Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3660

Appeal PA14-622

Mohawk College of Applied Arts and Technology

October 19, 2016

Summary: The appellant made a request to the college for email records that refer to him sent or received by eighteen employees at the college. The college disclosed some records and withheld information under section 21(1) (personal privacy), 13(1) (advice or recommendations) and 19 (solicitor-client privilege). During mediation, the college raised the issue of the possible application of sections 49(a) and (b) (request for appellant's own information) and the appellant added the issues of the reasonableness of the college's search for records and the adequacy of its decision letter. The college also added the issue of the possible application of the employment-related exclusion in section 65(6) to one record during the inquiry. In this order, the adjudicator upholds the college's decision on access, in part. The adjudicator finds that the college's search for records was reasonable. The adjudicator also finds that the college's decision letter did not preclude the appellant from appealing the access decision and participating in the inquiry to the appeal.

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*), 13(1) (advice or recommendations), 19, 21(1) (personal privacy), 21(3)(g), 49(a), 49(b), 65(6)3.

OVERVIEW:

[1] The appellant made a request for access to Mohawk College of Applied Arts and Technology (the college) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for "all emails (with attachments) that relate or refer to me, dated from [specified date] until present, sent or received by the following eighteen (18) employees". The appellant then listed the names of the eighteen employees.

[2] Prior to issuing its decision, the college extended the time to respond to the request by 30 days pursuant to section 27 of the *Act*. The college subsequently issued a decision to disclose responsive records in part, citing the exemptions in sections 13(1) (advice or recommendation), 19 (solicitor-client privilege) and 21(1) (personal privacy) to withhold information.

[3] During mediation of the appeal, the college added the issue of the application of sections 49(a) and (b) as the records relate to the appellant. The appellant took the position that the exception 13(2)(l) should apply to any information claimed exempt under section 13(1). The appellant also expressed concern that he was not provided with an adequate decision letter in response to his request. The appellant also believes that additional responsive records should exist, and the reasonableness of the college's search was added as an issue on appeal.

[4] Also during mediation, the college gave notice to one of the individuals whose information is contained in the records (the affected party). The affected party consented to the disclosure of their personal information and the college issued a revised decision disclosing additional information and withholding some information under the exemptions in sections 13(1), 19, 21(1), 49(a) and (b) of the *Act*.

[5] During the inquiry into this appeal, I sought and received representations from the appellant and the college. Representations were shared in accordance with the IPC's *Practice Direction 7*.

[6] In this order, I uphold the college's decision in part and find that its search for responsive records was reasonable. I also find that the college's decision letter did not preclude the appellant from appealing the decision or participating in the inquiry into his appeal. Finally, I order the college to disclose some records that I have found not exempt under the *Act.*

RECORDS:

Document #	Description	Partially or fully Withheld	Page Number	Exemption claimed
4	Email dated March 24, 2014	Full	4	49(a), 13(1)
17	Email dated May 5, 2014	Partial	13	49(b), 21(1)
18	Email dated May 5, 2014	Partial	13	49(b), 21(1)
23	Email dated June 25, 2014	Partial	17	49(b), 21(1)
39	Email dated August 1, 2014	Full	46	49(a), 19
51	Email dated August 8, 2014	Partial	57	21(1)

56	Email dated August 11, 2014	Partial	60	21(1)
57	Email dated August 8, 2014	Partial	60	21(1)
79	Email dated August 7, 2014	Full	78	49(a), 13(1)
80	Email dated August 7, 2014	Full	78-79	49(a), 13(1)
84	Email dated August 20, 2014	Full	81	49(a), 13(1)
86	Email dated August 20, 2014	Full	82	49(a), 13(1)
87	Email dated August 21, 2014	Full	83	49(a), 13(1)
88	Email dated August 21, 2014	Full	83	49(a), 13(1)
89	Email dated August 21, 2014	Full	83-85	65(6)3, 49(a), 13(1)
130	Email dated August 1, 2014	Full	112	49(b), 21(1), 49(a), 19
132	Email dated August 1, 2014	Full	115	49(a), 19
133	Email dated August 1, 2014	Full	115	49(a), 19
141	Email dated September 9, 2014	Full	123	49(a), 19
154	Email dated July 29, 2014	Full	137	21(1)
156	Email dated July 30, 2014	Partial	147	21(1)
158	Email dated August 1, 2014	Partial	155	21(1)
160	Email dated August 1, 2014	Full	155-56	49(a), 19
161	Email dated August 5, 2014	Partial	159	49(a), 13(1), 49(b), 21(1)

ISSUES:

A. Was the college's decision letter adequate in the circumstances?

B. Did the college conduct a reasonable search for responsive records?

C. Is Record 89 excluded from the scope of the *Act* under section 65(6)3?

D. Do the records 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(b) apply to the information at issue?

F. Does the discretionary exemption at section 49(a) in conjunction with section 13(1) apply to the records at issue?

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

H. Was the college's exercise of discretion under section 49(a) and (b) proper in the circumstances?

DISCUSSION:

Issue A: Was the college's decision letter adequate in the circumstances?

