Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3580

Appeal PA14-55

York University

February 26, 2016

Summary: The appellant sought access to records relating to matters involving her and the university. In response, the university granted full or partial access to certain records for a fee and denied access to the remaining records or portions of records on the basis of the exemptions in sections 49(a) (discretion to refuse requester's own information) in conjunction with sections 19(a) and (c) (solicitor-client privilege), section 49(b) (personal privacy) and section 65(6)3 (labour relations or employment related matters) of the *Act*. In addition, the appellant took issue with the scope of the request and the reasonableness of the university's search for responsive records. At mediation, the appellant indicated that she no longer sought access to the information withheld under section 49(b) of the *Act*. This order finds that the university properly characterized the scope of the appellant's request, upholds the reasonableness of the university's search for responsive records and determines that records or portions of certain records qualify for exemption under section 49(a), in conjunction with section 19(a) or are excluded from the scope of the *Act* under section 65(6)3.

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), 19(a), 24, 49(a) and 65(6)3.

BACKGROUND:

[1] York University (York University or the university) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for access to the following information:

1. the complete 'file' up to the present date on my case as identified in the correspondence of University Secretary [named individual] in her email to [university Counsel's assistant], dated January 26, 2009;

2. any and all communications (emails, letters, notes of telephone conversations or meetings) to and from York University University Secretary, the President, Vice-President and the Ontario Ministry of Labour with respect to my case and my correspondence with the Ministry, for the periods: August 1, 2013 to the present, and July 1, 2008 to January 31, 2010;

3. any and all communications (emails, letters, notes of telephone conversations or meetings) to and from York University University Secretary's, President's and Vice-President's offices and the Chief Coroner of Ontario's office concerning my case and my correspondence and that of [named Doctor] with the Chief Coroner's Office, for the periods: July 15, 2013 to the present and between December 31, 2008 to December 31, 2009.

4. any and all communications (emails, letters, notes of telephone conversations or meetings) to and from York University University Secretary's, President's and Vice-President's offices and the office of the Minister of Training, Colleges and Universities concerning my case and my correspondence with the Ministry, for the periods: July 15, 2013 to the present, and July 1, 2008 to December 31, 2009;

5. any and all communications (emails, letters, notes of telephone conversations or meetings) to and from York University University Secretary's, President's and Vice-President's offices and the office of the Minister of Education concerning my correspondence with the Ministry, and my case, for the periods: July 15, 2013 to the present, and July 1, 2008 to December 31, 2009;

6. any and all communications (emails, letters, notes of telephone conversations or meetings) between York University University Secretary's, President's and Vice-President's offices and the office of the Ontario Minister responsible for Women's Issues concerning my correspondence and my case, for the periods: July 15, 2013 to the present, and July 1, 2008 to December 31, 2009;

7. any and all communications (emails, letters, notes of telephone conversations or meetings) between York University University Secretary's, President's and Vice-President's offices and the office of the Ontario Premier concerning my correspondence and my case, for the periods: July 15, 2013 to the present, and July 1, 2008 to December 31, 2009;

8. any and all communications (emails, letters, notes of telephone conversations or meetings) between the offices of the University Secretary, President, and

> Provost, and [named Dean] and his office with respect to my correspondence and my case, for the period: May 1, 2010 to the present.

[2] In response, the university issued an access decision, which included an index of responsive records. As set out in the decision letter, the university found no records that were responsive to items 2, 5, 6 or 7 of the request. The university granted partial access to the records that it identified as being responsive to items 1, 3, 4 and 8 of the multi-part request, upon payment of a fee. As set out in the index, the university relied on the exemptions at sections 19(a) and (c) (solicitor-client privilege) and 49(b) (personal privacy) as well as the exclusion at section 65(6)3 (labour relations or employment-related matters) of the *Act*, to deny access to the portions it withheld. The decision letter further advised the appellant that:

> For your convenience, we have not claimed the exclusion on records, or portions of records, where you are included as either the sender or receiver.

[3] The requester paid the fee and received copies of the records that the university had agreed to disclose, in part or in full.

[4] The requester (now the appellant) then appealed the university's decision to withhold the balance of the information. In her letter of appeal she also asserted that other responsive records ought to exist.

[5] At mediation, the appellant took the position that records responsive to items 2, 5, 6 and 7 of the request ought to exist, and that some of the disclosed documents appeared to be incomplete. This led her to believe that the university failed to locate some attachments or replies to the emails that had been disclosed. In addition, the appellant took issue with the manner in which the records were described in the index of records. Furthermore, the appellant challenged the university's application of the exemptions to the responsive records.

[6] In response, the university explained how sections 19(a) and (c) of the *Act* were claimed in the alternative for certain records, in the event that the exclusion in section 65(6)3 was found not to apply. Furthermore, the university advised that it had applied section 49(b) of the *Act* to the portions of the records which contain the personal information of individuals other than the appellant.

