other individuals in their personal capacities, for the most part. Further, the university submits that:

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[11] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[12] Orders P-1409, R-980015, PO-2225 and MO-2344.

> Where the personal information relates to third parties in their professional capacities, the personal information is of a personal nature to the respective third party. … [It] is reasonable to expect that certain third parties may be identified if their names are not redacted.

[38] The appellant disputes McMaster's position that the records contain the personal information of other individuals, particularly views or opinions about them. The appellant argues that these opinions were provided by the individuals in their professional capacities and are about how best to handle the appellant's situation from an employment and medical perspective. The appellant submits that the professional opinions provided by these other individuals formed the basis for decision-making about her and, thus, would not reveal something of a personal nature about them. Accordingly, the appellant submits that the records contain only her personal information.

Analysis and findings

[39] To begin, I note that McMaster's submissions on the definition of personal information do not address the issue of whether the records also contain the appellant's personal information. Notably, McMaster's other submissions suggest a belief that through severance, it has disclosed all of the appellant's personal information to her and that, therefore, the portions of the records remaining at issue do not contain her personal information. However, in an analysis of whether the relevant personal privacy exemption is section 21(1) or section 49(b), or if the solicitor-client privilege exemption in section 19 must be reviewed under section 49(a), this determination is made on a record-by-record basis.

[40] Reviewed in this context, I find that some of the records contain the personal information of other identifiable individuals. Specifically, I find that pages 82, 92, 145-148, 150, 202, 204, 215, 256-257, 329, 354, 437, 459, 503, 510-511, 516-517, 536, 538, and 545 contain information relating to their employment status, financial transactions, their views, and other information that fits within paragraphs (b), (d), (g) and (h) of the definition in section 2(1).

[41] I also find that the records contain the personal information of the appellant in that they relate to her family status, employment status, financial transactions, contact information, her views, and also contain the personal opinions or views of others about her, according to paragraphs (a), (b), (d), (e) and (g) of the definition.

[42] Since the records contain information related to individuals in an employment context, I must consider whether the information fits within section 2(3), which means that it does not qualify as personal information. McMaster takes the position that although the information is about these individuals in a professional capacity, the information is nevertheless of a personal nature. In my view, this is only true for some

of the information. For the most part, the references to employees or prospective employees (of the appellant) in the emails constitute their professional information for the purpose of section 2(3) of the *Act.* Given the context in which it appears, I find that the names, titles and contact information about other individuals on pages 56,[13] 93-94, 112, 354 and 417-418 fits within section 2(3) of the *Act.* Accordingly, this information is not "personal information" and does not qualify for exemption under section 49(b). As no other exemptions have been claimed for it, and no mandatory exemptions apply, I will order it disclosed. Notably, with the exception of page 354, the information on these pages that I am ordering disclosed appears in emails that either originated from the appellant, or were sent to her directly.

[43] Finally, I note that page 354 consists of handwritten notes about the appellant. Above, I found that this page contains personal information about another identifiable individual, as well as information that fits within section 2(3) of the *Act.* However, the university has also severed a noun used in a heading on this page. This word does not qualify as personal information and it cannot, therefore, be withheld under section 49(b). As no other exemptions are claimed in relation to it, and no mandatory exemptions would apply, it will also be disclosed pursuant to this order.

[44] In summary, as the records contain the mixed personal information of the appellant and other individuals, the relevant exemptions are the discretionary ones in sections 49(a) and 49(b).

C. Does page 636 contain solicitor-client privileged information that is exempt under section 49(a)?

[45] As already noted, section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by a government body, while section 49 provides a number of exceptions to this general right of access.

[46] Under section 49(a) of the *Act*, the institution has the discretion to deny access to an individual's own personal information in instances where certain exemptions would otherwise apply to that information. 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 appellant because the record contains his or her personal information. Section 49(a) 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.[14]

[13] The name of the individual withheld from this page was not severed where it also appears on page 540.
[14] Order M-352.