[7] The appellant submits that the college's decision was inadequate and consequently he was unable to properly address the issues on appeal.

[8] Section 29(1) of the *Act* sets out the requirements for the college's decision following a request for access. It states:

> Notice of refusal to give access to a record or a part thereof under section 26 shall set out,
>
> (a) where there is no such record
>
> (b) where there is such a record,
>
> i. the specific provision of this Act under which access is refused,
>
> ii. the reason the provision applies to the record,

[9] As set out above, section 29(1)(a) and (b) requires that a notice of refusal to give access, contained in the institution's decision letter, must indicate where there is no responsive record and/or the specific section of the *Act* under which access is refused and the reason why the section of the Act applies.

[10] Past decisions of this office have indicated that the purpose of the content set out in section 29(1) in a decision letter is to permit the requester to make a reasonably informed decision whether to appeal the institution's decision.[1]

[11] The appellant submits that the college has provided several decision letters and

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[1] Order M-913.

none of them have put him "…in a position to make a [reasonably] informed decision whether to appeal the institution's decision". In particular, the appellant notes that he has not been provided with a sufficient description of the records and he does not know whether the records are properly the subject of an appeal.

[12] The appellant submits that the inadequate decision letters combined, with the portions of the college's representations that were not shared with him during the inquiry of his appeal, impeded his ability to make proper representations. The appellant states:

> [This not only limits] my ability to present my arguments, but [limits the adjudicator's] ability to hear and decide this matter with the benefit of complete representations from all parties. This would be possible with a well-informed decision letter which omits the disputed information but still describes the records (linking them to the claimed exemptions).

[13] I have reviewed the college's decision letter and its revised decision letter. I further note that during mediation the appellant was provided a detailed index setting out a description of the records at issue, the exemptions claimed and a brief explanation of why the information was being withheld.

[14] Clearly, the appellant was not precluded from appealing the college's decision withholding records from him as the appeal is currently the subject of this order. I accept the appellant's position that the college's initial decision letter to him did not adequately address how the exemptions applied to the information being withheld nor did the decision letter provide a description of the records and information at issue. I note that this office's publication entitled *Drafting a Letter Refusing Access to a Record* provides guidance for institutions on the kind of information they should include in decision letters, including in part:

- An index of records;
- A document number assigned to each record and a general description of each record;
- An indication of whether access has been granted or denied for each record or part of a record;
- The specific provision of the *Act* for which access has been denied to each record or each part of a record;
- An explanation of why the provision applies to each record or part of a record;
- The name and position of the person making the decision; and
- A paragraph informing the requester that he or she can appeal the decision of this office.

[15] The first decision provided to the appellant in response to his request did not contain many of the elements set out above. However, I note that the college provided a detailed index of records to the appellant during mediation and a copy of the college's non-confidential representations were provided to the appellant during the inquiry.

[16] The college's index of records provides a detailed description of the type of records at issue as well as the names of the authors or individuals referred to in the records. The index also includes a brief explanation as to how the exemption applies. I find that this information provides the appellant with an ability to assess the type of information at issue to determine whether he still wished to pursue access to the information, and to adequately address the application of the various exemptions to it.

[17] I have also reviewed the college's representations that were shared with the appellant. I note that the information that was withheld from the appellant was information that would disclose the actual content of the records or is information that would be exempt if it was included in a record that was the subject of a request under the *Act*. If the appellant had been provided with access to this information, the appeal would have been rendered moot. The appellant was provided with a large portion of the college's representations and given the opportunity to respond to its arguments, which he did.

[18] Finally, I note that the appellant was able to complete mediation and adjudication and was provided with an opportunity to participate fully in both stages of the appeal process.

[19] Accordingly, while the college's initial decision letter lacked information about the types of records at issue and how the exemptions claimed applied, in the course of this appeal any deficiencies in the decision letter have been addressed by the information in the college's index of records and representations provided to the appellant during the inquiry process. I dismiss this part of the appellant's appeal.

