Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3715

Appeal PA12-359

Western University

March 29, 2017

Summary: An individual submitted a request to the University of Western Ontario for access to records related to her medical residency. The university granted partial access to the records identified as responsive. Some records were withheld in part or in full based on the labour relations and employment exclusion in section 65(6) or the exemptions in section 49(a), together with sections 13(1) (advice or recommendations) and 19 (solicitor-client privilege), and section 49(b) (personal privacy).

In this order, the adjudicator upholds the university's decision to apply the section 65(6)3 exclusion and section 49(a), together with section 19, but only partly upholds Western's exemption claims under section 49(b) and section 49(a), in conjunction with section 13(1). The adjudicator orders the university to disclose the non-exempt records or portions of records to the appellant. The adjudicator finds the university's search for responsive records to be reasonable. In this regard, the adjudicator finds that records in the email accounts of the other medical residents requested by the appellant are not in the university's custody or under its control for the purpose of section 10(1) of the *Act.* The university's search is therefore upheld in its entirety.

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," 10(1), 10(2), 13(1), 19, 21(2)(f), 21(2)(h), 21(3)(d), 21(3)(g), 25(2), 24(1), 49(a), 49(b), 65(6)3.

Orders Considered: Orders MO-1251, PO-1725, PO-2809, PO-2842, PO-3009-F, PO-3257, PO-3298, PO-3642 and PO-3689.

Cases Considered: *City of Ottawa v. Ontario,* 2010 ONSC 6835; *Canada (Information Commissioner) v. Canada (Minister of National Defence),* 2011 SCC 25; *John Doe v. Ontario (Finance)*, 2014 SCC 36; *Kandasamy v. The Queen,* 2014 TCC 47; *Guelph (City) v. Super Blue Box Recycling Corp.,* 2004 CanLII 34954 (ON SC); *Balabel v. Air India*, [1988] 2 W.L.R. 1036 (Eng. C.A.).

OVERVIEW:

[1] This order addresses the issues raised by a request submitted under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for access to records held by the University of Western Ontario[1] (Western or the university). The requester, a former postgraduate medical education student, sought access to the following information:

> All records relating to [the requester] in all offices of the University and with all staff and residents of the University, including but not limited to:
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> The Department of [specified area]
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> The Post Graduate Medical Education Office
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> The Offices of the Associate Deans
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> The Office of the Dean of the Medical School
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> The Office of the Senate, including Academic Appeals
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> The Office of the President of the University
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> Human Resources
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> Vice President, Academic
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> Vice President, Governance
>
> Legal Counsel
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> Financial Services
>
> Copies of all records, documents, notes, information, communications (paper or electronic) relating to [the requester] from July 1, 2004 to

[1] The institution now goes by the name "Western University."

> present, including the following name variations: [10 variations of the appellant's name].[2]

[2] After receiving the request, the university sought clarification from the requester before issuing an interim access decision and fee estimate, which included the claim of a time extension to complete the processing of the request. Additional efforts followed to narrow and clarify the request and the methods for searching for responsive records. During this time, Western transferred some records identified by the searches to St. Joseph's Health Care, London (SJHC or the hospital) under section 25(2) of the *Act*, because the hospital had a greater interest in those records.[3]

[3] In July 2012, the university issued a final decision with an index of records and granted partial access to the responsive records it had located, relying on section 49(a) (discretion to refuse requester's information), together with sections 13(1) (advice or recommendation) and 19 (solicitor-client privilege) and sections 21 or 49(b) (personal privacy). Some records were withheld pursuant to the employment and labour relations exclusion in section 65(6)3. The university explained it conducted searches "on the basis of where we would reasonably expect to find responsive records and we did not necessarily search all of the areas nor use all of the search terms you requested." No responsive records were located in the offices of the University Secretariat, President, Human Resources, Provost and Vice-President (Academic), Associate Dean (Research), Vice-Dean (Hospital and Interfaculty Relations). Western advised that many clinical faculty and staff in the Department had not identified any responsive records and also indicated that it had not searched medical residents' records "as they are not in the custody or control of the University for the purposes of FIPPA." The appellant challenged the university's response, arguing that additional responsive records should exist from the department, including with the residents and Program Educational Specialist, as well as the departmental Chair's and Dean's offices.[4] The university responded to many of these concerns, but ultimately the appellant was not satisfied that the searches had been adequate and the reasonableness of Western's search remains at issue.

[4] Since the appeal could not be fully resolved by mediation, it was transferred to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. The adjudicator sent a Notice of Inquiry, setting out the facts and issues on appeal, to the university. The university provided representations and a non-

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[2] Regarding the time frame specified in the request, the appellant appears to have accepted that the university was not subject to the *Act* at the stated start date. Universities were added to the list of institutions under FIPPA as of June 10, 2006 with the passing of the *Budget Measures Act, 2005*, S.O. 2005, c. 28 - Bill 197 (Schedule F).

[3] The issues in the related appeal (PA12-358) with SJHC were determined in Order PO-3689, which was issued on January 20, 2017.

[4] The appellant also identified attachments to emails that were not disclosed and this matter was dealt with prior to the close of mediation.

confidential set of them was shared, in turn, with the appellant along with a Notice of Inquiry. The appellant then provided representations and these were sent to the university to seek reply representations. Shortly following the receipt of the university's reply representations, I assumed conduct of the appeal and decided to seek supplementary representations from the university respecting the custody or control of medical residents' records. I reminded the university that it was required to issue a supplementary access decision to the appellant regarding newly identified responsive emails.[5] I also sought supplementary representations on the issue from SJHC in Appeal PA12-358 at that time. Upon receipt of representations from the hospital and the university in the two related appeals, I sent the appellant a Joint Notice of Inquiry on the custody or control issue, providing complete copies of the two institution' representations for this purpose. I received representations on custody or control from the appellant, which were subsequently shared with Western for reply. Once these representations were received, I concluded my inquiry.

[5] In this order, I find that the exclusion for labour relations and employment records in section 65(6)3 of the *Act* applies. I partly uphold Western's decision to sever certain information as not responsive to the request. I find that section 49(b) applies, in part, as does section 49(a), together with section 13(1), to some of the information. I find that section 49(a), in conjunction with section 19, applies to all of the records identified by Western as subject to solicitor-client privilege. Finally, I uphold Western's search for responsive records, and I uphold its decision not to search medical residents' email accounts on the basis that they are not in its custody or under its control under section 10(1) of *FIPPA*.

ISSUES:

A. Does the labour relations exclusion in section 65(6) apply?

B. Did Western properly withhold information as non-responsive, given the scope of this request?

C. Do the records contain personal information?

D. Would disclosure result in an unjustified invasion of personal privacy under section 49(b)?

E. Do the records contain advice or recommendations, such that section 49(a), together with section 13(1), applies?

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[5] In the supplementary decision issued on February 27, 2015, Western withheld only a portion of one (of the 31) newly identified email records (#90.103) under section 49(a), together with section 19(a) (solicitor-client privilege), a claim I address below.

F. Do the records contain solicitor-client privileged information, such that section 49(a), in conjunction with section 19, applies?

G. Should the university's exercise of discretion be upheld?

H. Did the university conduct a reasonable search for records within its custody or under its control?

DISCUSSION:

A. Does the labour relations exclusion in section 65(6) apply?

[6] Western claims that records related to investigations into the appellant's allegations against two clinical faculty members are excluded from the *Act* by section 65(6)3. These records are identified as 1-5 to 1-11, 1-18 to 1-19, 1-300 to 1-306, 1C-34 (part), 50A-2 to 50A-10 and 50B-69 to 50B-92. If section 65(6)3 applies to these records, they are not accessible under *FIPPA*. I must determine this issue before addressing the other issues, including the possible exemption of information under section 49(b), which was also claimed for some of the same records.

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:
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> > Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[7] 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*. Section 65(6) is record-specific and fact-specific. If it applies to a specific record in the circumstances of a particular appeal, and none of the exceptions listed in section 65(7) are present, then the record is excluded from the scope of the *Act.* As I recently observed in Order PO-3689, referring to Order PO-3642, the application of the exclusion is record, and fact, specific and if it is found to apply, the record as a whole is excluded. Therefore, the question is whether the collection, preparation, maintenance or use of the record, as a whole, is sufficiently connected to an excluded purpose so as to remove the entire record from the scope of the *Act*.[6]

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[6] As Adjudicator Jenny Ryu noted in Order PO-3642, the *Act* does not contain any requirement to sever excluded records, as there is under section 10(2) of FIPPA for records that fit within an exemption.

[8] To demonstrate that the exclusion in section 65(6)3 applies, Western was required to establish that:

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

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

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

[9] 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.[7]

[10] 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]

[11] 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.[9] On the other hand, 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.[10]

Representations

[12] The university submits that the identified records are excluded from the *Act* as they relate to two separate investigations in 2007 and 2011 conducted into harassment and intimidation allegations made by the appellant regarding two individuals employed by Western.

[13] Western explains that the 2007 investigation was conducted by the medical

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[7] *Ontario (Ministry of Correctional Services) v. Goodis*, (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).
[8] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).
[9] *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.
[10] Order PO-2157.

school's Associate Dean of Equity and Gender Issues and the records relevant to that investigation are pages 1-300 to 1-306, 50A-2[11] to 50A-10 and 1C-34 (part). The school's Associate Dean of Equity and Professionalism conducted the 2011 investigation, and the relevant records are pages 1-5 to 1-11, 1-18 to 1-19 and 50B-69 to 50B-92. According to the university, these records were collected, prepared, maintained or used by each appointed investigator as part of their investigation into the complaints. Western asserts, with specific examples, that some of the records subject to the exclusion claim were referenced in each final report.

[14] The university notes that the records consist of communications in the form of emails, reports and letters or are notes taken as a direct result of meetings, consultations and discussions between the investigator, the individuals being investigated, the appellant, and other witnesses.

[15] Western submits that the records are about an employment-related matter in which it has an interest because the university arranged for these investigations into conduct in its capacity as employer and there was potential for disciplinary action against the two clinical faculty members. The university further submits that past decisions such as Orders PO-2748 and PO-2809 have confirmed that these types of records fit within section 65(6)3.

[16] The university also submits that none of the exceptions in section 65(7) apply. Based on the circumstances and the wording of the exceptions in subsection 7, I agree.