[7] In turn, the appellant indicated that she does not wish to pursue access to other individuals' personal information which may be contained in the records. Accordingly, this type of information, and the application of section 49(b) of the *Act*, is no longer at issue in this appeal.

[8] With respect to the reasonableness of the university's search for responsive

records, the appellant provided a detailed email to the mediator setting out the basis for her belief that additional records exist. The mediator relayed these issues to the university which agreed to conduct a further search for records, ultimately issuing a supplementary decision advising that three additional records had been found. As set out in a revised index that accompanied its supplementary decision, the university relied on the exclusion at section 65(6)3 of the *Act* to deny access to these three records, in full. The university also provided an email to the mediator which was subsequently forwarded to the appellant, responding to each of the search issues and questions posed in the appellant's earlier email. With respect to the search for additional records involving the university and the Ministry of Labour, the university subsequently clarified that it did not conduct a search of its Department of Occupational Health and Safety (DOHS), as it was of the view that these records would fall beyond the scope of the request.

[9] In response, the appellant objected to the university's interpretation of the scope of item 2 of the original request. She asserted that the DOHS records should have been captured within that item. Accordingly, the scope of the request was added as an issue in the appeal.

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

[11] As the records contain the personal information of the appellant, I decided to add the application of the discretionary exemption at section 49(a), in conjunction with sections 19(a) and (c), as an issue in the appeal.

[12] During the inquiry into the appeal, I sought and received representations from the university and the appellant. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

RECORDS:

[13] The records at issue consist of email chains.

ISSUES:

A. What is the scope of item 2 of the request? What records are responsive to that item?

B. Did the institution conduct a reasonable search for records?

C. Does section 65(6)3 exclude certain records from the scope of the *Act*?

D. Do Records 3, 4, 5, 7, 8, 9, 14, 25, 31, 36, 46, 59, 63, 64, 65, 66, 67, 71, 72, 75, 78 and 84 contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

E. Does the discretionary exemption at section 49(a), in conjunction with sections 19(a) and/or (c) of the *Act*, apply to Records 3, 4, 5, 7, 8, 9, 14, 25, 31, 36, 46, 59, 63, 64, 65, 66, 67, 71, 72, 75, 78 and 84?

F. Did the institution exercise its discretion under section 49(a)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

SCOPE OF THE REQUEST/RESPONSIVENESS OF RECORDS

Issue A: What is the scope of item 2 of the request? What records are responsive to that item?

[14] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
>
> . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[15] 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.[1]

[16] To be considered responsive to the request, records must "reasonably relate" to

[1] Orders P-134 and P-880.

the request.[2]

The university's representations

[17] With respect to item 2 of the request, the university submits that it understood the search parameters to be the offices of the specific individuals named, being the University Secretary, the President, and the Vice-President.

[18] It submits that:

> … As [the university] has more than one Vice-President, instructions were issued to the Vice-President Finance and Administration, the Vice-President Academic and Provost, and the Vice-President Research and Innovation. None of these individuals, nor the University Secretary or President, had hardcopy or electronic records (including email records) responsive to this item.

[19] The university states that during mediation, the appellant noted that correspondence between the university and the Ministry of Labour had been produced under her earlier request covering the period from 2008 to 2010.[3] The university states that it advised the appellant that the correspondence referenced from the first request was found in the Department of Occupational Health and Safety (DOHS) because she had asked the university to search specifically in that office. The university submits that for the request that is the subject of this appeal, it was not asked to search the records of DOHS. The university submits that the wording of her request "seemed clear and limited to the specific individuals mentioned".

The appellant's representations

[20] The appellant takes issue with the university's characterization of the scope of her request. The appellant submits that the term "offices" in item 2 of her request:

> … could reasonably be interpreted here to include any employees of the university acting for these administrators. In the context of correspondence and communications with the Ministry of Labour, which is named in part two of the request, this would automatically include the [DOHS].

[21] She further submits that:

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[2] Orders P-880 and PO-2661.
[3] This request is not before me.

> The university itself appears to have conceded this point because it initially advanced, as an argument that it had indeed disclosed all responsive documents, that the responsive records from DOHS had already been released following a previous request from the appellant.

[22] The appellant submits that the university only relied on the time frame of the previous request after the appellant had indicated that the DOHS documents already released were for the time frame from 2008-2010. She asserted that further responsive records existed for the period after 2010.

[23] She submits that:

> It is important to note that the university representations under this point do not respect the chronology of what happened. It was the university, and not the appellant, that first mentioned that DOHS documents had already been produced, in the context given above. The reconstruction of events would seem to be done to justify the university's decision to limit the scope of part two of the present request, and to place the responsibility for the limitation on the appellant.

[24] The appellant argues further in the alternative that:

> … even if the university's reconstruction were accurate, which it is not, one could also argue that since a previous request specifically included the DOHS documents the university should normally have made an attempt to clarify the present request.
>
> No attempt was made by the university when the request was made or at any subsequent time, to clarify the appellant's request with respect to part two.