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

[20] The appellant submits that additional responsive records should exist.

[21] 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.[2] 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.

[22] 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.[3] To

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[2] Orders P-85, P-221 and PO-1954-I.
[3] Orders P-624 and PO-2559.

be responsive, a record must be "reasonably related" to the request.[4]

[23] 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.[5] 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.[6]

[24] 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.[7]

[25] The college was asked to provide a written summary of all the steps taken in response to the request. In support of its search, the college provided representations and an affidavit in support of its search for records.

[26] The college submits that it considered as responsive any records that were "held" by any of the employees identified in the appellant's request which were created during the specific dates and contained information related or referring to the appellant. The college submits that it did not need to seek clarification of the request as it contained sufficient detail to enable each individual specified to search for responsive records. The college states:

> Specifically, the appellant named the individuals whose information was sought, and asked for copies of records that related or referred to the appellant that was sent or received by those individuals. Accordingly, the college submits that it had sufficient information to conduct a targeted search as required by the *Act* without seeking clarification from the appellant.

[27] The college also provided an affidavit from the Executive Assistant to the Board of Governors and Mohawk College Foundation Board and Administrative Assistant, Vice President of Corporate Services. The affiant states that she was asked to coordinate the search of the college's record holdings for records relating to the appellant's request.

[28] In order to conduct the search, the affiant sent an email attaching the appellant's request to the named individuals identified in the appellant's request. The individuals were asked to search their email records and produce the emails relating to the appellant. The affiant swears that in regard to two named individuals that were no longer employed by the college, she contacted the college's server administrator in the information technology department to access and search their email records.

[29] The affiant states that she received responses to the access request from all of

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[4] Order PO-2554.
[5] Orders M-909, PO-2469 and PO-2592.
[6] Order MO-2185.
[7] Order MO-2246.

the individuals named in the request, or from the individuals assigned to conduct the search.

[30] The affiant affirms her belief that the individuals who conducted the searches for the appellant's electronic records were experienced employees, knowledgeable in the subject matter of the request and the records they were required to search. She further affirms her belief that they expended a reasonable effort to locate and provide responsive records.

[31] Finally, the affiant states that the college does not have a retention policy at this time but is in the process of developing one.

[32] The appellant submits that the college's search for records was not reasonable as the search failed to identify responsive records. The appellant provided examples of emails that were sent to him by college employees but were not identified as responsive records to his request. The appellant states:

> Although the affidavit description of the search is long-winded and complex, it does not imply the search was actually reasonable. The abovementioned email is recent and obviously responsive, containing both my name and student number. The records are electronically searchable and processed through a centralized Microsoft Exchange server. Their search must have been totally ineffectual in order to miss it. Microsoft Exchange has a tool, Multi-Mailbox Search, designed for bulk email searches and legal discovery. You would only avoid such a tool if you were committed to not finding the records, as is the case here.

[33] The appellant further submits that he is aware of events that would have necessitated emails, but no emails around those times were identified as responsive to his request. The appellant further argues that asking employees to search their own emails is not evidence of a reasonable search.

[34] The college was asked to respond to the appellant's representations on search and his evidence of the email sent to him by an employee but not identified as responsive to his request. The college acknowledges that the record produced by the appellant was responsive to his request and submits that it is unable to explain why that record was not identified as responsive. The college submits that, "…considering the context of the appellant's exceptionally broad access request, the failure to identify one responsive email does not establish an intention not to disclose responsive documents, or that additional undisclosed responsive records exist."

[35] Finally, the college submits that there were many records that were identified as responsive that did not contain the appellant's name or student number but were still responsive to his request. The college states:

> This supports the College's position that a diligent search of email records was conducted. The College also notes that the appellant has failed to

identify specifically what other responsive emails should exist that were not identified and produced by the College.

Analysis and Finding

[36] The appellant's reasonable basis that additional records should exist is his claim that he has additional emailed records from employees identified in his request that were not identified as responsive records. The appellant further alleges that there may be attempts by the employees conducting the searches to deliberately not identify responsive records. Finally, the appellant submits that the college did not use the proper search tool (Microsoft Exchange search).

[37] As stated above, the *Act* does not require the college to prove with absolute certainty that further records do not exist. However, the college must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.

[38] Having reviewed the parties' representations, I find that the college's search for records was reasonable. I find that the appellant's request was sufficiently detailed and I accept the college's submission that clarification was not required to conduct the search.