[17] The appellant relies on the Tax Court of Canada case *Kandasamy v. The Queen*[12] for the finding that medical residents are full time students, in that case for the purpose of claiming certain tax credits. The appellant explains that *Kandasamy* is relevant because the records at issue in this appeal relate to the appellant's status as a student in the residency program; therefore, since the records were created, maintained and used by Western in its capacity as a school and relate to the appellant's academic performance and conduct as a student, "they are not capable of attracting the labour and employment exemption."

[18] The appellant submits that if I determine that the records were created in connection with the appellant's status as an employee, then I should distinguish between records related to matters in which the SJHC was acting as an employer and terms and conditions of employment or human resources, which would be excluded, and matters related to employee actions, which would not.[13] The appellant maintains that the records deal with her actions and complaints relating to the faculty members,

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[11] Two different page numbers are given by Western for this group of records in its submissions on section 65(6)3: either starting at 50-A2 or 50-A4. I have proceeded on the basis that this group of records marked with the exclusion starts with 50-A2.
[12] 2014 TCC 47.
[13] Relying on *Goodis*, cited above.

so the focus is not on the human resource or employment aspect of their relationship, but rather on the academic context. The appellant emphasizes that the phrase "labour relations and employment related matters" has been found not to apply in a litigation context where the institution may be found vicariously liable for the actions of its employees. The appellant believes that the records in question contain information that would establish vicarious liability on the part of the university.

[19] Finally, the appellant argues that the withheld information is her own personal information and "it ought to be produced."

Analysis and findings

[20] Based on the content of the records at issue, I find that section 65(6) applies and that they are excluded from the *Act.* Therefore, I have no continuing authority over records 1-5 to 1-11, 1-18 to 1-19, 1-300 to 1-306, 1C-34, 50A-2 to 50A-10 and 50B-69 to 50B-92, including the power to order them disclosed because they may contain the appellant's personal information.

[21] I reviewed the two groups of records related to the 2007 and 2011 investigations into complaints initiated by the appellant against two clinical faculty members. The records consist of emails, notes (handwritten and typed), correspondence and draft documents. I am satisfied that these records were collected, prepared, maintained or used by the university and, further, that this collection, preparation, maintenance and use was in relation to the meetings, consultations, discussions or communications undertaken by the university's appointed investigators to look into the appellant's complaints about the two individuals, who were clinical faculty with Western. I find that parts 1 and 2 of the test under section 65(6)3 are satisfied.

[22] To meet part 3 of the test under section 65(6)3, Western was required to demonstrate that the meetings, consultations, discussions or communications described in part 2, above, were about labour relations or employment-related matters in which the university had an interest. 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.[14] In this appeal, it is clear that the records involve Western's own workforce, related as they are to two separate investigations into allegations of improper conduct made by the appellant against two clinical faculty members employed by Western. The two investigations came about as a result of the university's oversight responsibilities regarding the conduct of its employees and they carried with them the potential for disciplinary action against the two accused individuals. I reject the appellant's assertion that the records ought to be primarily characterized as relating to the appellant's academic performance and conduct as a student, thus moving them beyond the reach of the employment exclusion. These

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[14] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner),* cited above. See also Order PO-3346.

records fit within the scope of the exclusion because the focus was on the university's employment relationship with the clinical faculty being investigated, not its relationship with the student complainant – the appellant. I agree with Western that many past IPC decisions, such as Order PO-2809, have confirmed that these types of records fit within the scope of the exclusionary provision in section 65(6)3. I find that part 3 of the test for exclusion under section 65(6)3 has been met.

[23] Since section 65(6)3 applies to these records and none of the exceptions in section 65(7) do, I uphold the university's decision that the records are excluded from the scope of the *Act* as a result of section 65(6)3.[15]

B. Did Western properly withhold information as non-responsive, given the scope of this request?

[24] The parties were asked to address the scope of this request due to the fact that Western severed information from some records as non-responsive.

[25] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. These responsibilities include providing sufficiently clear detail about the information sought so that an experienced employee of the institution can identify responsive records with a reasonable effort.

[26] Institutions must 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.[16] To be considered responsive to the request, records must "reasonably relate" to the request.[17]

[27] The university submits that some information in the records did not "reasonably relate" to the appellant and was severed for that reason. The university explains that even though some records may mention the appellant, they were not responsive given their subject matter and content. The university provides examples[18] of the information withheld as non-responsive, including: details of another individual's work or private schedule, general discussion about the residency program that does not specifically relate to the appellant, other program and resident issues, and hiring matters.

[28] The appellant does not respond directly to the university's submissions on the reasons for withholding information from certain records, focusing instead on concerns about the unilateral narrowing of the scope of the request. I address the appellant's

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[15] Only a portion of record 1C-34 with withheld under section 65(6)3, but I affirm its exclusion notwithstanding that Western was under no obligation to sever it.
[16] Orders P-134 and P-880.
[17] Orders P-880 and PO-2661.
[18] The examples given include record numbers for each type.

concerns about the effect of narrowing the request's search parameters in the discussion of search, below.

[29] Since the appellant did not comment on Western's reasons for severing information as non-responsive, this could be seen as a concession that this issue is not being pursued. Regardless, I have reviewed the records identified as withheld as non-responsive, either in full or in part.

[30] I accept Western's explanation of the reasons for severing the following records as non-responsive: 1-17, 1-60 (part), 1-137, 1-145 (part), 1-217 to 1-232, 1-241, 1-254, 1-283, 1A-2 (part), 1C-25 (part), 11B-45, 11B-120, 11B-164, 11B-170, 50B-11, 50B-20 and 50B-24. The passages are not reasonably related to the request, and I uphold Western's decision to withhold them on this basis. For record 50B-20, this removes it entirely from the scope of this appeal.[19]

[31] There are a few portions of the withheld records which I find do contain responsive information and for which I do not uphold Western's decision. This finding applies to records 1-17, 1-24, 1-145 (part), 1C-25 (part) and 8-3. These same record portions are subject to claims of section 49(b) or section 49(a), together with section 13(1), and I will review them below.

C. Do the records contain personal information?

[32] The university withheld information on the basis that its disclosure would result in a violation of personal privacy. The appellant responded by indicating that she does not seek access to personal phone numbers, pager numbers, vacation details or email addresses, as long as the identity of the sender or recipient is clear.

[33] These positions raise two issues: first, for the personal privacy exemption in section 49(b) to apply, the record must contain personal information as that term is defined in section 2(1) of the *Act*; and second, any of the listed personal information of other individuals is removed from the scope of the appeal. To determine whether section 49(b) could apply, I must first determine whether the records contain personal information and, if so, to whom it relates, in order to allow for the removal of the listed personal information from scope. Additionally, records withheld under sections 13(1) or 19 that contain the appellant's personal information will be reviewed under the discretionary exemption in section 49(a).

[34] "Personal information" is defined in section 2(1) of the *Act* as "recorded information about an identifiable individual," including information such as an individual's age or marital status (paragraph (a)), educational or employment history (paragraph (b)), address (paragraph (d)), their views and opinions (paragraph (e)), correspondence sent to the institution of a private and confidential nature (paragraph

[19] This includes removal of record 50B-21 because it contains no substantive content at all.

(f)) or the views and opinions of others *about* them (paragraph (g)). The list of examples of personal information under section 2(1) is not exhaustive. Information that does not fall under paragraphs (a) to (h) may still qualify as personal information.

[35] Sections 2(3) and (4) provide exceptions to the definition of personal information for certain information about individuals in their business, professional or official capacity.

[36] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[20] 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] This matter requires some further consideration in the circumstances of this appeal.

Representations

[37] Western subsumes its representations on this issue under those provided regarding the discretionary personal privacy exemption in section 49(b). According to the university, the context of the appeal is relevant to the determination of the presence of personal information in the records. The university submits that the records contain personal information about clinical faculty and residents. The "private, non-employment related information," the university argues, includes contact details, confidential correspondence sent to the university, personal views, and other information fitting within paragraphs (b), (d), (e), (f) and (g) of section 2(1) of the *Act*. Western notes that it did not contact or notify any individuals identified in the records,[22] and submits that these individuals should be notified if disclosure is to occur.

[38] The appellant argues that for information about the individuals identified by the university to qualify as their personal information, it must be about them in a personal capacity; to the extent that the records primarily relate to these individuals in their professional, employment or teaching capacities, it is not their personal information. Further, the appellant submits that these individuals were expressing opinions about the appellant based on working with her, teaching her and otherwise performing their official duties. The appellant argues that the opinions were expressed by the individuals as representatives of the organization they represent and the information therefore

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[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] Under section 28(1)(a) of the *Act,* Western was required to give notice, and an opportunity to respond, to individuals if it had intended to disclose personal information about them that would result in an unjustified invasion of personal privacy.

represents the university's views.[23]

[39] In reply, the university challenges the appellant's characterization of Orders P-270 and R-980015 regarding opinions offered by individuals in their professional capacity, stating that for such opinions to amount to "professional" information, the individual must be expressing the position of the organization as the voice for the organization. That is, Western argues, if the individual is expressing their own personal opinion, the voice is that of the individual personally. The university explains that:

> … if an employee stated that the student was suspended due to her conduct, then this would be [an] example of an individual giving voice to the institution. If, however, an employee stated that he was afraid that a student might harm him, this is an individual giving voice to his own concerns and should be considered that individual's personal information. Several portions of documents withheld from the appellant under section 49(b) were as a result of this distinction.

Analysis and findings

[40] As stated, in order to determine if section 49(b) applies, or if section 49(a) is engaged, as claimed by the university, I must first decide whether the records contain "personal information" and, if so, to whom it relates. Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including 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.

[41] Based on my review of the records, I find that they contain the personal information of the appellant and other individuals. Specifically, I find that the records contain personal information about the appellant that fits within paragraphs (b), (d) and (h) of the definition of personal information in section 2(1) of the *Act*. I also find that the records contain views or opinions expressed by other individuals about the appellant, which fits within paragraph (g) of the definition.