[25] The appellant further submits that documents that she obtained from the Ministry of Labour indicate that there were a number of communications between the Ministry of Labour and the university during the time period of the request, and that consequently responsive records under this part of the request should exist.

The university's reply

[26] In reply, the university submits that the appellant's interpretation of the scope of her request is "exceedingly broad and it is not unreasonable to interpret her request in the way the university understood it." The university submits that unlike a typical broad request where access is sought to all records pertaining to a requester:

> … The fact that the appellant asked for records from specific senior administrators' offices seemed to be limiting the scope of the request to

> just the offices of those individuals. This made sense to the [university] because the appellant had made two previous requests, one of which asked for the "Department of Occupational Health and Safety (DOHS) case file," which indicated she was capable of targeting specific offices. The appellant is an employee of York University with knowledge of its organizational structure. Accordingly, as she seemed to be targeting certain offices, there was no attempt to clarify what was perceived as a clear request.

[27] With respect to the appellant's submission that the DOHS ought to have been included within the scope of her request regarding any correspondence/communication with the Ministry of Labour, the university points to the wording of item 2 of the request and submits:

> As York University has more than one Vice-President, the Vice-President Academic and Provost, Vice-President Finance and Administration, and Vice-President Research and Innovation were asked to search for records, along with the University Secretary and General Counsel. … It is difficult to comprehend why the appellant would have expected the university to draw the Department of Occupational Health and Safety into the scope of this request when she had asked us to search the records of specific individuals. DOHS is a unit within Human Resources; its Director reports to the Assistant Vice-President Human Resources, who in turn reports to the Vice-President Finance and Administration.

[28] With respect to the appellant's suggestion that the university used the appellant's position as a springboard to identify records as falling outside the time-frame of the request, the university submits:

> The appellant claims that the university conceded that DOHS should have been included within the scope of her request by advancing the argument that the university had already disclosed DOHS documents for a previous request covering the timeframe 2008 to 2010. The university respectfully responds that it conceded no such point. Records from DOHS pertaining to correspondence/communications with [the Ministry of Labour] were disclosed to the appellant under an earlier *FIPPA* request covering the timeframe 2008- 2010 because she asked for "the Department of Occupational Health and Safety (DOHS) case file". This was conveyed to the appellant during mediation ….

Analysis and findings

[29] I have considered the submissions of the parties and I find that the university properly characterized the scope of the appellant's request. In the appellant's earlier

request she specifically identified the DOHS as an area to be searched. I agree with the university that the request before me is targeted at other specific offices at a higher level, namely for records from specific senior administrators' offices. As stated by the university the university interpreted the request verbatim, and in my view, in light of all the circumstances, this was an appropriate approach for the university to take. In that regard, I agree with the university that the scope of the request does not include DOHS records.

Issue B: Did the institution conduct a reasonable search for records?

[30] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24.[4] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[31] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[5] To be responsive, a record must be "reasonably related" to the request.[6]

[32] 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.[7]

[33] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[8]

[34] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[9]

The university's representations

[35] The university submits that a reasonable search for responsive records was conducted by several experienced employees knowledgeable in the subject matter of the request.

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[4] Orders P-85, P-221 and PO-1954-I.
[5] Orders P-624 and PO-2559.
[6] Order PO-2554.
[7] Orders M-909, PO-2469 and PO-2592.
[8] Order MO-2185.
[9] Order MO-2246.

[36] In support of its position, the university attached an affidavit of an individual holding the titles of its Director, Records and Information Management, and Coordinator, Information and Privacy Office, setting out in detail the steps she took to locate responsive records. She deposes that the information sought by the appellant seemed clear to her and she sent an acknowledgement letter to the appellant "detailing my understanding of her request." She deposes that:

> It was my understanding that the appellant sought records from the particular offices she named - mainly from the offices of the University Secretary and General Counsel, the President and Vice-Presidents, as well as the Dean of the Faculty of Liberal Arts and Professional Studies. The appellant is an employee of York University, and seemed to be knowledgeable about its organizational structure.

[37] She deposes that as part of her initial search she prepared and delivered memos to the units within York University that she believed would hold responsive records, asking them to search for such records. She also delivered an additional memo for the Senior Executive Officer, Office of the Vice-President Research and Innovation. She deposes that "[t]hese individuals coordinated searches within their units/divisions and provided responsive records to my office." She further deposes that:

> I did not send a memo to the Office of the President because I had been advised by the University Secretary and General Counsel that the Office of the President had delegated her to respond to any questions from the appellant, and thus the Office of the President would hold no responsive records.

[38] She then sets out the various responses she received to her memos, including who was consulted with respect the areas searched and receiving responsive records or being advised that responsive records do not exist.