[47] One of the exemptions listed in section 49(a) is the solicitor-client privilege exemption in section 19 of the *Act.* In this appeal, McMaster relies on section 49(a) in conjunction with section 19(a) and (c), which state:

> A head may refuse to disclose a record,
>
> (a) that is subject to solicitor-client privilege;
> …
> (c) that was prepared by or for counsel employed or retained by an educational institution for use in giving legal advice or in contemplation of or for use in litigation.

[48] 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, from section 19(c). The university must establish that at least one branch applies. In this appeal, I find it necessary to review only the university's claim under section 19(a).

[49] 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.

[50] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[15] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[16]

[51] The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.[17]

[52] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[18] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.[19]

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

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

[54] Under branch 1, the actions by, or on behalf of, a party may constitute waiver of common law solicitor-client privilege. Waiver of privilege is ordinarily established where it is shown that the holder of the privilege knows of the existence of the privilege, and voluntarily evinces an intention to waive the privilege.[21] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[22]

[55] Waiver has been found to apply where, for example: the record is disclosed to another outside party; the communication is made to an opposing party in litigation; and the document records a communication made in open court.[23] Waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party. The common interest exception has been found to apply where, for example, the sender and receiver anticipate litigation against a common adversary on the same issue or issues, whether or not both are parties.[24]

Representations

[56] According to the university, the record "clearly satisfies" both the common law and statutory tests under section 19 because it is an email communication from "a high level employee" of McMaster to a specific lawyer at a named Toronto law firm, in addition to other individuals. Further, the university submits that:

> The email clearly seeks advice as to how to respond to a communication from the appellant. There is no implicit or explicit waiver contained in the … record, nor has there been any subsequent waiver of privilege to McMaster's knowledge.

[57] The appellant argues that the record withheld by McMaster under section 49(a), together with section 19, does not constitute a solicitor-client communication or, alternatively, that the privilege has been waived. The basis for the appellant's argument that privilege has been waived is that the email was sent not only to external legal counsel for McMaster, but also to other individuals. For this reason, the appellant asserts that "the record does not bear the hallmark of a privileged document as it was not communicated in a confidential manner." The appellant also suggests that the act

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[20] 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)* [2006] S.C.J. No. 39.
[21] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.)
[22] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; see also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.).
[23] Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.); Orders MO-1514 and MO-2396-F; and Orders P-1551 and MO-2006-F.
[24] *Chrusz, supra;* see also Order PO-3154.

of sending it to individuals other than legal counsel vitiated any zone of privacy that may have existed.

Analysis and findings

[58] For a record to be subject to the common law solicitor-client privilege exemption, it must be established that the record is a written or oral communication of a confidential nature between a client and a legal advisor that is directly related to seeking, formulating or giving legal advice.[25]

[59] Having considered the circumstances of the creation of page 636, I find that the recipient of the email, a lawyer from a Toronto law firm, was in a solicitor-client relationship with the sender of the email, the Chief of the Department of Medicine. The other individuals listed in the "To" or "CC" lines of the email were also university staff somehow involved in the matter; I am satisfied that they, too, ought to be considered clients of the solicitor in this context.

[60] Based on the content of the email, I find that its disclosure would reveal the nature of the legal advice sought by staff of the university from its solicitor. There is a confidentiality statement at the footer of the email, which supports the assertion that the communication was intended to be confidential as between these parties.

[61] Therefore, I find that the email at page 636 represents a confidential solicitor-client privileged communication. I also find that there has been no intentional waiver of the privilege that attaches to it. Accordingly, I find that section 49(a), together with section 19(a), applies to page 636 and that it is exempt, subject to my review of the university's exercise of discretion, below.

D. Do the rest of the university's severances consist of information that is exempt under section 49(b)?

[62] Under section 49(b), McMaster has the discretion to deny the appellant access to her own personal information, if the disclosure of a record containing mixed personal information would constitute an unjustified invasion of another individual's personal privacy. Conversely, upon weighing the appellant's right of access to her own personal information against another individual's right to protection of their privacy, McMaster may choose to disclose a record with mixed personal information.