[42] I find that the records also contain the personal information of other identifiable individuals that fits within paragraphs (a), (b), (d), (e), (f), (g) and (h) of the definition in section 2(1) of the *Act*. This information includes family status, email addresses, phone and pager numbers, employment, views or opinions under paragraphs (e) and (g), confidential correspondence sent to the university and, finally, names, together with other information about these individuals. In reaching my conclusion about whether information falls under paragraph (e) or (g) in this appeal, I agree with the university's characterization of opinions or views expressed in the individual's "voice" versus the institution's "voice" (i.e., on behalf of the institution). The circumstances are

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[23] The appellant relies on Orders PO-3063, PO-2225, P-270 and R-980015.

relevant to my determination.[24] Accordingly, I reject the appellant's position that the views or opinions expressed by faculty members categorically cannot constitute their personal information. Both kinds of views – personal and professional - are expressed in these records and their exemption or disclosure will be considered under section 49(b). Nor is it a satisfactory solution for all of these records to simply redact the individuals' names and disclose the information given by them, as the appellant suggests, because the "speaking" individuals remain identifiable in this particular situation.

[43] As the appellant does not seek access to personal phone numbers, pager numbers, vacation details, faculty members' schedules unrelated to the appellant or personal email addresses, this information is removed from the scope of the appeal, and I will not be reviewing its possible exemption under section 49(b) in this order. For records 1-17, 1-241, 1-254, 50B-11 and 50B-24, this conclusion removes them from the scope of the appeal entirely, given the content of the severances, which consist only of information the appellant does not pursue.[25] Where other severances of this nature appear on pages reviewed under sections 49(a) or 49(b), below, these non-responsive passages are marked in yellow on any copies of the records that are provided to the university. This will confirm that the text need not be disclosed to the appellant.

[44] In sum, since the responsive records contain the personal information of the appellant, the advice or recommendations, solicitor-client privilege and personal privacy exemptions must be considered under sections 49(a) and 49(b), which are the relevant discretionary exemptions in Part III of the *Act.* I begin with section 49(b).

D. Would disclosure result in an unjustified invasion of personal privacy under section 49(b)?

[45] Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution, but this right of access is subject to a number of exceptions.

[46] One such exception is section 49(b) which gives Western discretion to deny access to information if its disclosure would constitute an unjustified invasion of another individual's personal privacy. Section 49(b) can only apply if the record contains the *personal* information of another identifiable individual with that of the appellant. Further, if the information falls within the scope of section 49(b), that does not end the matter because the university is still obliged to exercise its discretion in deciding whether to disclose the information by weighing the requester's right of access to the requester's own personal information against the other individual's right to protection of

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[24] See Order PO-3655-I for a recent discussion of this issue.

[25] For record 1-241, the content of the first email in the string relates to a general program matter, not to the appellant. The content of a second email withheld alternately under section 49(a), together with section 13(1), relates to the non-responsive matter raised in the previous email; I conclude that it is also non-responsive.

his or her privacy. Where a record does *not* contain the appellant's own personal information and only another individual's, section 21(1) prohibits the university from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies.

[47] Whether the relevant exemption is section 21(1) or section 49(b), sections 21(1) to (4) are considered in determining whether the unjustified invasion of personal privacy threshold is met. The exceptions in sections 21(1)(a) to (e) are relatively straightforward, but none of them apply in this appeal. Section 21(4) identifies information whose disclosure is not an unjustified invasion of personal privacy. Section 21(4) has no application in the circumstances of this appeal.

[48] When the exemption of records under section 49(b) is at issue, this office will consider and weigh the factors and presumptions in sections 21(2) and (3), balancing the interests of the parties in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.[26] As explained in Order MO-2954, section 49(b) is "… permissive in nature, which … reflects the intention of the legislature that careful balancing of the privacy rights versus the right to access one's own personal information is required in cases where a requester is seeking his own personal information."[27]

[49] In addition, where an appellant originally supplied the information, or is otherwise aware of it, the information may be found not exempt under section 49(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption.[28] This is referred to as the absurd result principle.

[50] Western claims that section 49(b) applies to records 1-24, 1-26, 1-32, 1-60 to 1-62, 1-67 & 1-68, 1-76, 1-79 to 1-80, 1-92, 1-111, 1-123,[29] 1-125 (1-126 cont.), 1-134, 1-137 & 138, 1-140 to 142, 1-144 to 1-146, 1-153, 1-157, 1-167 to 1-168, 1-175, 1-209,[30] 1-254, 1-275, 1-283, 1A-2, 1A-4, 1B-5, 1B-7 to 1B-9, 1B-18, 1B-20, 1C-25, 1C-31 to 33,[31] 1C-37, 5-2, 8-3, 11A-141, 11B-45, 11B-120, 11B-164, 11B-170, 50B-9 & 10,[32] 50B-41 (part) to 50B-52, 60E-115, 60E-116 and 60E-118.

[51] In denying access under this exemption, Western relies on the presumptions against disclosure in sections 21(3)(d) and (g) and the factors favouring privacy protection in sections 21(2)(e), (f), (h) and (i). These parts of section 21 state:

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[26] Order MO-2954.
[27] At paragraph 74 of Order MO-2954.
[28] Orders M-444, M-451, M-613, MO-1323, PO-2498 and PO-2622.
[29] Record 1-123 was missing from the mediator's report listing of records withheld under section 49(b), but the index identifies it as a relevant exemption.
[30] This email appears as part of record 5-2.
[31] This record group originally included 1C-34, but it is excluded from *FIPPA* by reason of section 65(6)3.
[32] This record group originally included 50B-11, but it is removed from scope due to non-responsiveness and the appellant's position on certain personal information.

> (2) 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,
>
> > (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
> >
> > (f) the personal information is highly sensitive;
> >
> > (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
> >
> > (i) the disclosure may unfairly damage the reputation of any person referred to in the record.
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > (d) relates to employment or educational history;
> >
> > (g) consists of personal recommendations or evaluations, character references or personnel evaluations;

Representations

[52] Western's representations set out a list of eight categories of information withheld under section 49(b). The first and second are no longer at issue because the appellant has removed them from the scope of the appeal.[33] The six other categories of information and summaries of the university's related non-confidential arguments are set out below, along with the appellant's responses and submissions on each category.

[53] Although both the university and the appellant intersperse their submissions on the personal privacy exemption in section 49(b) with arguments about the presence of personal information in these records, I have already determined this issue, and I will not address it further, except where it is necessary to adequately convey the party's position.

Employment or educational history of an individual

[54] Severed portions of the records in this category consist of performance evaluations or other issues related not to the appellant, but to other identified medical residents. According to the university, since these records contain the personal

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[33] (i) private, non-employment related information of clinical faculty, personal pager numbers and/or personal email addresses; and (ii) clinical faculty members' schedules on the condition that they do not related to the appellant (which I have confirmed to my satisfaction upon review.)

evaluations or educational history of these other identifiable individuals, their disclosure is presumed to constitute an unjustified invasion of personal privacy under sections 21(3)(g)[34] and 21(3)(d), respectively. Western also claims that the presumption against disclosure in section 21(3)(d) applies to the employment and educational history of an identified faculty member.

[55] In response, the appellant argues that since the evaluation of other medical residents is conducted in comparison with her own performance, the identity of the other resident(s) should simply be severed and the balance of the record disclosed. The appellant also argues that the information relating to the educational and employment histories of residents and faculty members ought to be disclosed with their names severed. The argument is that doing so accords with section 10(2) of the *Act,* which requires an institution to sever and disclose as much of a record as possible without disclosing information that is exempt. Replying to this submission, the university explains that there were instances where the personal information of other identifiable individuals – residents or faculty members - was so intertwined with that of the appellant that severance was simply not possible.

Complaints against faculty members

[56] Personal information about the named faculty members complained about by the appellant in 2007 and 2011 is contained in many of the records at issue, as is personal information about several other involved individuals. The university provided background information about the harassment and intimidation complaints, describing the investigations and "no further action" outcomes. The conduct and complaint-related information is contained in emails, notes and reports and for it, the university relies on the factors favouring non-disclosure in sections 21(2)(f), (h) and (i) of the *Act.* Disclosure would lead to significant personal distress to the individuals for the purpose of section 21(2)(f) because "the individuals subject to the [appellant's] complaints of misconduct are forced to respond in defense of their character, expressing their emotions and … their personal concerns." The factor in section 21(2)(h) applies because the communications of the individuals with the program director are implicitly confidential, given the nature of the investigation and the necessity of validating the complaints. Western also asserts that section 21(2)(i) favours withholding this information because the individuals complained about are "professionals whose reputations are very important to them, the hospital and the university."

[57] The appellant argues in response that since the university's investigations did not uphold the complaints and exonerated the faculty members, "there is no need to be concerned about their professional reputations if the contents of the interviews and notes are released." In reply, Western disputes this argument, noting that even untrue, disproved allegations may taint reputations and lead to unfair regard by others, which is

[34] Western relies on Orders PO-3298 and PO-3257.

why defamation laws were created to protect reputations sullied by such allegations.

[58] Relying on Order PO-3341, the appellant submits that Western must disclose any information in the records that "is not inextricably linked to the person against whom the complaint was made, but which amounts instead to "discrete information" about the appellant. This argument is repeated throughout the representations as a concern that opinions expressed by the individuals complained against or interviewed as part of those investigations, or the one into the appellant's conduct, were expressed in an "official capacity," which cannot be exempted under section 49(b). In reply, Western maintains that none of the withheld portions contain only the discrete personal information of the appellant because it was adjudged to be intertwined with that of the individuals complained about.

[59] The appellant disputes Western's assertion that there was an expectation of confidentiality regarding information provided by faculty members during the investigations: since the university would be evaluating it to determine the validity of the appellant's complaints, it was to be shared with her for reply and cannot be considered confidential. This assertion is expressly repudiated by Western in its reply representations: "the investigation was conducted like most personal misconduct cases, not in a public forum, but through a discrete investigation respecting the privacy of those involved." The university acknowledges that a fair and thorough investigation demands a certain amount of disclosure to the parties directly involved, but observes that it does not create any entitlement to access to all of the personal information communicated to the institution.

Investigation of the appellant's conduct

[60] Several withheld records, including emails and interview notes, relate to the university's investigation into whether the appellant's actions constituted unprofessional conduct. These records identify the participating individuals and reveal their views and opinions of the appellant's conduct and its effect on the residency program. Western maintains that as much of these records were disclosed as possible while still protecting the privacy interests of the other individuals. The individuals who assisted with the investigation did so with an expectation that the information they provided about themselves and other individuals would be kept private and the university has maintained that confidentiality. Western invokes the factor in section 21(2)(h) and, in a confidential portion of its representations, also raises section 21(2)(i).