[39] She further deposes that subsequent searches for responsive records took place, explaining that:

> … [During mediation], the appellant asked why records of the former Provost, [named individual] had not been provided. Accordingly, on [specified date], I followed up with [named individual] of the Office of the Vice-President Academic and Provost to ask if she had searched for those records. She believed that she had done so, but nevertheless made an additional search and found three additional email records. A supplementary decision letter was issued to the appellant on [specified date] with the three additional records included in the Index of Records.

> … on [specified date], I asked [named individual], Chief of Staff in the Office of the President to conduct a search for responsive records in case any additional records could be found there. On [specified date] a memo was received in my office from [named individual], Information Technology Records Coordinator, Office of the President, with no responsive records. …

[40] She further deposes that:

> None of the offices that searched for records indicated that records may have once existed but no longer do, or that any responsive records had been destroyed in accordance with the authorized records retention schedule (available at http://crs.appso6.yorku.caf). The retention for legal files is seven years after settlement of the issue (file class ADG45); the retention for Security investigation files is fifteen years after the investigation is completed (FCL6I). Records pertaining to government relations (ADG65) have a seven-year retention period. None of the records responsive to this request would have exceeded the retention period.

[41] She concludes by deposing that to the best of her information and belief, experienced employees knowledgeable in the subject matter of the request expended a reasonable effort to identify and locate records reasonably related to the request. She deposes that responsive records in the custody or control of the university were identified and located and that no other unit has any records responsive to this request.

The appellant's representations

[42] The appellant asserts that the university did not contact her to clarify the search and that the university "chose to respond very literally and very narrowly to the request and to define the scope of the request unilaterally." She submits that she was given no opportunity to clarify her request. She asserts that no information was communicated to her with respect to the limits of the scope of the request as defined by the university and the reasons for these limits. She submits that:

> In the university's representations, no information is given as to what records were actually searched for, what search criteria were used, and what types of files were searched.

[43] The appellant submits that, contrary to the position of the university, the request was not restricted to "correspondence", but included the broader category of "communications (emails, letters, notes of telephone conversations or meetings)." The appellant also asserts that the language used by the university suggests that the term "offices", "was reduced simply to the individuals named". The appellant submits that the deponent did not provide copies of the memos sent to each office, "so it is not

possible to know what criteria for searching were actually applied" and that "[n]o information has been provided as to what type of files were searched".

[44] She further challenges the reasonableness of the university's search for responsive records on the following grounds:

- The deponent does not state the date of the delegation of responsibility for the search from the Office of the President to the University Secretary and General Counsel and whether this would cover all responsive records for the entire time period of the appellant's request.

- Documents the appellant obtained from the Premier's Office and the Office of the Minister of Training, Colleges and Universities indicate that officials from these ministries met with the university President or his office in 2008/2009 and "it is reasonable to believe that there are responsive records for these meetings".

- The search for records from the Office of the Vice-President - Finance and Administration, should have been interpreted to include the employees responsible for Faculty Relations, DOHS and York Security.

- Documents the appellant obtained from the Ministry of Labour and the Toronto Police Service (Toronto Police) suggest that there are further responsive documents at York University concerning the Executive Director of Faculty Relations, DOHS and York Security.

- Documents the appellant obtained from the Toronto Police suggest that there are further responsive documents related to part 3 of the request. In particular, "[i]n documents released, the university Secretary indicates that she communicated with the Chief Coroner of Ontario, but no records from notes from telephone conversations have been released".

[45] Finally, the appellant submits that:

> In article 8 of her affidavit, the [deponent] indicates that on [specified date] she received a memo "noting that no additional responsive records were located in Security Services since the last FIPPA request made by the appellant." She states that [the university's Manager, Investigations and Threat Assessment] was consulted in the search for records.
>
> Through documents obtained from the Toronto Police, the appellant was able to obtain access to further responsive records concerning York

> Security in [specified date] from York University. However, the fact that these documents were only found by [the university's Manager, Investigations and Threat Assessment] after they were located by the Toronto Police, does raise concerns about the general adequacy of the search.
>
> It is important to note that York University has considerable interest in not releasing even normally releasable responsive documents. If documents showed that the University had not adequately investigated [a described matter] or conspired in any way to cover up an investigation into [a described matter], this could potentially put officers of the University at risk of criminal proceedings.

The university's reply

[46] With respect to the appellant's submission that she was not contacted to clarify the search nor provided an opportunity to clarify the search:

> York University responds that its practice is to reflect the actual language of the request as much as possible in an acknowledgement letter that is sent out to requesters shortly after a request is made. Sometimes the university will correct grammar, spelling, names of individuals or offices if they are incorrect; however, in the case of this request, the acknowledgement letter reiterated the appellant's request virtually word for word, simply changing the preposition "my" to "your"… The point of the acknowledgement letter is to let requesters know that their request and application fee have been received, to give them a date when they can expect a decision, and to provide them with an opportunity to comment on, or object to, the way the university has interpreted their request. Accordingly, the appellant had an opportunity to provide clarification, but did not contact the university further upon receipt of the acknowledgement letter.