[63] McMaster has withheld information from approximately 30 pages of records. I note that many of these severances consist only of one or two words on each page.

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[25] *Descôteaux, supra.*

[64] Sections 21(1) to (4) provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. 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). However, in *Grant v. Cropley*, [2001] O.J. 749, the Divisional Court commented on the discretionary nature of a section 21(3) presumption when reviewed under section 49(b). The Court stated that the Commissioner could:

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

[65] Additionally, a presumption in section 21(3) can also be overcome where the personal information falls under section 21(4) or the "public interest override" at section 23 applies.[26] The "public interest override" in section 23 has not been raised in this appeal and, in my view, it would not apply. Moreover, I agree with the university that none of the exceptions in section 21(4) are applicable in the circumstances.

[66] The possible application of the factors listed in section 21(2) of the *Act*, as well as all other considerations which are relevant in the circumstances, must also be considered.

Representations

[67] McMaster submits that the disclosure of the personal information that has been withheld would constitute an unjustified invasion of the personal privacy of the individuals to whom it relates. McMaster contends that:

> The redacted information is personal information of third parties and is *not* personal information of the appellant; the third party personal information simply happens to be in the same record as the personal information of the appellant.

[68] According to the university, "much of the redactions … are protected by the presumption of privacy provisions in section 21(3) of the *Act* and are not saved by any of the limitation provisions in section 21(4)." McMaster specifically relies on the presumptions against disclosure in paragraphs (d) (employment or educational history) and (f) (finances, income, assets, liabilities, etc.) of section 21(3).

[69] McMaster submits, in the alternative to its position on section 21(3), that it considered all of the factors in section 21(2) and acted reasonably and in accordance with the *Act* by concluding that the factors favouring disclosure in sections 21(2)(b), (c)

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

and (d) did not apply to favour disclosure of the withheld information. Apparently alluding to section 21(2)(i), the university also submits, without elaboration, that disclosure of the withheld personal information may unfairly damage the reputation of the third parties referred to in the records.

[70] The appellant's submissions focus on the assertion that the appellant's own personal information in the records appears together with any other personal information, thus highlighting the discretionary nature of McMaster's obligation to consider its exemption. The appellant maintains that none of the presumptions against disclosure in section 21(3) apply, and submits that the information does not describe an individual finances, income, assets, etcetera, for the purpose of section 21(3)(f). Finally, the appellant argues that, contrary to McMaster's position, obtaining access to the withheld information in the records is relevant to a fair determination of the appellant in ongoing litigation, for the purpose of section 21(2)(d).

Analysis and findings

[71] In my discussion, above, I concluded that the records contain the personal information of the appellant and of other identifiable individuals and, therefore, that the relevant personal privacy exemption is the discretionary one in section 49(b). However, my review of section 49(b), together with the presumptions and factors in sections 21(3) and 21(2), is conducted only in relation to the personal information of these other individuals because I am satisfied by my review of the withheld information that McMaster disclosed all of the appellant's own personal information to her.

[72] Having considered the representations and based on my review of the personal information in the records, I agree with the university that the presumption against disclosure in section 21(3)(d) applies to one small portion of another individual's personal information. Specifically, I find that the withheld personal information on page 82 contains information about that other individual's employment with McMaster that fits within the presumption in section 21(3)(d).[27]

[73] For section 21(3)(f) to apply, the personal information must describe "an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness." Based on my review of the records, I accept, in part, the university's submission that the presumption against disclosure in section 21(3)(f) applies to the personal information in some of the records, including correspondence about income or other financial matters on pages 329 and 503. I find that this information satisfies the requirements of section 21(3)(f) and that its disclosure is presumed to constitute an unjustified invasion of the personal privacy of those individuals.