[61] As to there not being a plausible expectation of confidentiality on the part of the individuals interviewed about her, the appellant argues that they "knew full well that their opinions would inform the investigation" that ultimately led to her removal from the program. In reply, Western points out that this collected personal information in the interview notes includes personal concerns, their views about themselves and the appellant's effect on other residents and views of other individuals. This point and counter-point are reiterated regarding the two next categories of information and their

associated records, all of which the university maintains were private in nature.

Private correspondence from, and confidential meetings with, residents

[62] Disclosure of withheld portions of minutes of the residency training committee, correspondence from residents and notes of meetings with those residents would reveal the residents' personal experiences and their views of the program. Although the residents are not specifically named in all of these records, the university maintains that they would nevertheless be identifiable, given the particular context and the information provided. For this information, Western relies upon the section 21(3)(d) presumption because the records "form a significant and integral part of the resident's education-related association with the university." Western also relies upon sections 21(2)(f) and (h) because it would be reasonable to expect that disclosure would cause significant personal distress to the residents who assisted the administration during its inquiry into serious issues related to the appellant and who expected a zone of privacy in freely discussing issues related to their own education. Since the information was supplied so that the administration could explore the possible impact of the appellant's conduct on the program and determine the veracity of the appellant's complaints, an expectation of confidentiality was thereby implicit in the sharing of information to pursue the inquiry. Western also reiterates that even though the medical residents' "dual status" as a learner (Western student) and employee (hospital) is complicated, it is clear that they were not acting in any official capacity as far as their relationship with the university is concerned.

Views about individuals other than the appellant

[63] For this type of information, Western reiterates that it is the personal information of the individuals about whom the views or opinions are being expressed. The individuals about whom these views are stated include residents and faculty members. Western maintains that the factors weighing against disclosure in sections 21(2)(f) and (h) apply to the withheld information because it consists largely of others' reactions to the situation and expressions of support for individuals complained about by the appellant.

Personal information of employees

[64] According to Western, this information was provided by the individuals to whom it relates spontaneously and in response to a "deeply emotional affair" where individuals were "victims of or witnessed relentless character attacks" by the appellant. In the context of the situation described by the university, the individuals involved in evaluating the appellant could reasonably expect to be complained about and this led to expressions by them of concern and emotion. The concerns expressed were not solicited, but rather were provided spontaneously, in unusual and heightened circumstances. The university submits, therefore, that disclosure would reveal the individuals' personal concerns related to their own employment or personal feelings and

reactions to the situation, more generally.[35] In this context, the information was supplied in confidence, by the individuals to whom it relates, to their colleagues and thus should attract the protection of the factor in section 21(2)(h).

[65] The personal experiences and feelings conveyed in the records also relate to situations in which individuals were present during, or responsible for, teaching moments with the appellant, or when they were on the receiving end of the appellant's comments and actions.[36] Western relies on the factor in section 21(2)(e), saying that disclosure of these reactions could be expected to expose the individuals to unfair pecuniary or other harm, given the appellant's propensity to be litigious, as evidenced by the appellant's legal action against the university and seven physicians in a personal capacity over matters related to her terminated residency. The university notes that the action against the seven individuals personally was dismissed by the court, but expresses concern that disclosure of this personal information could lead to further attempts to single out individuals and to use their personal information against them to "advance further unwarranted claims at the expense of these individuals."

[66] The appellant disputes this reason for withholding information, arguing that "there is nothing in the *Act* or in the public interest" that should be taken as a reason to shroud individuals and records in a cloak of secrecy to protect them from litigation. The appellant argues that the *Act* ought not to be used "to shield culpable parties from litigation" and, in any event, it is outside the IPC's jurisdiction and expertise to make any determination based on sympathy for assertions that disclosure could result in litigation. In reply representations, the university maintains that the appellant's conduct after her removal from the program does, in fact, support the application of the factor in section 21(2)(e), given the unfair exposure to meritless civil litigation and the associated stress and concern.

[67] Finally, the university submits that the appellant's scrutiny of these individuals' personal information not only has the potential to unfairly damage their reputations in the medical community, but could also impact their livelihood; that is, because the appellant widely distributed a letter critical of faculty members and the program, it is reasonable to expect that she might use any disclosed information to further disseminate her allegations. Western states that section 21(2)(i) applies to this personal information. On this last point, the appellant argues that the university's position that the faculty members' concerns related to their employment should be exempt is disingenuous since faculty members "wield much more power" than the appellant, as was made clear when she was removed from the program. The appellant reiterates that faculty were not "vulnerable victims in need of protection," but, rather, were performing their official duties in reviewing the conduct of the requester as a student.

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[35] Western relies on Orders P-564 and MO-2698.
[36] Western relies on Order PO-2894.

Analysis and findings

[68] Since the records contain the personal information of the appellant and other identifiable individuals, my review of section 49(b) is conducted in relation to the intertwined personal information of the appellant and these other individuals.

[69] The university identified several parts of section 21(3) and 21(2) that it considered relevant in the making of its access decision under the personal privacy exemption. I will begin with the two claimed sections that point to a presumed invasion of privacy.

[70] To begin, I find that there is personal information about other individuals in the records that fits within the presumption against disclosure in section 21(3)(d) for employment or educational history. My finding applies to portions of the records that detail such history and, in a few instances, such as select entries in the Resident Training Committee minutes, ongoing academic or training matters relating to individuals other than the appellant. Section 21(3)(d) applies to this information and it is exempt.[37]

[71] I am also persuaded by my review of the records that the presumption against disclosure in section 21(3)(g) applies to some of the withheld information, much of which is related or similar to the information subject to section 21(3)(d). Section 21(3)(g) protects information revealing assessments or evaluations about an individual. Such assessments must be made according to measureable standards.[38] In this context, the "measurable standard" would refer to performance and competence expectations for a medical resident in a particular post-graduate training year. These records contain information of this nature not only about the appellant, but about many other medical residents, both incidentally and in conjunction with the appellant's information. I find that section 21(3)(g) applies. However, I reject the appellant's submission that this type of information ought to be disclosed with names severed since the evaluation of other medical residents is conducted in comparison with her own performance. In fact, much of the content to which section 21(3)(g) applies is stand-alone evaluative commentary about other residents and is exempt on that basis.

[72] Since sections 21(3)(d) and (g) apply to certain types of personal information only, determining the possible exemption of the other kinds falls to a review of the factors in section 21(2). Western has argued that four of the factors favouring privacy protection are relevant in the circumstances of this appeal. I will deal with each of these in turn. Before doing so, I note that the appellant did not identify any of the factors favouring disclosure in sections 21(2)(a) to (d) as relevant, nor is there evidence to support a finding that they apply in the circumstances of this appeal. In that situation, the application of any of the factors argued by Western will weigh against the disclosure

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[37] Order PO-2711.
[38] Order P-447.

of the personal information of individuals other than the appellant. On the facts before me, I have decided that is it only necessary for me to review the factors in paragraph (f) and (h), because I conclude that they apply to the remaining personal information of individuals other than the appellant, thus rendering the information exempt.

[73] To establish the application of section 21(2)(f), I must be satisfied that disclosure of the particular information could reasonably be expected to cause significant personal distress to the individual to whom it relates.[39] The personal information that is at issue was provided in the context of the investigation into complaints made by the appellant against certain faculty members. As the university submitted, the records convey the emotions and concerns expressed by those faculty members, but also include the views or opinions of other individuals about those faculty members. Similarly, in the course of reviewing the appellant's own conduct, residents provided information about the program, about their experiences and about the appellant, which formed the basis of the administration's review. Given the context in which the records were prepared, I find that the factor in section 21(2)(f) applies to the personal information of individuals other than the appellant and attracts significant weight. Disclosure of the personal information of the faculty members and the residents that was provided by colleagues, witnesses and others as a consequence of the complaints against the two faculty members and in response to the university's appointed investigator's questioning about the appellant could reasonably be thought of as significantly distressing enough to attract the factor in section 21(2)(f).[40] Consequently, I find that section 21(2)(f) applies to the personal information provided by other individuals during the investigations. Notably, the factor does not, indeed could not, apply to the appellant's own personal information, where it is reasonably severed from the records. This is because its disclosure to her could not result in an unjustified invasion of another individual's privacy by reason of significant personal distress or otherwise.

[74] The factor at section 21(2)(h) applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. The factor requires an objective assessment of the reasonableness of any confidentiality expectation.[41] Western claims that this factor applies to the information provided by individuals (faculty and residents) in relation to the ccomplaints against faculty members and the review of the appellant's conduct, and that it should apply to the views or opinions about individuals other than the appellant.[42] Western argued that these communications were implicitly confidential and that it has maintained that confidentiality because the individuals who provided the information reasonably expected that the information they provided about themselves and other individuals

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[39] Orders PO-2518, PO-2617, MO-2344 and PO-2916.
[40] Order P-1014.
[41] Order PO-1670.
[42] Western also relied on this factor as weighing against disclosure of employees' personal information, but at least some of this type of information has been removed from the scope of the appeal.

would be kept private. In my consideration of section 21(2)(h), I agree with the university that although the parties directly involved in an investigation must be afforded with adequate disclosure about the process to support procedural fairness, this does not "create any entitlement to access to all of the personal information communicated to the institution."

[75] I accept that the context and circumstances of this matter are such that a reasonable person would expect that the information supplied by them to the investigators appointed by the university to conduct investigations into the appellant's complaints or into the appellant's conduct would be subject to a degree of confidentiality. As the submissions of Western and the appellant make clear, there is a tension between procedural fairness and confidentiality in the consideration of this factor's explanation. Past orders have acknowledged limits to the expectation of confidentiality in relation to information provided in the course of an investigation, generally drawing them around the appellant's personal information.[43] In Order P-1014, for example, the factor in section 21(2)(h) applied to "all personal information provided by the witnesses and the complainant which pertains to individuals other than the appellant." Similarly, in Order PO-2916, section 21(2)(h) applied only to the personal information of the affected parties, which was intermingled with the views and opinions expressed about the requester in that appeal. Following that approach in this appeal, I find that the factor favouring privacy protection in section 21(2)(h) applies to the personal information of the individuals – faculty, residents and others – who spoke to the university's investigators. Section 21(2)(h) weighs in favour of protecting the privacy of those individuals in respect of their personal information.