[47] The university submits that it searched for exactly what the appellant asked for in her request - i.e., "any and all communications (emails, letters, notes of telephone conversations or meetings)". With respect to the appellant's allegation that the university "reduced" her request to "records pertaining to her case and correspondence from a number of different offices within the university", the university states that:

> … this phrasing was simply a convenience so as not to have to repeat the full text of the lengthy eight-part request. The term "correspondence" was not meant to be limiting. Note, however, that the term "my case and my correspondence" comes directly from the request itself, repeated in most of the items requested … .

> The university was quite aware that the appellant requested more than correspondence and this is evident in the university's acknowledgement letter sent to the appellant, a copy of which was attached to the memos sent to the units instructing them to undertake their searches. Most of the responsive records produced for this request are email communications which demonstrates that units undertaking searches understood the nature of the records being sought.

[48] With respect to the appellant's assertion that there should be records relating to meetings between government officials and the university president, the university points to an emails exchange during mediation wherein it advised that "[a]ccording to the Office of the President, no government official ever met with [the named President] regarding [the appellant]."

[49] With respect to the appellant's suggestion that her request for records from the Office of the Vice-President Finance and Administration should have been interpreted to include records from employees responsible for Faculty Relations, DOHS and York Security, the university states:

> … first, that she did not ask for records of the "Vice-President Finance and Administration" but rather records of the "Vice-President' and that York University interpreted this broadly to include the Vice-President Finance and Administration (amongst others).
>
> However, more importantly, as has already been discussed, there was no reason to believe that she intended to include each Vice-President's entire span of control within the scope of her request. Nevertheless, York University's Security Services was asked to search for records because in item 1 of her request, she asked for "the complete 'file' up to the present date on my case as identified in the correspondence of University Secretary [named individual] in her email to [university Counsel's assistant], dated January 26, 2009". The legal file in the Office of the University Secretary and General Counsel (i.e., [named individual's] file) was searched and described in the index of records, but the main file pertaining to the alleged incident resides in Security Services. This Security file was provided in response to the appellant's first *FIPPA* request (…), but as the request now under appeal has a different timeframe, the university wanted to ensure that any subsequent documentation falling within the timeframe of this later request was searched for and provided.
>
> Several months later, as the appellant notes, Security Services found further responsive records that had been stored in an unusual location.

> Once located, the appellant was immediately apprised of the existence of the records and shortly thereafter provided with copies. …

[50] With respect to the allegation that there should be documentation pertaining to communications with the Chief Coroner of Ontario, the university states:

> … It may be the case that the University Secretary and General Counsel communicated by telephone with the Chief Coroner, but there is no reason to assume that she would have kept notes of the telephone conversation. The University was asked specifically to search for notes of telephone conversations and no such records were discovered.

Analysis and finding

[51] I found above that the scope of the request did not include DOHS records, and accordingly it was reasonable for the university not to conduct a search of the DOHS.

[52] As set out above, the *Act* does not require the university to prove with absolute certainty that the records do not exist, but only to provide sufficient evidence to establish that it made a reasonable effort to locate any responsive records. 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. In my view, the individual who organized the search process and those who conducted the searches are such experienced employees knowledgeable in the subject matter of the request.

[53] As set out in the affidavit of the university, when it learned more responsive records might exist, it conducted a further search locating three additional records, which were then disclosed to the appellant. Based on the evidence before me, I am satisfied that the university conducted a reasonable search for responsive records.

[54] Accordingly, I find that the university has provided me with sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate responsive records.

[55] As a result, I am satisfied that the university's search for records that are responsive to the appellant's request is in compliance with its obligations under the *Act*.

Issue C: Does section 65(6)3 exclude certain records from the scope of the Act?

General Principles

[56] 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.

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

[58] 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.[10]

[59] 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.[11]

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

[61] If section 65(6) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.[13]

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[10] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).
[11] *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.
[12] Order PO-2157.
[13] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.

[62] Section 65(6) may apply where the institution that received the request is not the same institution that originally "collected, prepared, maintained or used" the records, even where the original institution is an institution under the *Municipal Freedom of Information and Protection of Privacy Act*.[14]

[63] The type of records excluded from the *Act* by section 65(6) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.[15]

Section 65(6)3: matters in which the institution has an interest

Introduction

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

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

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

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

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

- a job competition[16]
- an employee's dismissal[17]
- a grievance under a collective agreement[18]
- a "voluntary exit program"[19]
- a review of "workload and working relationships"[20]

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[14] Orders P-1560 and PO-2106.
[15] *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.
[16] Orders M-830 and PO-2123.
[17] Order MO-1654-I.
[18] Orders M-832 and PO-1769.
[19] Order M-1074.
[20] Order PO-2057.