[39] I further accept that the college's chosen method to search for the records was reasonable. The appellant submits that the college should have used the Microsoft Exchange search tool to conduct its search of the college's email server in response to his request. As set out above in the college's representations and affidavit, the college searched for responsive records by having the individuals specified in the request search their electronic records using the search terms identified by the appellant. The appellant appears to argue that his suggested method of search (Microsoft Exchange) would result in additional records being found because it would remove any bias the employees have against the appellant.

[40] The *Act* does not require that institutions search for responsive records in the most expedient manner. Moreover, I find that requesting named employees to conduct searches of their own record-holdings for records responsive to a request is a reasonable method of search for the college to use.

[41] Finally, I must consider whether the evidence of additional responsive records that the appellant provided with his submissions is evidence that the college's search for records was not reasonable. The appellant submits that there are events that he is aware of that would have resulted in a responsive email which the college did not locate in its search. The appellant also provided an actual email that is responsive to his request, but was not identified by the college in its search for records.

[42] I put little weight in the appellant's argument that there should be emails for certain events and no responsive records were identified. The fact that the appellant believes that records should have been generated or created for certain events does

not mean that records were actually created by the college that would be responsive to his request.

[43] I agree with the appellant that the email he provided with his submissions would be responsive to his request. It is unclear to me why this email was not identified or found in the search for records, and the college has not provided an explanation of why it was not identified. However, I also find that this fact does not render the college's search for responsive records to be unreasonable. As stated above, the *Act* does not require the college to prove with absolute certainty that further records do not exist. I note that the college's search for responsive records resulted in the location of records where the appellant's name and student number did not appear on the face of the records which may not have necessarily occurred had the college conducted the Microsoft Exchange server search suggested by the appellant.

[44] On the basis of the parties' representations, I find that the college's search was reasonable. I find that the college has provided sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. I find that experienced employees, namely the employees specified in the request, were asked to conduct searches of their email record holdings and did so. Accordingly, I dismiss this portion of the appellant's appeal.

Issue C: Is Record 89 excluded from the scope of the *Act* under section 65(6)3?

[45] During the inquiry, the college raised the issue of the possible application of the exclusion in section 65(6)3 to Record 89. Section 65(6)3 states:

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

[46] 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*.

[47] 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.[8]

[48] 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

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

and employees that do not arise out of a collective bargaining relationship. [9]

[49] 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.[10]

[50] 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.[11]

[51] For section 65(6)3 to apply, the college 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.

Parts 1 and 2

[52] The college submits that Record 89, which is comprised of an email and two-page attachment, is connected to communications about "employment-related matters" in which it has an interest.

[53] I note that much of the college's representations on the application of the exclusion were not shared with the appellant due to confidentiality concerns. The appellant did not make specific representations on the application of the exclusion to Record 89.

[54] As stated above, Record 89 consists of an email and attached document. I find that both the email and attached document were prepared, maintained and used by the college and that its preparation and usage was in relation to discussions and communications. Accordingly, both parts 1 and 2 have been met for the application of the exclusion.

Part 3

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

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[9] Order PO-2157.

[10] *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.

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

- a job competition[12]
- an employee's dismissal[13]
- a grievance under a collective agreement[14]
- disciplinary proceedings under the *Police Services Act*[15]
- a "voluntary exit program"[16]
- a review of "workload and working relationships"[17]

[56] 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.[18]

[57] The college submits that the email and attached document relate to matters in which the institution is acting as an employer. On my review of the record and the college's confidential representations, I find that the records concern employment-related matters. I further find that the college's interest in these records, which involves a member of its own workforce, is more than a "mere curiosity or concern". Accordingly, I find that the college has established part 3 of the test and I find that Record 89 is excluded from the application of the *Act.* I will not consider it further in this order.

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

[58] 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.

[59] The college submits that the records contain the personal information of the appellant and other individuals. Personal information is defined in section 2(1) of the *Act*, in part, as follows:

> *Personal information* means recorded information about an identifiable individual, including,
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> > (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,

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[12] Orders M-830 and PO-2123.
[13] Order MO-1654-I.
[14] Orders M-832 and PO-1769.
[15] Order MO-1433-F.
[16] Order M-1074.
[17] Order PO-2057.
[18] *Ontario (Solicitor General)* v. *Ontario (Assistant Information and Privacy Commissioner)*, cited above.

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

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

(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.

[60] 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.[19]

[61] 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.[20]

[62] 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.[21]

[63] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[22]

[64] The college submits that some of the withheld records contain the appellant's personal information, specifically his name and student number. The college alleges that none of the redacted portions of the records contain the appellant's personal information.