[76] Having concluded that section 21(2)(f) and 21(2)(h) both apply to the personal information of individuals other than the appellant, I find that its disclosure would constitute an unjustified invasion of their personal privacy. As such, section 49(b) applies to exempt their personal information from disclosure, subject to my consideration and finding on the university's exercise of discretion, below. The effect of this finding is that the appellant's personal information and information about the complaint against her will be disclosed to the extent that is reasonable to give effect to section 10(2) of the *Act;* that is, without also disclosing the inextricably intertwined personal information of these other individuals. My findings in this regard are demonstrated by the highlighting applied to the copies of the records sent to Western with this order.

E. Do the records contain advice or recommendations, such that section 49(a), together with section 13(1), applies?

[77] Under section 49(a), section 13(1) provides one of the exceptions to the general right of access individuals have to their own personal information under section 47(1) of

[43] See also Orders M-82 and PO-2967.

the *Act.* Relying on section 49(a), together with section 13(1), Western has withheld portions of records 1-53 to 1-56, 1-60 to 1-62, 1-76, 1-92, 1-106, 1-111, 1-123, 1-125 to 1-127, 1-139, 1-141, 1-145, 1-175, 1-202, 1-203, 1-206, 1-209, 1-268, 1-310, 1-311, 5-2, 50B-19 and 60E-116 to 118.

[78] Section 13(1) states:

> 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.

[79] 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 recommendations within the deliberative process of government decision-making and policy-making.[44]

[80] "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.

[81] "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 made. "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. [45]

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

[83] 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.[46]

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[44] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.
[45] See above at paras. 26 and 47.
[46] 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,

[84] The application of section 13(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. 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.[47]

[85] The reference in paragraph 47 of *John Doe v. Ontario (Finance)* to "considerations" does not mean that *any* factor that might inform a policy recommendation or decision is exempt under section 13(1). The reference to "the opinion of the author of the Record as to advantages and disadvantages" of various alternative options suggests that there is an evaluative component to "considerations."[48]

[86] Examples of the types of information that have been found *not* to qualify as advice or recommendations include factual or background information,[49] a supervisor's direction to staff on how to conduct an investigation,[50] and information prepared for public dissemination.[51]

[87] Sections 13(2) and (3) create a list of mandatory exceptions to the section 13(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 13.

Representations

[88] Much of Western's detailed representations on the application of section 13(1) to the records was withheld as confidential because it describes the very content of the records at issue. More generally, the university's submissions rely on the Supreme Court of Canada's dicta in *Finance*, particularly for the finding that "advice" may be no more than material that permits the drawing of inferences with respect to a suggested course of action, but which does not recommend a specific course of action.

[89] In the university's non-confidential representations, Western submits that the withheld information reflects the advice or recommendations made by various colleagues within, or associated with, the appellant's specific residency program. The exempt advice or recommendations exchanged between them in relation to the appellant include: how to educate and supervise her, how to respond to (and protect

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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.

[47] *John Doe v. Ontario (Finance)*, cited above, at para. 51.

[48] Order PO-3470-R at para. 43.

[49] Order PO-3315.

[50] Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.).

[51] Order PO-2677.

oneself against) the allegations of misconduct she raised, and how the residency program ought to change,[52] as highlighted by the situation. In the confidential portions of its representations, the university seeks to connect the content of the withheld portions with specific "advice or recommendations," as the term is used in section 13(1). Western submits that because the appellant alleged bias, unfairness, malice or intimidation against virtually any clinical faculty member who evaluated her negatively, the program director and supervising clinical faculty members needed to be able to rely upon confidential exchanges of advice with their colleagues.

[90] In response, the appellant disputes Western's reliance on section 13(1) based on the difference between the fact situation before the Supreme Court of Canada in *Finance* and the one here. The appellant states that *Finance* involved a tax lawyer seeking recommendations and advice about policy options to be adopted by the Crown and the retroactivity of tax legislation; whereas in this appeal, the advice or recommendations sought or given are not policy-related, but are instead about the decision to remove the appellant from an educational program. According to the appellant, the difference in circumstances renders section 13(1) "wholly inoperable" to this situation.

[91] Alternatively, the appellant argues that the exceptions in section 13(2)(a), (i), (j), (k) and (l) apply, thereby precluding the application of section 13(1). Specifically, records containing factual material under section 13(2)(a) or a final plan or proposal to change a program of an institution, whether or not subject to approval, for the purpose of section 13(2)(i) are not exempt. Further, the appellant argues that section 13(2)(j) applies because the report by an interdepartmental committee, task force or similar body established for the purpose of preparing a report on a particular topic means the committee dealing with the appellant's dismissal. Similarly, the appellant argues that section 13(2)(k) applies to the faculty tasked with undertaking inquiries and making recommendations to Western about the appellant's continuation in the program because this is a report of a committee, council or other body attached to an institution and which is established for the purpose of undertaking inquiries and making reports or recommendations to the institution. Finally, the appellant also submits that the exception in section 13(2)(l) applies to the report and working drafts on her dismissal from the program because these constitute reasons for a final decision, order or ruling of an officer of the institution made during or at the conclusion of an exercise of discretionary power conferred by or under an enactment or scheme administered by the institution, whether or not an appeal is allowed.

[92] In reply, Western states that the appellant has incorrectly interpreted *Finance* and has also made assertions regarding the exceptions in section 13(2) that are not supported by the facts. First, while acknowledging that the Supreme Court's decision in

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[52] Notably, information about the residency program was removed from scope because it is unrelated to the appellant in its more general form.

Finance was rendered in the context of documents related to policy options, the discussion of the exemption was not limited to analysis of policy options. This general discussion of the distinction between "recommendations" and "advice" resulted in the court declaring that information that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised qualifies as "recommendation," while "advice" has a broader meaning and comes in different forms, of which policy options is only one.

[93] Respecting the exceptions in section 13(2) argued by the appellant, Western maintains that none of them apply. To begin, the university submits that section 13(2)(a) cannot apply to factual information that is so intertwined with the advice or recommendations that it does not amount to a distinct body of fact, as is the case here. Western also submits that the appellant provides no factual support for the assertion that the exceptions in paragraphs (i), (j), (k) and (l) of section 13(2) apply, particularly since all of the records are emails.

Analysis and findings

[94] The rationale for what ended up being the exemption in section 13(1) of the *Act* was discussed in the Williams Commission Report in 1980, as follows:

> Although the precise formula for achieving a desirable level of access for deliberative materials has been a contentious issue in many jurisdictions in which freedom of information laws have been adopted or proposed, there is broad general agreement on two points. First, it is accepted that some exemption must be made for **documents or portions of documents containing advice or recommendations prepared for the purpose of participation in decision-making processes**. Second, there is a general agreement that **documents or parts of documents containing essentially factual material should be made available to the public.** If a freedom of information law is to have the effect of increasing the accountability of public institutions to the electorate, it is essential that the information underlying decisions taken as well as the information about the operation of government programs must be accessible to the public. We are in general agreement with both of these propositions [emphasis added].[53]

[95] The purpose of section 13(1) is to protect the deliberative process relating to the development of government policy *or* government decision-making. As the university correctly points out, although *Finance* was decided in the context of government policy-making, its principles are applicable to other fora in which decisions are made by individuals acting on the institution's behalf. Further, as stated, the exemption

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[53] Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy, 1980, vol. 2 (Toronto: Queen's Printer, 1980), page 288.

recognizes the importance of full, free and frank advice to the integrity of institutional decision-making.

Does section 13(1) apply?

[96] The main concern is with the internal deliberative process leading to the ultimate decision under scrutiny in this matter – the termination of her medical residency; however, there were other decisions made over the course of some years regarding the appellant's residency and the deliberative process relating to them is also reflected in these records. In this setting, the "decision maker" was a collective comprised of the clinical faculty who evaluated, and made decisions about, residents "by committee." The program director (a named physician) was also clearly responsible for aspects of this decision-making.

[97] The withheld information consists of portions of emails exchanged between clinical faculty members regarding the appellant. Based on my review, I am satisfied that the withheld portions of records 1-53 to 1-56, 1-127 (part), 1-141, 1-175, 1-209 (duplicated at record 5-2), 1-268, 1-310 to 1-311, 50B-19 (part), 60E-116 to 60E-118 contain advice or recommendations for the purpose of section 13(1). The withheld information includes recommended options or actions respecting the evaluation of the appellant's residency or her appeals of decisions made in that regard. It also includes advice as to "how to view a matter" and the limits on the committee's decision-making in the larger context.[54] Disclosure of the withheld portions of records authored by the participating clinical faculty would not only reveal the deliberative process within the committee, but would also permit inferences to be made about the actual recommendations given as the matters evolved. Past orders have held that even emerging advice or recommendations may be protected if its disclosure would reflect the internal evolution of the positions of these clinical faculty members.[55] On my review of the records, I am satisfied that even where recommendations are not expressly stated, the input and opinion reflected fits within the definition of "advice" given to the word by the Supreme Court of Canada in *Finance* because it contains a consideration or analysis of options available for moving forward. Disclosure of the withheld information could reveal the "changes of mind, the solicitation and rejection of advice, and the re-evaluation of priorities and the re-weighing of the relative importance of the relevant factors as [the] problem [was] studied more closely."[56] On this basis, I find that the records identified above fit within section 13(1) and are, therefore, exempt under section 49(a), subject to my review of Western's exercise of discretion.

[98] On the other hand, I find that some of the information for which Western claims section 13(1) does not fit within the scope of the exemption. Neither the university's

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[54] Order PO-3578.
[55] See Order PO-3315.
[56] Evans J.A. in *Canadian Council of Christian Charities v. Canada (Minister of Finance)* 1999 CanLII 8293 (FC), [1999] 4 F.C. 245, at paragraphs 30-31; adopted by Rothstein J. in *Finance*.

representations nor the content of the records persuade me that certain withheld information qualifies as advice or recommendations. To paraphrase the Supreme Court in *Finance*, these particular records do not set forth considerations to take into account by the decision maker in making the decision; nor does the information consist of the opinion of the author of the record as to advantages and disadvantages of alternatives.[57] In other words, it does not contain the requisite degree of evaluation to qualify for this exemption. Rather, I conclude that the withheld portions of records 1-61, 1-76, 1-92, 1-106, 1-111, 1-123, 1-125 to 1-126, 1-139, 1-145, 1-202, 1-203, 1-206 and 50B-19 (part) are more aptly characterized as direction, observation or mere statement relating to one aspect or another of the appellant's ongoing residency matters. As such, I find that section 13(1) does not apply to these records and that they are not exempt under section 49(a).