[66] The phrase "labour relations or employment-related matters" has been found *not* to apply in the context of:

- an organizational or operational review[21]
- litigation in which the institution may be found vicariously liable for the actions of its employee.[22]

[67] The phrase "in which the institution has an interest" means more than a "mere curiosity or concern", and refers to matters involving the institution's own workforce.[23]

[68] The records collected, prepared maintained or used by the institution are excluded only if [the] meetings, consultations, discussions or communications are about labour relations or "employment-related" matters in which the institution has an interest. Employment-related matters are separate and distinct from matters related to employees' actions.[24]

The university's representations

[69] The university submits that the matter of where and when the appellant teaches is an employment-related matter in which the institution has an interest.

[70] The university submits that the records that it claims are excluded from the *Act* under section 65(6)3 involve consultations, discussions and communications between the university Secretary and General counsel and various senior administrators on the academic side of the university, all of which pertain to the appellant's conditions of work and whether she should be allowed to teach courses exclusively in an online format. The university submits that the records pertain to the employer/employee relationship. In addition, the university submits that there are a few records involving the York University Faculty Association which is the bargaining unit representing faculty members.

[71] The university submits:

> The records in question were collected, prepared, maintained and used within offices of York University's senior administration, and all were collected, prepared, maintained and used in relation to meetings, consultations, discussions and/or communications regarding an employee of York University and her conditions of work. Accordingly, these records

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[21] Orders M-941 and P-1369.
[22] Orders PO-1722, PO-1905 and *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.
[23] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner),* cited above.
[24] *Ontario (Ministry of Correctional Services) v. Goodis*, cited above.

> pertain to meetings, consultations, discussions and/or communications about labour relations or employment-related matters in which the institution has an interest.

The appellant's representations

[72] The appellant submits that in the case of some of the records at issue, this exclusion has been applied too broadly, and that some of the records could be released in part or in full.

[73] In particular, she submits that:

> Some records (such as, but not restricted to, 64, 65, 66, 71, 72), involving York Faculty Association concern individual faculty members, who happen to be York University Faculty Association executive officers, but the matter under discussion was of concern to these employees personally, not in their capacity as [York University Faculty Association] officers.
>
> Other records (such as, but not restricted to, 4, 5, 7, 8, 12, 80, 108) deal in whole or in part with the appellant's concerns that [named Dean] was linked to the professional network […] in the context of [a civil matter] … . The information regarding the appellant's civil case would not fall under labour relations exemptions.

Analysis and findings

[74] I find that records[25] 10, 12, 13, 15, 16, 17, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 51, 52, 53, 70, 73, 74, 76, 79, 80, 85, 93, 102, 108, 116, 117 and 118 fall within the exclusionary provision in section 65(6)3. I am satisfied that all of these records meet the first two criteria in section 65(6)3. Furthermore, in my view, the requested records (which pertain to scheduling information, discussion of workload issues and teaching methods) directly relate to employment-related matters, namely, the university's ongoing relationship with a member of its own workforce, the appellant. As a result, I find that these records are about employment-related matters for the purpose of section 65(6)3. In addition, I am satisfied that the university clearly has an interest in these records, as they relate to matters involving its own workforce. In these circumstances, I find that the exclusionary wording in section 65(6)3 applies to the requested records, and they fall outside the scope of the *Act*.

[75] I do not make the same finding with respect to records[26] 4, 5, 7, 8, 9, 14, 25,

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[25] In some cases, the university only relied on section 65(6)3 to withhold specific portions of the records at issue.
[26] Ibid.

31, 63, 64, 65, 66, 71, 72 and 78 which the university also claimed were subject to the section 65(6)3 exclusion. Based on my careful review of these records and their content which, in my view, pertains to various allegations the appellant, or an individual on her behalf, made against certain organizations or individuals, I have not been provided with sufficient evidence to find that a primary purpose for the collection, preparation, maintenance or use of these records is "in relation to" the subjects mentioned in paragraph 3 of section 65(6)3 and I do not find it reasonable to conclude that there is "some connection" between them.

[76] As section 19 was claimed in the alternative with respect to these records, I will address them in the analysis that follows.

[77] As I have found that records[27] 10, 12, 13, 15, 16, 17, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 51, 52, 53, 70, 73, 74, 76, 79, 80, 85, 93, 102, 108, 116, 117 and 118 are excluded from the scope of the *Act*, there is no need for me to review the possible application of the exemptions claimed by the university with respect to these records.

Issue D: Do records 3, 4, 5, 7, 8, 9, 14, 25, 31, 36, 46, 59, 63, 64, 65, 66, 67, 71, 72, 75, 78 and 84 contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

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

> "personal information" means recorded information about an identifiable individual, including,
>
> > (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
> >
> > (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
> >
> > (c) any identifying number, symbol or other particular assigned to the individual,
> >
> > (d) the address, telephone number, fingerprints or blood type of the individual,

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[27] Ibid.