[27] See Orders PO-1741 and PO-2961.

[74] Although this point was not argued by McMaster, I find that the severed personal information on page 538 relates to an identifiable individual's medical treatment or evaluation and that its disclosure would result in a presumed invasion of personal privacy for the purpose of section 21(3)(a). Accordingly, I find that this personal information fits within the ambit of the presumption against disclosure in section 21(3)(a).

[75] I must now consider whether disclosure of the remaining withheld portions on pages 92, 145-148, 150, 202, 204, 215, 256-257, 354, 437, 459, 510-511, 516-517, 536, and 545 would result in an unjustified invasion of other individuals' privacy under section 49(b).

[76] In my view, the appellant's representations do not support a finding that any of the factors favouring disclosure in sections 21(2)(a) to (d) are relevant in the circumstances of this appeal. In an apparent reference to section 21(2)(d), the appellant submits that the severed information is "relevant to a fair determination of the rights affecting the Requester in ongoing litigation." However, this succinct statement alone is not sufficient to establish that that the disclosure of the withheld personal information is required to prepare for any existing (or contemplated) civil proceeding, or to ensure an impartial hearing. Further, in view of the nature of the information in those withheld portions, I am not persuaded that the personal information is relevant to a fair determination of rights affecting the appellant, and I find that this factor does not apply.[28]

[77] However, I am also not persuaded by the university's assertion that the factor favouring privacy protection in section 21(2)(i) applies to the personal information remaining at issue. McMaster has not provided sufficient evidence to establish that damage to the reputation of the individuals whose personal information is withheld by the remaining severances would result from disclosure, or that such harm would be "unfair," as the section requires.[29] I find that the factor in section 21(2)(i) does not apply.

[78] Accordingly, given the application of the presumptions against disclosure in sections 21(3)(a), 21(3)(d) and 21(3)(f) to the withheld personal information on pages 82, 329, 503 and 538, and the absence of factors favouring disclosure to the other, limited, personal information remaining at issue, I conclude that disclosure the brief snippets of personal information on those pages, as well as that on pages 92, 215, 354, and 437 would constitute an unjustified invasion of the personal privacy of the individuals to whom it relates. Therefore, I find that this personal information is exempt under section 49(b), subject to my review of McMaster's exercise of discretion, below.

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[28] Orders PO-2715, PO-2778, PO-2910 and MO-2448 consider the diminished weight accorded to the section 21(2)(d) factor where there are disclosure or production processes available to an appellant in concurrent court matters.
[29] Order P-256.

[79] However, this finding under section 49(b) does not include other personal information on pages 145-148, 150, 202, 204, 256-257, 418, 459, 510-511, 516-517, 536 and 545. I have decided that the absurd result principle applies to this information. As discussed in previous orders, the absurd result principle may apply whether or not the factors or circumstances in section 21(2) or the presumptions in section 21(3) apply, in situations where the requester originally supplied the information, or the requester is otherwise aware of it. In appropriate circumstances, the information may be found not exempt under section 49(b) because to find otherwise would be absurd and inconsistent with the purpose of the exemption.[30]

[80] Past examples of the application of the absurd result principle include situations where the requester sought access to his or her own witness statement;[31] the requester was present when the information was provided to the institution;[32] or the information is clearly within the requester's knowledge.[33] If disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.[34]

[81] Order MO-1449 contains the following helpful summary of the considerations underlying the absurd result principle:

> The privacy rights of individuals other than the appellant are without question of fundamental importance. However, the withholding of personal information of others in certain circumstances, particularly where it is intertwined with that of the requesting party, would also be contrary to another of the fundamental principles of the *Act*: the right of access to information about oneself. Each case must be considered on its own facts and all of the circumstances carefully weighed in order to arrive at a conclusion that, in these circumstances, withholding the personal information would result in an absurdity.[35]