Do any of the exceptions in section 13(2) apply?

[99] Information that qualifies for exemption under section 13(1) may be ordered disclosed if it fits within one of the exceptions in section 13(2). Given that the appellant argues the application of five of these exceptions, I must review their possible application to the exempt portions of records 1-53 to 1-56, 1-127 (part), 1-141, 1-175, 1-209 (duplicated at record 5-2), 1-268, 1-310 to 1-311, 50B-19 (part), 60E-116 to 60E-118.

[100] The exceptions in subsection (2) can be divided into two categories: objective information, and specific types of records that could contain advice or recommendations. The first four paragraphs in section 13(2), paragraphs (a) to (d), are examples of objective information. They do not contain a public servant's opinion pertaining to a decision that is to be made but rather provide information on matters that are largely factual in nature. The types of records specified in the remaining exceptions in subsection (2) will not always contain advice or recommendations but when they do, they are not protected from disclosure.

[101] To begin, I agree with Western's submission that there is no factual basis to support the application of the four exceptions in sections 13(2)(i), (j), (k) or (l). As I stated above, the exceptions in this part of section 13(2) are intended to apply to specific record types. In the case of paragraphs (i), (j), (k) and (l), the qualifying records are a final plan or proposal, a report, or the reasons for a final decision. Since the withheld email content does not meet the requirements of these exceptions, I find that none of them apply.

[102] As for the application of section 13(2)(a) argued by the appellant, it is well established that factual material does not refer to occasional assertions of fact in a record, but to a coherent body of facts separate and distinct from the advice and

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[57] *Finance, supra,* at paragraph 47.

recommendations the record contains.[58] Where the factual information is inextricably intertwined with the advice or recommendations, section 13(2)(a) will not apply.[59] In these email records, the factual information that is withheld in some of them is interwoven with the advice itself and it cannot be severed from the actual advice. I find that the exception in section 13(2)(a) does not apply.

[103] Some of the same records reviewed in this section were also subject to a claim for exemption under section 49(b), and I found some portions to be exempt on that basis. Additionally, although I have found that record 1-76 does not qualify for exemption under section 49(a) with section 13(1), it is duplicated at record 80-260 and is, therefore, also subject to the university's claim for exemption under section 49(a), together with section 19. Where none of these exemptions applies, I will be ordering this information disclosed to the appellant.

F. Do the records contain solicitor-client privileged information that is exempt under section 49(a), together with section 19?

[104] Western claims that branches 1 and 2 of section 19 of the *Act* apply to records 1-316 to 1-359, 1B-61 to 1B-66, 20-2 & 20-3, 50B-14 to 50B-18, 50B-41 (part), 50B-53 to 50B-68, 60C-36 to 60C-62, 60D-8 & 60D-9, 60E-138 to 60E-142, 60E-153 to 60E-155, 80-1 to 80-708 and 90-103.

[105] The relevant parts of the discretionary exemption are sections 19(a) and (c), which state as follows:

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

[106] 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. Since the university relies on both branches, it bears the burden of establishing that one or both of the branches apply.

[107] Branch 1 arises from the common law and section 19(a), and it encompasses two heads of privilege derived from the common law: (i) solicitor-client communication

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[58] Order 24, where examples of a "coherent body of facts" include an appendix or a schedule to a policy document.
[59] Order PO-2097.

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

[108] 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.[60] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[61]

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

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.[62]

[110] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[63] 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.[64]

[111] Under branch 1, the actions by, or on behalf of, a party may constitute waiver of common law solicitor-client privilege. Waiver of privilege is ordinarily established where it is shown that the holder of the privilege knows of the existence of the privilege, and voluntarily evinces an intention to waive the privilege.[65] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[66] Waiver has been found to apply where, for example: the record is disclosed to another outside party; the communication is made to an opposing party in litigation; and the document records a communication made in open court.[67]

[112] 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."

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[60] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[61] Orders PO-2441, MO-2166 and MO-1925.
[62] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[63] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[64] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.) [*Chrusz*].
[65] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).
[66] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; see also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.).
[67] Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.); Orders MO-1514 and MO-2396-F; and Orders P-1551 and MO-2006-F.

The statutory exemption and common law privileges, although not identical, exist for similar reasons. This privilege 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.[68] The statutory litigation privilege in section 19 protects records prepared for use in the mediation or settlement of litigation.[69] In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 19.[70]

Representations

[113] In support of its section 19 exemption claim, Western provided representations and a separate affidavit from in-house legal counsel for the university. Western explains that this individual was consulted about the various matters relating to the appellant's residency beginning in December 2007 and that this individual later secured the services of external legal counsel to assist with matters relating to the appellant's dismissal from the program. According to Western, consultation with legal counsel that created the continuum of communications took place with regard to the appellant's failed rotations in 2008, her July 2010 appeal to the university's Senate Review Board – Academic (SRBA) and other issues around conduct, suspension and dismissal.

[114] The records consist of emails, notes, correspondence and other documents, and are grouped into the following five categories by Western:[71]

1. Notes and other communications between or among counsel for the university or university staff for the purpose of seeking, or giving, legal advice *prior to* July 2010.

2. Emails and other communications between or among counsel for the university, university employees, physicians with university academic appointments (clinical faculty) and their administrative staff for the purpose of seeking, or giving, legal advice *after* July 2010.

3. Emails or other communications including draft documents prepared by university employees and/or clinical faculty and their administrative staff regarding which legal advice is sought from legal counsel.

4. Emails or other communications that form part of the continuum of communications and that were exchanged for the purpose of keeping university

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[68] See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.) (*Big Canoe (2006)*); *Ontario (Ministry of Correctional Service) v. Goodis*, cited above.

[69] *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.

[70] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, cited above.

[71] Western's representations list the records fitting within each of these groups and the appellant was provided with this information during the inquiry, but these references are not given here.

legal counsel and clinical faculty (and their staff) informed so that advice could be sought or given as required. Western relies on *Balabel, supra.*

5. Working papers prepared or used by legal counsel for the university in relation to the SRBA appeal. Western relies on *Susan Hosiery Ltd., supra.*

[115] Western acknowledges that facts may not themselves be privileged, but submits that communications made to gather facts for legal counsel and the communication of those facts to legal counsel are privileged because doing so is a necessary part of the formulation and provision of legal advice. Western's legal counsel speaks to the additional element of confidentiality surrounding these communications in his affidavit. Western maintains that all of the records, including email chains and attachments and other documents forwarded to legal counsel for his advice on them are subject to this "class based privilege." Further,

> Where a record is subject to solicitor-client privilege, it may not be severed under the *Act.* In *Ontario (Ministry of Finance) v. Ontario (Assistant Information and Privacy Commissioner),*[72] the Ontario Divisional Court accepted that the exemption protecting solicitor-client privilege is "class-based." In other words, the entire communication between a solicitor and client that is privileged is exempt, not merely the portion that involves the advice itself unless the record contains communications for other purposes which are clearly unrelated to legal advice.

[116] Western identifies several exceptions where records, such as emails and handwritten notes,[73] represent communications *not* sent to or from counsel and explains why they are still subject to privilege because they contain legal advice.

[117] In support of the application of section 19 to the fifth category of records described, above, Western also provided an affidavit from its legal counsel, who describes the five possible levels of academic appeal at the university,[74] ending with the right to appeal to the SRBA. Western's legal counsel explains that since judicial review of internal university appeal proceedings is not uncommon, his practice is to approach all internal proceedings as though they may be subject to such a review. He confirms that his involvement with the various matters involving the appellant commenced in 2007 when he was asked to provide advice to the Associate Dean of Post Graduate Medical Education. Counsel describes how he was consulted for legal advice by the Appeals Committee, the Residency Training Committee, other Deans of Post Graduate Medical Education and was asked to represent the medical school in the SRBA appeal. In representing the medical school, the affiant states that he was provided with

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[72] (1997), 102 O.A.C. 71, 46 Admin. L.R. (2d) 115.
[73] Records 20-2 to 20-3, 80-398 and 80-706-708. This submission also applies to 90-103.
[74] Appeals are to be directed to (in sequence): supervisor, Residency Training Committee, the medical school's Appeals Committee, the medical school's Dean and then, finally, the SRBA.

documents relating to the appellant's earlier appeals and complaints. He indicates that he was "continually kept informed by the staff and faculty of the medical school of any developments … so that the medical school could seek and receive advice from me as required." Legal counsel explains that after the appellant's legal counsel contacted him in the spring of 2011, he retained external legal counsel to act on behalf of the medical school regarding its decision about the appellant. Finally, counsel describes the contents of his file in an attached index and attests that the medical school has never waived privilege over any of the records.

[118] According to Western, litigation privilege also applies to all of the same records, with several explained exceptions,[75] because litigation was reasonably contemplated from the point in time of the appellant's SRBA appeal. Western provides and expands upon four grounds for this claim and I have considered these submissions. However, in view of my finding on this issue, I do not set these arguments out here. For the same reason, the appellant's representations on litigation privilege are also not outlined.

[119] Western maintains that no actions have been taken that could be construed as waiver of its privilege in these records. The records have never been disclosed to outsiders and no voluntary intention to waive privilege has been evinced.

[120] The appellant concedes that under the common law, solicitor-client privilege attaches to private communications sent directly between an institution and its legal counsel for the purpose of giving or obtaining legal advice. However, the appellant argues that any such communications that have been disseminated, or copied, to outside or third parties are not protected by the cloak of privilege because this constitutes waiver. The appellant also submits that no privilege attaches to correspondence between faculty members or administrative staff in which legal counsel is not included. Further, the appellant argues that only the legal advice contained in emails exchanged between individuals internally at the institution is privileged, not the entire record; therefore, the balance of each record must be disclosed because section 19 does not protect it in its entirety if the legal advice is severable. Picking up on the theme that not all of these records reflect communications between counsel and client, the appellant argues that the university is trying to "improperly" assert that a large series of records comprises a continuum of communications when this type of privilege only applies to exchanges between counsel and his or her client for the purpose of keeping each other apprised.

[121] The appellant also states that contrary to Western's assertion, not all emails with attachments that were sent to counsel become protected by privilege on a class basis.