> (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;

[79] 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.[28]

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

[81] 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.[29]

[82] 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.[30]

[83] To qualify as personal information, it must be reasonable to expect that an

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

individual may be identified if the information is disclosed.[31]

[84] The university submits that all of the records at issue contain the appellant's personal information. I agree and find that all of the records at issue contain the appellant's personal information as that term is defined in section 2(1) of the *Act*.

[85] In addition, the university claims that records 14, 36, 66 and 78 contain the personal information of other university employees and a private individual.

[86] The appellant asserts that the information pertaining to the university employees could relate to these individuals in a professional, official or business capacity:

> … with respect to courses taught or membership in a professional association such as the Royal Society of Canada, or views on professional issues arising at the university that would normally be part of the exchange of views at Faculty Council.

Analysis and findings

[87] As discussed below, for the purposes of the analysis that follows, it is only necessary to determine whether the records remaining at issue contain the person information of the appellant to trigger the application of section 49(a) in conjunction with section 19. I find that they do. On my review of the records, I agree with the university that the records contain the personal information of the appellant, as they contain the appellant's name as it appears with other personal information relating to her [paragraph (h)].

Issue E: Does the discretionary exemption at section 49(a), in conjunction with sections 19(a) and/or (c) of the Act, apply to records 3, 4, 5, 7, 8, 9, 14, 25, 31, 36, 46, 59, 63, 64, 65, 66, 67, 71, 72, 75, 78 and 84?

Introduction

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

[89] Section 49(a) reads:

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

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

[90] Section 49(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.[32]

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

[92] In this case, the university relies on section 49(a) in conjunction with sections 19(a) and/or (c).

[93] Section 19 of the *Act* states as follows:

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

[94] Section 19 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 (prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital) is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

[95] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

Solicitor-client communication privilege

[96] 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.[33] The rationale for this

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[32] Order M-352.
[33] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[34] The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.[35]

[97] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[36]

[98] 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.[37]

Litigation privilege

[99] Litigation privilege protects records created for the dominant purpose of litigation. It is based on the need to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial.[38] Litigation privilege protects a lawyer's work product and covers material going beyond solicitor-client communications.[39] It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[40] The litigation must be ongoing or reasonably contemplated.[41]

Branch 2: statutory privileges

[100] Branch 2 is a statutory privilege that applies where the records were prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital "for use in giving legal advice or in contemplation of or for use in litigation." The statutory exemption and common law privileges, although not identical, exist for similar reasons.

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[34] Orders MO-1925, MO-2166 and PO-2441.
[35] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)
[36] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[37] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[38] *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).
[39] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).
[40] *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).
[41] Order MO-1337-I and *General Accident Assurance Co. v. Chrusz,* cited above; see also *Blank v. Canada (Minister of Justice)*, cited above.

The university's representations

[101] The university submits that the discretionary exemption at sections 19(a) and (c) were claimed because all of the records are subject to solicitor-client privilege and all were prepared by or for counsel employed or retained by an educational institution for use in giving legal advice.

[102] The university submits that:

> All of the records consist of communications between various York University employees and the University's General Counsel, [named individual], whose advice is explicitly sought. In consulting the University Counsel, employees would expect these communications to be kept confidential.

The appellant's representations

[103] The appellant submits that given the professional and academic nature of the issues discussed in these documents, it is questionable whether the other employees concerned could effectively consider the university Counsel to be acting as their personal solicitor.

[104] The appellant submits:

> An issue raised is whether these employees could reasonably expect the University Secretary to provide privileged consultation to them personally, irrespective of her obligation as Counsel for the university as a whole. In the latter case, the communications would take on a more "university professional or business", rather than a "privileged" dimension.
>
> If these communications concern professional issues, such as the criteria for election to the Royal Society or online teaching or safety issues that would normally be considered discussable and debatable publicly within the university, then this would also necessarily affect the application of the notion of privilege.

Analysis and findings

[105] I have carefully reviewed the records at issue which consist of email communications involving internal legal counsel, with or without attachments, which the university claimed in part or in full, qualified for exemption under section 19(a) in conjunction with section 49(a).

[106] I find that records 3, 4, 5, 7, 8, 9, 14, 25, 31, 46, 59, 63, 64, 65, 66, 67, 71, 72, 75, 78 and 84 where the withheld information is found, are emails between internal

legal counsel and one or more employees of the university, either copied or not copied, to other university employees. I find that internal legal counsel was acting as legal counsel for the university in course of the exchanges, and in no other capacity. I find that the exchanges form part of the continuum of communications concerning matters involving the appellant, aimed at keeping both internal legal counsel and the client informed so that legal advice may be sought and given as required. In my view, disclosing this information would reveal the confidential privileged communications. Accordingly, I find that the records, or portions of the records, where the withheld information is found qualifies for exemption under Branch 1 of section 19(a) in conjunction with section 49(a) of the *Act*.