[65] The college then goes through each specific record to identify the personal information withheld under section 49(b), on each page. The college submits that the withheld information contains information that would be characterized as the personal information of the named employees within the meaning of paragraphs (b), (e), (g) and (h) of the definition of that term in section 2(1) of the *Act*. Furthermore, the college submits that that some of the withheld information is the personal information of the employees "even if the information relates to an individual in a professional, official or business capacity". Lastly, the college submits that the individuals referred to in the

[19] Order 11.
[20] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[21] Orders P-1409, R-980015, PO-2225 and MO-2344.
[22] Order PO-1880, upheld on judicial review in *Ontario (Attorney General)* v. *Pascoe*, [2002] O.J. No. 4300 (C.A.).

records would be identifiable to the appellant if the information is disclosed.

[66] The appellant submits that he is sceptical as to whether all the information withheld under section 49(b) is the personal information of the employees. He asks that I consider the finding in Order PO-3390 where Adjudicator Daphne Loukidelis, in considering a student's access to records at the University of Ottawa, found the following:

> Moreover, contrary to the university's submission, the professor's views and opinions about the appellant's academic endeavor qualify as the appellant's personal information, not the professor's personal information. This is the distinction highlighted by paragraphs (e) and (g) of the definition of personal information in section 2(1) of the *Act*.

[67] I have reviewed the information identified by the college as the personal information of other individuals.

[68] To begin, I note the college distinguishes between the personal information of the appellant, which has been disclosed to him, and the personal information of other individuals that has been withheld. Specifically, the college has claimed the application of either section 49(b) and/or section 21(1) for the withheld information. I remind the college that the determination of which personal privacy exemption applies is done on a record-by-record basis. In the present appeal, as the records all relate to the appellant, the withheld personal information in them, even if they do not directly relate to the appellant, should be considered under section 49(b).

[69] I further find that some of the information identified by the college as personal information does not relate to those individuals in a personal capacity. In particular, I refer to the information withheld in Records 17 and 18. In reviewing this information, I considered whether it would qualify as personal information using the two step method set out by Former Assistant Commissioner Tom Mitchinson in Order PO-2225. Using this rationale, I find that the information of these individuals appears in a professional context, namely work emails. I next considered whether disclosure of this information would reveal something that is inherently personal in nature. In my view, disclosure would not reveal something personal in nature as it relates to the individuals in a professional context. Accordingly, I find that some of the information in Records 17 and 18 is not personal information for the purpose of the *Act* and thus is not exempt under section 49(b).

[70] I find the information the college alleges is personal information within the meaning of paragraph (b) of the definition of that term in section 2(1) in Records 51, 56, 57 and 130 is the personal information of this individual. This information relates to the education, medical, psychiatric, psychological, criminal or employment history of the individual. The appellant submits that he is not interested in the medical history about another individual. Accordingly, I have removed the information in Records 51, 56 and 57 from the scope of the appeal.

[71] I find that the information the college alleges is personal information within the meaning of paragraph (e) of the definition of that term in section 2(1) in Record 154 is that individual's personal information.

[72] I further find that the information the college claims is only the personal information of certain individuals actually consists of mixed personal information of the individual and the appellant. This includes the information in Records 156, 158 and 159 where the appellant's personal information is inextricably linked to the personal information of the named individual.

[73] With regard to Records 23 and 161, the college claims that these records contain the personal information of the named individual. In both of these records, I find that most of this information relates to the appellant and a portion of it relates to the other individual. As the information relating to the appellant is only his personal information, it cannot be exempt under sections 49(b) or 21(1). It can be severed from the rest of the information relating to the other named individual, and I will order that the appellant's personal information on these pages be disclosed to him.

[74] I also accept the college's position that disclosure of the information would be for identifiable individuals as the records are comprised of emails where the names of the sender and recipient as well as much of the body of the emails have already been disclosed to the appellant. It would be evident to the appellant who the information is about if the information is disclosed.

[75] Accordingly, I find that the records all relate to the appellant and contain his personal information. Some of the records also contain the personal information of other individuals and I will consider the appellant's access to this information under section 49(b).

Issue E: Does the personal privacy exemption in section 49(b) apply to the information at issue?

[76] Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right including section 49(b). Under section 49(b), where a record contains the personal information of both the appellant and another individual, and disclosure of the information would be an unjustified invasion of the other individual's personal privacy, the college may refuse to disclose that information to the appellant.