> This is not a correct interpretation of the case cited[76] and would lead to ludicrous results. If merely emailing a document to counsel could attract

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[75] 60E-142 and 80-18 to 19.
[76] *Ontario (Ministry of Finance) v. Ontario (Assistant Information and Privacy Commissioner),* cited above.

> privilege over the document, despite the fact that it came into existence independent of counsel and was not a document created for the purpose of giving or receiving legal advice, copying counsel on emails could effectively render every document subject to privilege.

[122] The appellant argues that external counsel for the university also waived privilege – both solicitor-client and litigation – over the records by including them as evidence in the SRBA hearing. Relying on *Guelph (City) v. Super Blue Box Recycling Corp.*,[77] (*Super Blue Box*) the appellant maintains that once privilege has been waived, that waiver applies to the entire subject matter of the communication.

[123] In reply,[78] Western submits that the appellant has applied limitations to the scope of solicitor-client privilege, has discounted litigation privilege and also made claims of waiver that are simply not supported by the facts. The university then gives reasons to refute each of the appellant's submissions on the exemption, starting with the rebuttal that solicitor-client privilege protects communications, not only advice: legal advice may be embedded in a communication, but the *communication itself* is protected. Western relies upon *Pritchard.*[79]

[124] Western relies upon *Balabel*, cited above, and provides a lengthy excerpt[80] intended to illustrate that the phrase "communications aimed at keeping solicitor and client informed" is only an example of communications included in the continuum. The term "continuum" must be broadly construed and envelops not only all communications that seek and convey legal advice, but also "all communications that are reasonably supportive of the solicitor-client relationship."

[125] Solicitor-client privilege protects "entire communications," including the attachments to privileged emails in this appeal, contrary to the appellant's argument. Relying on *Ministry of Finance (1997)* and *Blank*,[81] Western submits that if a document is attached to an email by a client so that a lawyer can review it to provide legal advice, the attachment is "privileged *as part of the whole communication.*" Additionally, Western states that unless a fact or document exists independently from the solicitor-client relationship, the fact or document is privileged *in all regards* as part of the continuum and cannot be accessed, subject only to waiver. In this matter, privilege applies to draft documents that would not exist independent of the solicitor-client

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[77] 2004 CanLII 34954 (ON SC).
[78] Concurrent with its reply, Western also provided a copy of its supplementary decision letter to the appellant, which disclosed 31 newly identified records nearly in their entirety, while withholding a portion of one under section 19. This new record, 90-103, was noted to fall into the same category as records 20-2 to 20-3.
[79] *Pritchard v. Ontario (Human Rights Commissioner),* [2004] 1 SCR 809 at para 15.
[80] *Balabel*, *supra*, at page 254.
[81] *Canada v. Blank*, 2007 FCA 87 at para 22.

relationship.[82]

[126] Summaries of solicitor-client communications that are prepared by non-lawyers must be redacted with a view to their strict protection, recognizing that any un-redacted text "should reveal *nothing at all* about the protected communication, even if what is revealed may seem non-sensitive." As an example, Western refers to record 20-2 to 20-3 which is exchanged between non-lawyer university staff but contains a summary of legal advice provided. What remains in such records, say the university, is often "disconnected snippets" or "meaningless information" that need not be disclosed.

[127] In closing, Western refutes the appellant's suggestion that there has been waiver of privilege through the records included in the university's SRBA filings. Western argues that confidentiality has been maintained and provided its SRBA submissions "to show that none of the documents filed with the SRBA correspond with the university's section 19 claims" in this appeal.

Analysis and findings

[128] Based on my consideration of the evidence provided, particularly Western's detailed description and categorization of the records, I uphold the university's decision under section 49(a), together with section 19, of the *Act.* I find that the records are exempt on the basis of the common law solicitor-client privilege exemption in Branch 1 of section 19.

[129] With consideration of the circumstances surrounding the creation of the records and Western's submissions, I accept that a solicitor-client relationship existed between Western's in-house legal counsel (and, eventually, its external counsel) and the members of Western's clinical faculty and administration who were involved in the appellant's medical residency matters.[83] I am also satisfied that the withheld records contain written communications of a confidential nature between a client and a legal advisor, or their agents or employees, and reflect the seeking, formulating or giving legal advice.[84]

[130] The appellant argues that the university's claim of a continuum of communications in this "large series of records" is not justified and expresses concern that the act of "copying counsel on emails could effectively render every document subject to privilege." While that may be true, there is no evidence of this type of "mere copying" of legal counsel for the purpose of shielding records from access by pulling the veil of privilege over them. Further, the privilege covers not only the document

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[82] Examples given are records 80-1 to 80-23, 80-165 to 80-192 and 80-400 to 80-403.
[83] In the related appeal with St. Joseph's Health Care (London) resulting in Order PO-3689, I concluded that the same solicitor advised clients who were senior medical staff and administrative personnel with the hospital, but were also clinical faculty with Western's post graduate medical education department.
[84] *Descôteaux, supra.*

containing the legal advice, or the request for advice, but also information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.[85] In Order PO-3689, which addressed the appellant's related appeal with St. Joseph's Health Care (London Health Sciences), I set out the relevant principles as follows:

> *Descôteaux v. Mierzwinski* described the privilege as follows:[86]
>
> > ... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship ...
>
> As for the concept of "a continuum of communications" between a solicitor and client, *Balabel v. Air India*[87] established that:
>
> > ... the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. … [L]egal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.[88]
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> Although decided at a time when communications between solicitor and client were typically limited to formal written correspondence, the principles outlined in *Balabel* have equal application to email communications.

[131] These principles and commentary are applicable in the circumstances of this

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[85] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[86] *Supra,* at 618.
[87] *Supra*
[88] *Balabel v. Air India, supra*; Orders PO-1994 and PO-3328.

appeal. I have applied them to my consideration of the records created as a result of the appellant's medical residence matters, which reflect the unique, shared decision-making environment applicable to medical residency.

[132] I agree with Western that the attachment of emails, correspondence or other documents by the client to their communications with the solicitor does not serve to disrupt the continuum. This is so where is it clear, as it is in this case, that the documents were included for the express purpose of seeking legal advice or input on them. Still other attachments were obviously intended to keep the solicitor up to date or to convey necessary context to him to facilitate the formulation of his legal advice as events transpired in what was evidently an evolving and challenging situation for everyone.

[133] I am similarly satisfied, and so find, that privilege applies to summaries of the legal advice sought or received that are prepared by non-lawyers, even when the communications do not include legal counsel as a sender or recipient. Accordingly, emails such as records 20-2 to 20-3 and 90-103 are solicitor-client communication privileged.

[134] I accept, based on Western's representations and the affidavit evidence provided by its solicitor, that the records withheld in their entirety as series 80 belong to, and were kept, by this lawyer, who was employed by Western. Based on the evidence before me, I am satisfied that the records fit within Branch 1 of section 19 because they reflect direct communications of a confidential nature exchanged in the course of giving and receiving legal advice or that they can be characterized as part of a continuum of communications between the lawyer and his clinical faculty and university administration clients, as was necessary in order to permit advice to be sought and received. My finding that solicitor-client communication privilege applies to the withheld records extends to communications in which the university's legal counsel is providing advice to the human resources staff with regard to "what should prudently and sensibly be done" in the relevant legal context; for example, records 80-51 to 80-57. Also included in this set of records that comprise the solicitor's file are working papers prepared or used by legal counsel for the university in relation to the SRBA appeal and which reflect the seeking, formulating or giving legal advice.[89]

[135] The appellant argues, partly based on *Super Blue Box,* cited above, that privilege has been waived and says that once waiver occurs, it applies to the entire subject matter of the communication. I disagree. In any event, waiver is determined as a matter of fact and I accept that there is no evidence to support that assertion here. In *Super Blue Box*, the court had to determine whether the City of Guelph had waived the privilege in its in-house solicitors' files on the basis of four different grounds – the one relevant here being by disclosing parts of privileged documents and purporting to

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[89] *Susan Hosiery, supra*.

redact the privileged portions. From my review of it, however, there was no such pattern of disclosure in this situation. Nearly without exception, Western withheld records as privileged, in their entirety. The two exceptions are records 50B-41 and 90-103. I concluded previously that the lower withheld portion of record 50B-41 was exempt under section 49(b), while record 90-103 was severed and disclosed in part. On my review of them, the portions of both records which were withheld under section 19 contain summaries of legal advice provided by Western's solicitor written by non-lawyer university staff. In my view, these minor exceptions do not provide persuasive evidence of an intention on the part of the university to waive privilege over these two particular records in their entirety or the entire subject matter of the communication. *Super Blue Box* does not assist the appellant in establishing such a broad proposition in this appeal in relation to those two records, to the larger swath of records withheld in full, or more generally.[90] Rather, I accept that the university's submitted evidence of its SRBA submissions demonstrates that its disclosure of documents through that process did not correspond with those that are at issue under section 19 in this appeal. Since I am satisfied that Western did not waive the privilege attached to the records at issue in this appeal, I find that the privilege remains intact.

[136] In conclusion, I find that the records withheld by Western on this basis are subject to solicitor-client communication privilege. Accordingly, section 49(a) of the *Act* applies, together with section 19(a), to the withheld information, subject to my review of Western's exercise of discretion, below.

G. Should the university's exercise of discretion be upheld?

[137] After deciding that a record or part thereof falls within the scope of a discretionary exemption, an institution is obliged to consider whether it would be appropriate to release the record, regardless of the fact that it qualifies for exemption. The exemptions in section 49(a) and 49(b) are discretionary, which means that Western could choose to disclose information, despite the fact that it may be withheld under the *Act*.

[138] In applying the exemption, Western was required to exercise its discretion. On appeal, the Commissioner may determine whether Western failed to do so. In addition, the Commissioner may find that the university erred in exercising its discretion where it did so in bad faith or for an improper purpose; where it took into account irrelevant considerations; or where it failed to take into account relevant considerations. In either case, I may send the matter back to the university for an exercise of discretion based

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[90] This part of *Super Blue Box* addresses discovery perils in the modern civil litigation context, given that the principles relating to waiver were developed long before current pre-trial disclosure obligations were developed. Justice Corbett states: "… With such arduous disclosure requirements has come a difficult task of ensuring that, while discharging the positive obligations to disclose, a party does not inadvertently reveal some aspect of legal advice it has received, thus opening the door to a demand for disclosure of a broad range of privileged communications."

on proper considerations.[91] According to section 54(2) of the *Act*, however, I may not substitute my own discretion for that of the university.