[107] I further find that the withheld portion of record 36, which is contained in an email from internal legal counsel to her assistant, qualifies as a legal advisor's working papers directly related to seeking, formulating or giving legal advice. Accordingly, I find that the withheld portion of record 36 qualifies for exemption under Branch 1 of section 19(a), in conjunction with section 49(a) of the *Act*.

[108] Accordingly, as I have found that section 19(a) in conjunction with section 49(a) applies to the information for which it is claimed, I uphold the university's decision to withhold these records, or portions of these records, pursuant to section 49(a) of the *Act*.

[109] As I have found that section 19 (a) in conjunction with section 19(a) applies, it is not necessary for me to consider whether these records, or portions thereof, also qualify for exemption under section 19(c), in conjunction with section 49(a) of the *Act*.

Issue F: Did the institution exercise its discretion under section 49(a)? If so, should this office uphold the exercise of discretion?

General principles

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

[111] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[112] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[42] This office may not, however, substitute its own discretion for that of the institution.[43]

Relevant considerations

[113] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[44]

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

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[42] Order MO-1573.
[43] Section 54(2).
[44] Orders P-344 and MO-1573.

The university's representations

[114] The university submits that it exercised its discretion with respect to denying access to records in a proper manner, taking into account relevant factors and not taking into account irrelevant factors.

[115] The university submits that:

> … many of the records are subject to solicitor-client privilege pursuant to section 19(a) and (c) of the *Act*. Other York University employees sought the confidential advice of the university's General Counsel and expected their communications to be privileged.
>
> The university also considered the personal privacy of other York University employees and a private individual and the fact that disclosing their opinions and concerns would constitute an unjustified invasion of their personal privacy.

The appellant's representations

[116] The appellant challenges the university's exercise of discretion and asserts that it was exercised for an improper purpose:

> … namely predominantly with a view to protecting the interests of the university at the expense of the legitimate interests of the appellant and [another individual] with respect to obtaining information about the university's response to an incident that could have cost them their lives.

[117] The appellant further asserts that she has a sympathetic or compelling need to receive the information in order to follow-up with the Toronto Police about further investigation into the incident and protect her safety and that of another individual.

[118] She submits that:

> The issue with respect to the request for records involves the response of a public institution of higher learning to an issue of [named issue]. This issue is recognized as still not receiving the attention it warrants from public institutions and the police, as demonstrated by the Ontario government's Action Plan to prevent violence against women.

[119] The appellant also argues that the university, as a publically-funded institution of higher learning, has a particular obligation to be transparent about its functioning. She submits that:

> Exercising discretion with a view to maximizing, rather than minimizing, disclosure would increase public confidence in the operation of the institution and in academic values with respect to the free debate and circulation of ideas about issues of importance to society.

The university's reply

[120] The university submits that it has not exercised its discretion for an improper purpose, but rather sought to disclose records in a proper manner in compliance with the *Act*.

[121] The university submits:

> The university has disclosed a large number of records, amounting to 924 pages, responsive to the appellant's three requests, including the one at issue in this appeal. Furthermore, the university provided her with additional records - records originally thought to have been lost or destroyed - promptly and at no cost when they were found.
>
> The university strives to be transparent and to comply with *FIPPA*, disclosing as much of the body of responsive records as possible while adhering to principles such as solicitor - client privilege and the protection of personal privacy, both of which are embodied within the *Act*.
>
> The university takes the issue of [named issue] seriously. It thoroughly investigated the alleged incident when it was reported by the appellant, and all extant documentation pertaining to this case has been searched for and disclosed as appropriate.

Analysis and finding

[122] On my review of the representations and the records, I am satisfied that the university properly exercised its discretion in deciding not to disclose the records, or portions of the records, that I found to qualify for exemption under section 49(a) in conjunction with section 19(a). I am satisfied that the university has not made this decision in bad faith or for an improper purpose, nor has it taken into account irrelevant considerations or failed to take into account relevant ones. I note that the university granted full or partial access to many responsive records. In the circumstances, I find that the university property exercised its discretion to apply the exemption in section 49(a) in conjunction with section 19(a) to the records.

[123] Accordingly, I find that the university appropriately exercised its discretion to withhold the information that I have found to qualify for exemption under section 49(a) of the *Act*, and I uphold this exercise of discretion.

ORDER:

1. I uphold the university's characterization of the scope of the appellant's request.

2. I uphold the reasonableness of the university's search for responsive records.

3. I uphold the decision of the university that the *Act* does not apply to records[45] 10, 12, 13, 15, 16, 17, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 51, 52, 53, 70, 73, 74, 76, 79, 80, 85, 93, 102, 108, 116, 117 and 118.

4. I uphold the decision of the university to deny access to the withheld portions of records 3, 4, 5, 7, 8, 9, 14, 25, 31, 36, 46, 59, 63, 64, 65, 66, 67, 71, 72, 75, 78 and 84.

Original Signed by: February 26, 2015

Steven Faughnan
Adjudicator

[45] In some cases, the university only relied on section 65(6)3 to withhold specific portions of the records at issue.