[77] Sections 21(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy. None of the parties argues that any of the circumstances in section 21(4) apply, and I find they do not. If the information fits within any of the exceptions in paragraphs (a) to (e) of section 21(1), disclosure is not an unjustified invasion of personal privacy, and the information is not exempt under section 49(b). In the present appeal these sections do not apply.

[78] In determining whether the disclosure of the personal information in the records

would be an unjustified invasion of personal privacy under section 49(b), I must consider and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties.[23]

[79] If any of the paragraphs in section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 49(b). The college submits that the presumptions in sections 21(3)(a) and (g) are relevant to the personal information at issue. In paragraph 57 above, I removed certain personal information from the scope of the appeal as the appellant had confirmed that he was not interested in pursuing access to this information. Accordingly, I do not have to consider the application of the presumption in section 21(3)(a).

[80] The college submits that the presumption in paragraph (g) applies to the disclosure of the personal information in Record 130. Section 21(3)(g) states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information
>
> > consists of personal recommendations or evaluations, character references or personnel evaluations;

[81] The terms "personal evaluations" or "personnel evaluations" refer to assessments made according to measurable standards, not to general observations, comments or opinions.[24] The thrust of section 21(3)(g) is to raise a presumption concerning recommendations, evaluations or references about the identified individual in question rather than evaluations, etc., by that individual.[25] This exemption has been found to apply, for example, to interview or test scores in job competitions.[26]

[82] The information withheld by the college in Record 130 relates to a comment made by the email author to other individuals at the college about a professor. I find that the withheld personal information is better characterized as a general comment or observation and not made according to "measurable standards". Accordingly, the presumption in section 21(3)(g) does not apply to this personal information. Furthermore, based on my review of the presumptions in section 21(3), I find that no other presumptions apply to the withheld information.

[83] The college further submits that the factor in section 21(2)(h) applies to the records, which states:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

[23] Order MO-2954.
[24] Orders PO-1756 and PO-2176.
[25] Order P-171.
[26] Orders P-722 and MO-1444.

> the personal information has been supplied by the individual to whom the information relates in confidence.

[84] Section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.[27] Some of the factors listed in section 21(2), if present, weigh in favour of disclosure, while others weigh in favour of non-disclosure.

[85] The appellant did not make submissions on the factors in section 21(2) and simply asked that his own personal information be disclosed to him.

[86] The records at issue are emails between employees at the college. As identified above, the information withheld is the personal information of both the individuals who wrote the emails and the appellant. I confirm that the information in the emails does not relate to the employees in a professional capacity and instead concerns their opinions and views of themselves intertwined with the personal information of the appellant.

[87] I accept the college's submission that the individuals who wrote the emails supplied the personal information in the email about themselves and the appellant in confidence to the recipient of the email. While I find that this factor is relevant to my determination, I do not give it significant weight. The emails were part of a discussion about the appellant as a student at the college and the exchanges were between colleagues. In the normal course, email discussions are confidential as between the sender and recipient. However, when the email discussions are part of an institution's record holdings and in particular contain the personal information of a requester, I find that the sender's expectation of confidence in the contents of the email is reduced.

[88] I have found that none of the presumptions in section 21(3) apply to the information at issue, but that the factor in section 21(2)(h) does apply with limited weight. The section 21(2)(h) factor weighs in favour of non-disclosure and I have found that none of the factors favouring disclosure of the personal information apply in the circumstances. As a result, on balance, I find that disclosure of the personal information at issue in Records 23 (in part), 130, 154, 156, 158 and 161 (in part) would constitute an unjustified invasion of the personal privacy of identifiable individuals other than the appellant, and uphold the application of section 49(b), subject to my finding on the college's exercise of discretion.

Issue F: Does the discretionary exemption at section 49(a) in conjunction with section 13(1) apply to the records at issue?

[89] The college submits that section 49(a) in conjunction with 13(1) applies to exempt Records 4, 79, 80, 84, 86, 87 and 88 from disclosure. Section 13(1) states:

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[27] Order P-239.

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

[90] The purpose of section 13 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendation within the deliberative process of government decision-making and policy-making.[28]

[91] *Advice* and *recommendations* have distinct meanings. *Recommendations* refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred. *Advice* has a broader meaning than *recommendations*. It includes policy options, which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be mad. *Advice* includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.[29]

[92] *Advice* involves an evaluative analysis of information. Neither of the terms *advice* or *recommendations* extends to objective information or factual material.