[82] I agree with this reasoning and adopt it here. In my view, withholding the portions of pages 145-148, 150, 202, 204, 256-257, 418, 459, 510-511, 516-517, 536 and 545 propose by McMaster would result in an absurdity. Indeed, much of the personal information in the pages identified above appears in emails sent to, or by, the appellant. Accordingly, the information is clearly within her knowledge. I conclude that disclosure of these specific portions would not be inconsistent with the privacy-

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[30] Orders M-444, M-451, M-613, MO-1323, PO-2498 and PO-2622.
[31] Orders M-444 and M-451.
[32] Orders M-444 and P-1414.
[33] Orders MO-1196 and PO-2679.
[34] Orders M-757, MO-1323, MO-1378, PO-2622, PO-2627 and PO-2642.
[35] More recently, in Order PO-3247, Adjudicator Cropley provided an in-depth review of Order MO-1449 and other orders that address the absurd result principle, including Orders M-444 and MO-1323.

protecting purpose of the section 49(b) exemption. Therefore, I find that section 49(b) does not apply to them due to the application of the absurd result principle.

E. Did the university properly exercise its discretion?

[83] In situations where an institution has the discretion under the *Act* to disclose information even though it may qualify for exemption, this office may review the institution's decision to exercise its discretion to deny access. In this situation, this office may determine whether the institution erred in exercising its discretion, and whether it considered irrelevant factors or failed to consider relevant ones. The adjudicator, in reviewing the exercise of discretion by an institution may not, however, substitute her own discretion for that of the institution.

[84] As previously noted, sections 49(a) and 49(b) are discretionary exemptions. I have upheld McMaster's decision to apply the former to page 636, together with section 19(a), and the latter to deny access to brief portions of pages 82, 92, 215, 329, 354, 437, 503, and 538. I must review the university's exercise of discretion in doing so. To be clear, my review of McMaster's exercise of discretion is limited to the information that I have not otherwise ordered disclosed pursuant to this order.

Representations

[85] The first portion of McMaster's representations on this issue set out the 13-point list of considerations this office may take into account in evaluating an institution's exercise of discretion, as these were outlined in the Notice of Inquiry sent by this office. Next, McMaster submits that:

> In light of the purpose of the *Act* and the above principles, McMaster's compliance with the *Act* required that only 1 page of 636 responsive pages be withheld, which Withheld Record clearly falls within the ambit of solicitor-client privilege. McMaster's redactions of the Redacted Records were as minimal as possible and done only to enforce the provisions of the *Act* which protect the personal information of third parties. …
>
> For avoidance of doubt, it is reasonable to conclude that the Appellant has no interest in such information, which consideration further supports redaction of such third party personal information.

[86] The appellant takes the position that McMaster failed to identify that the records contain the appellant's personal information and that it "similarly failed to exercise its discretion in decid[ing] whether or not to release this information."

Analysis and findings

[87] Based on the representations received from McMaster and from the appellant, and my own review of the limited personal information of other individuals for which I have upheld the university's access decision under sections 49(a) and 49(b), I am satisfied that McMaster exercised its discretion properly. I am satisfied that the university considered relevant factors in exercising its discretion, and I have considered the disclosure the appellant will receive pursuant to this order.

[88] Given my conclusion that McMaster exercised its discretion properly in the circumstances, I will not interfere with it on appeal.

ORDER:

1. I uphold McMaster's search for responsive records and I dismiss that part of the appeal.

2. I uphold McMaster's decision to deny access to page 636 under section 49(a), together with section 19(a).

3. I order McMaster to disclose the non-exempt portions of the records to the appellant by **November 6, 2013** but not before **October 31, 2013**. The personal information on pages 82, 92, 215, 329, 354, 437, 503, and 538 that is to be withheld pursuant to section 49(b) is highlighted in orange on the copy of the records sent to the university with this order.

4. To verify compliance with order provision 3, I reserve the right to require McMaster to provide me with a copy of the records disclosed to the appellant.

September 30, 2013

Daphne Loukidelis
Adjudicator