[93] *Advice* or *recommendations* may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.[30]

[94] The application of section 13(1) is assessed as of the time the public servant or consultant prepared the advice or recommendation. Section 13(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 13(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.[31]

Representations

[95] The college provided specific representations about the information withheld in

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[28] *John Doe* v. *Ontario (Finance)*, 2014 SCC 36, at paragraph 43.
[29] See above, paragraphs 26 and 27.
[30] Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines)* v. *Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564, see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation)* v. *Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.
[31] *John Doe* v. *Ontario (Finance)*, cited above, at paragraph 51.

each of the records.

- Record 4 consists of emails that contain advice exchanged between two employees about the handling of students and does not contain factual or background information.
- Records 79 and 80 are also emails and relate to advice about the appellant's hearing.
- Records 84 and 86 are emails and the withheld portions would disclose preliminary findings and would reveal advice and recommendations made to the college.
- Records 87 and 88 are also emails and the withheld portions would permit the accurate inference of advice sought by the college in Record 89.
- Record 161 is an email and the withheld portion would reveal advice and recommendations regarding the appellant's hearing.

[96] The appellant concedes that some of the records may contain "advice or recommendations" but states:

> …a large volume of these records are about my academic appeal and [its] circumstances. The appeal cumulated in a formal, *written final decision* of the institution. Section 13 does not exempt factual information (which I expect to be abundant in these records), or reasons for a final decision, even if the information is included in internal memoranda and even if the information is incorporated by reference. If the records do not contain any reasons impacting on their final decision, please tell me so. The *final* nature of their appeal process is described in the academic appeal policy. It says: "The decision of the Grade Appeal Panel will be made by majority vote, in camera, and is considered to be final and binding." [emphasis in original]

Finding

[97] Based on my review of the withheld portions of the records at issue, I find that disclosure of the withheld information in Records 4, 79, 80, 87-88 (portions) would not reveal advice or recommendations or allow for an accurate inference of advice or recommendations for the purposes of section 13(1). The college characterizes the withheld information in these records as advice on the handling of student issues and on the appellant's hearing. As stated above, advice involves an evaluative analysis of information. I find that withheld information does not contain an "evaluative analysis of information". The college's representations and the content of the information does not establish that the withheld information contains a consideration or analysis of options. Instead, the information that has been withheld is, in my view, better characterized as objective information. As I have found that section 13(1) does not apply to these

portions of the records, they are not exempt under section 49(a). As the college has not claimed any additional discretionary exemptions and no mandatory exemptions apply, I will order this information to be disclosed.

[98] However, I find Records 84, 86 and portions of Records 87 and 88, namely the subject line of the emails, would permit the accurate inference of a recommendation given and section 13(1) of the *Act* applies to this information. The information withheld in these records consists of recommendations made by employees at the college regarding the conduct of the appellant's hearing and also managing contacts with the appellant.

[99] The appellant asked that I confirm whether the records at issue relate to advice or recommendations about the college's final decision in his academic appeal such that the exception in section 13(2)(l) applies to the information to which section 13(1) applies.[32] I confirm that the records do not relate to any decision or final decision about his academic appeal nor do they contain advice or recommendations about his academic appeal.

[100] In summary, I find that section 13(1) applies to the withheld information in Records 84, 86 and portions of Records 87 and 88 and thus are exempt under section 49(a), subject to my finding on the college's exercise of discretion. Section 13(1) does not apply to the remaining information for which it is claimed.

Issue G: Does the discretionary exemption at section 49(a) in conjunction with section 19 apply to the records at issue?

[101] The college submits that section 19 applies to the withheld information in Records 39, 132, 133, 141 and 160. 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

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[32] Section 13(2)(l) states:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
>
> > (l) the reasons for a final decision, order or ruling of an officer of the institution made during or at the conclusion of the exercise of discretionary power conferred by or under an enactment or scheme administered by the institution, whether or not the enactment or scheme allows an appeal to be taken against the decision, order or ruling, whether or not the reasons,
> > (i) are contained in an internal memorandum of the institution or in a letter addressed by an officer or employee of the institution to a named person, or
> > (ii) were given by the officer who made the decision, order or ruling or were incorporated by reference into the decision, order or ruling.

(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.

[102] 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.

[103] In this case, the college submits that Branch 1 of section 19 applies to the withheld records.

Branch 1: common law privilege

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

[105] 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 privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[34] The privilege convers 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]

[106] 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.[36] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[37]

Representations

[107] The college made specific representations regarding all the records for which it claimed section 19, including explaining the sender and recipients of the emails which included the college's general counsel. In particular, the college submits:

- Record 39 (duplicated information in Records 133 and 160) is an email request for legal advice on managing the board communication to the appellant.
- Record 132 is an email from the general counsel to college staff providing legal advice in response to an earlier email request for legal advice set out in Record 39.

[33] *Descôteaux* v. *Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[34] Orders PO-2441, MO-2166 and MO-1925.
[35] *Balabel* v. *Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[36] *General Accident Assurance Co.* v. *Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[37] *Kitchener (City)* v. *Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).

- Record 141 is an email from college staff to external legal counsel seeking a legal opinion.

[108] The appellant submits that communications between the college and the external law firm may be exempt under section 19. The appellant disputes the college's claim of section 19 to emails where the general counsel is one of the recipients. The appellant states:

> The role of institution's in-house counsel, [named individual], is more problematic and his involvement does not automatically establish the applicability of Section 19. In order for Section 19 to apply, there must be a request for professional legal advice, and not merely procedural or policy advice. Given the context, I find it much more likely that the staff was discussing policy matters (i.e. the academic appeal).

[109] The appellant asks that I confirm that the withheld information relates to a request for legal and not policy advice and that the communications involve a lawyer.

Finding

[110] I have reviewed the information withheld by the college under section 49(a) with reference to section 19. Record 39 contains a reference to a request for advice from college staff to the general counsel even though general counsel is not a recipient of that email. However, I find that Record 132 contains the same email with a reference to the fact that general counsel had mistakenly not been sent the earlier email and contains the legal advice sought. I further find that Record 141 is a request by college staff for a legal opinion regarding a matter to its external counsel. Based on my review, I find that the records contain solicitor-client communication privileged information between college staff and its counsel for the purposes of seeking and providing legal advice. I further find that these communications were confidential between the college staff and its lawyers. Finally, there is no indication that the college has waived its privilege in these records.

[111] Accordingly, I find that section 19 applies to the withheld information and thus the records are exempt under section 49(a) subject to my finding on the college's exercise of discretion.

Issue H: Was the college's exercise of discretion under section 49(a) and (b) proper in the circumstances?

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

[113] 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.

[114] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[38] This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

[115] The college submits that in applying sections 49(a) and (b) to exempt certain records, it considered that the personal information of staff, the advice and recommendations provided by staff and the solicitor-client relationship should be protected. It further sought to balance the appellant's right to his own personal information against the interests of affected staff identified in the records. The college notes that it disclosed to the appellant a large volume of email communications and notes that historically it has not disclosed solicitor-client communications as these communications are privileged. The college submits that it exercised its discretion in applying sections 49(a) and (b) in an attempt to protect the integrity of the college's legal services, the personal privacy and recommendations and advice of college staff. Finally, the college submits that the appellant does not have a sympathetic or compelling need to receive any records not already disclosed to him and that there is no public interest in the issues identified in the records.

[116] The appellant submits that the college has not followed its own policy for transparency in exercising its discretion to withhold information under sections 49(a) and (b). The appellant submits that he has a legitimate interest and emphasizes the importance of allowing the public to observe and hold the college accountable for the way it conducts its formal processes. The appellant submits that he does have a compelling and sympathetic interest in the records as he is seeking information about the college's decision regarding his appeal.

[117] I appreciate the appellant is seeking further information about the college's decision of his academic appeal and on that basis, he asks me to consider whether the college's exercise of discretion was proper in the circumstances. The records I have reviewed and I have found exempt under sections 49(a) and (b) do not relate to the college's decision-making regarding the appellant's academic appeal. I find that the college properly considered the privacy rights of other individuals and balanced these rights against the appellant's right to his own personal information. I further find that the college also considered the interests sought to be protected in applying sections 13(1) and 19 of the *Act*. I find that the college did not act in bad faith nor did it consider any irrelevant factors in its exercise of discretion. Accordingly, I uphold its exercise of discretion and the application of sections 49(a) and (b) to withhold the records at issue.

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[38] Order MO-1573.

ORDER:

1. I order the college to disclose the information I have found not exempt in Records 4, 23, 79, 80, 87-88, 161 to the appellant by providing him with a copy of this information by **November 24, 2016** in accordance with the copy of the highlighted records I have enclosed with the college's order. To be clear, only the highlighted information should be disclosed to the appellant.

2. I uphold the college's decision to withhold the remaining information.

3. I uphold the college's search as reasonable.

4. In order to verify compliance with Order provision 1, I reserve the right to require the college to provide me with a copy of the information sent to the appellant.

Original Signed By: October 19, 2016

Stephanie Haly
Adjudicator