[139] As I have upheld Western's decision to apply section 49(a), together with sections 13(1), in part, and 19, in full, as well as partly upholding the decision under section 49(b), I must review its exercise of discretion under those exemptions.

[140] According to the university, it took only relevant considerations into account in deciding to withheld information under sections 49(a) and 49(b). Western's starting point is that the proper functioning of the university is dependent on the full, free and frank exchange of advice and recommendations to, and between, senior administration or colleagues, particularly on difficult matters, and without fear of its disclosure. Western maintains that the appellant has neither a sympathetic need nor is there a compelling interest that would warrant disclosure of the information withheld under section 13(1). Respecting section 19, the university submits that the importance of protecting the sanctity of the solicitor-client relationship is demonstrated in this situation, given the need for staff to seek legal advice in difficult circumstances and the fact that the appellant has taken legal action again the university. Western submits that it properly exercised its discretion to withhold certain records on this basis.

[141] Regarding section 49(b), the university maintains that it considered the appellant's right of access to her own personal information and weighed that right with the entitlement of other individuals to the protection of their personal privacy. The university explains that while there should be no expectation that information such as professional assessments and opinions would be withheld, it was thought to be critical that faculty, staff and students have confidence that their personal information would be protected. Western submits that personal reactions and private concerns should be protected, as should be confidential communications solicited during the course of the investigations conducted.

[142] Although the appellant does not deal with the issue of the exercise of discretion by the university under a separate heading, the representations nevertheless address that subject. The appellant expresses disagreement with the approach taken by the university in withholding information under the discretionary exemptions. This disagreement is implied in the repeated assertion that the university did not meet its severance obligations under section 10(2). It is also conveyed through the submissions on sections 13(1) and 19, which suggest that Western's exercise of discretion under the exemptions for advice or recommendations and solicitor-client privilege was improper, or improperly broad. Further, the appellant submits under section 49(b) that the university considered an irrelevant factor in choosing to withhold information on the basis that it could result in legal action against an individual. The intimation is that this is an irrelevant factor because any litigation that may be initiated could be expected to

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[91] Order MO-1573.

clear the individuals or the university as representative of any wrongdoing, if the litigation was without foundation.

Analysis and findings

[143] I have considered Western's representations on the exercise of its discretion in relying on sections 49(a), together with sections 13(1) and 19, and section 49(b) to not disclose the records. In light of these submissions, I am satisfied that the evidence points to a proper exercise of discretion by Western under sections 49(a) and 49(b) with respect to disclosure of information to the appellant.

[144] In particular, I am satisfied that Western exercised its discretion under sections 49(a) and 49(b) by considering relevant, not irrelevant, factors. In particular, I am satisfied that Western properly considered the purpose of the section 13(1) exemption in deciding to withhold only the portions of the records that it did. I note also that Western considered the important role of solicitor-client privilege in our legal system. I have also considered that Western severed and disclosed certain portions of records under section 49(b) with an apparent attention to the appellant's interest in receiving those portions. In its totality and individually, I conclude that there is sufficient evidence of a good faith exercise of discretion under the *Act.*

[145] Accordingly, I find that Western exercised its discretion properly in the circumstances, and I will not interfere with it on appeal.

H. Did the university conduct a reasonable search for records within its custody or under its control?

[146] The appellant believes that numerous additional records, particularly emails sent to or from other medical residents about her, ought to exist and have not been located. As already stated, this raises the related issue of the custody or control of residents' email accounts, which the university did not search.

[147] In appeals that involve a claim that additional responsive records exist, the issue to be decided is whether the institution has conducted a reasonable search for the records as required by section 24 of the *Act*. To be considered responsive, a record must be "reasonably related" to the request.[92] 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.[93]

[148] Although an appellant will rarely be in a position to indicate precisely which records the institution has not identified, he still must provide a reasonable basis for

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[92] Order PO-2554.
[93] Orders M-909, PO-2469 and PO-2592.

concluding that such records exist.[94]

[149] If I am satisfied that the search carried out by the university was reasonable in the circumstances, I will uphold it. However, I may order further searches if I am not satisfied by the university's evidence that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[95] The university cannot be ordered to search records that are not in its custody or control, since the right of access in section 10(1) of the *Act* only applies to records that are in the custody or under the control of an institution. A record will be subject to the *Act* if it is in the custody or under the control of an institution; it need not be both.[96] A finding that a record is in the custody or under the control of an institution does not necessarily mean that a requester will be provided access to it, since exceptions to the right of access may still apply.[97]

[150] At a certain point in the inquiry, it became clear that the appellant was challenging the university's decision not to search medical residents' records on the basis that those records were not in its custody or control. Given the interrelatedness of the issues of reasonable search and custody or control, I sought supplementary representations from the parties. As in Order PO-3689, which addresses this matter as between the appellant and St. Joseph's Health Care, London, the issues of reasonable search and custody or control will be addressed together here.

Representations

[151] Western describes the approach to conducting searches for records responsive to the request as being based on consulting relevant individuals in the Post Graduate Medical Education Office, the Office of the Associate Deans and the Office of the Dean of the Medical School. The university provided affidavit evidence from the Associate University Secretary, who shared responsibility for the processing of the access request with the former freedom of information coordinator and the administrative officer for the department where the appellant had been enrolled. Western explains that the type and extent of searches conducted by individuals varied depending on the interaction they had had with the appellant, their responsibilities, and the way in which they maintained their records.[98] Western submits that although the appellant identified "all

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[94] Order MO-2246.
[95] Order MO-2185.
[96] Order P-239, *Ministry of the Attorney General* v. *Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).
[97] Order PO-2836. A record within an institution's custody or control may be excluded from the application of the Act under one of the provisions in section 65, or may be subject to a mandatory or discretionary exemption (found at sections 12 through 22 and section 49).
[98] The initial search directions stated, in part: "Remember to search paper documents (including printed email), electronic documents, and the Inbox, Sent box, Trash, and any local email folders that you or your assistant(s) may have. … Please note that this request encompasses records that are in the custody or control of Western. This means that you will have to search your @schulich.uwo.ca email account,

staff … in the Schulich School of Medicine & Dentistry" in her request, searches were limited to staff in the offices listed in the request and in the department where she has been enrolled as a postgraduate student because that is where responsive records could reasonably have been expected to be located. The university also notes that several of the appellant's requested name variations were not included in the search terms because this was determined to be unnecessary to capture the responsive records. However, Western maintains that it "directed all staff affected by the request to search for all records related to the requester, regardless of whether the requester was specifically named in the records and whether or not other individuals are also identified in the records." This, Western submits, amounts to "a full search of the requested records."

[152] Western's affiant submits that she and the department's administrative officer worked together to ensure that all clinical faculty members and staff responded to the request; 53 individuals in the department searched their files for records relating to the appellant. Of these individuals, 24 responded that they had no records related to the appellant, while the remaining 29 individuals submitted records, whether or not they were responsive to the request. The affiant then reviewed all of these records to determine responsiveness and duplication. During this review, some records were transferred to St. Joseph's Health Care London under section 25(2) of the *Act,* because the hospital had a greater interest in them as the appellant's employer than the university respecting its academic mission. Even after the removal of records for reasons of non-responsiveness, duplication and transfer, there were over 2000 pages of responsive records.

[153] Western also describes its response to a follow up request made through this office's mediator to contact an individual whose appointment in the relevant department ended four months before the appellant's access request was received. This individual conducted a search for responsive records, but identified only one record and it was not responsive because it had been sent to this individual by the appellant.

[154] Regarding the part of the appellant's request for "records held by all residents enrolled in the Schulich School of Medicine and Dentistry," Western states that these records were not searched. According to the university, "residents are postgraduate students … and, based on our understanding of the *Act*, it was determined that students' personal records are not in the custody or control of the University." The university maintains that "seizure of such documents by the University and the delivery of them to the requester would be antithetical to the privacy rights of the residents as noted by the court in *City of Ottawa v. Ontario (Information and Privacy Commissioner)*."[99]

@uwo.ca email account, and/or lhsc.on.ca account, depending on how you manage your Western-related records."

[99] 2010 ONSC 6835.

[155] In her initial submissions raising the issue, the appellant asserts that the university unilaterally deviated from the requested search parameters and excluded certain search terms and records sources, even after having sought further information and clarification from her. Only when reviewing Western's representations did it become clear that this had occurred. The appellant explains why the searches conducted by Western were not reasonable:

1. the failure to use search terms that include the appellant's initials, since individuals are often referred to by their initials in the medical community. The appellant notes that she had provided Western with a sample record where she was referred to only by her initials and submits that a search conducted without this variation would not have captured this particular record, or others like it.

2. the refusal to search the emails of medical residents. Medical residents have both university and hospital email accounts and the emails sent or received on these accounts would be on Western's servers and, therefore, are in its possession and control.

3. the failure to search the records of certain individuals:

    a. two individuals who were involved in one of the appellant's academic appeals, as well as the individual who heard the appeal;

    b. their administrative assistants; and

    c. an individual consulted by the appellant for assistance with learning.

[156] The appellant also argues that Western cannot claim that it is no longer able to conduct searches of records due to the passage of time, given its claim that litigation was contemplated as far back as 2007. According to the appellant, Western's legal counsel would be aware that any "destruction of records in the face of litigation constitutes spoliation and is a serious matter," so a fresh search using the proper parameters should be possible.

[157] Western responds by refuting the suggestion that it agreed to the search terms requested by the appellant and set out in her submissions. The university offers a lengthy explanation, with examples, of why the appellant's initials were not required as search terms. Western states that it was "left to each experienced staff and faculty member familiar with the appellant to determine how best to search their records…" Western says that it is relying on past IPC orders that have held that 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.

[158] Regarding the records of medical residents, Western reiterates its stance that such records are not in its custody or under its control since the residents are students,

not employees,[100] and their email accounts are personal. Any records in student email accounts are "created by or sent to the resident for the resident's personal use" and the residents are not covered by the *Act.* Furthermore, Western claims that although the university may have the records on its server, this amounts to no more than bare possession of these UWO accounts.[101]

[159] Finally, with respect to the individuals identified in item 3 of the appellant's submissions, above, Western describes each of their roles and degree of involvement in the appellant's matters and also provides details of the searches conducted, either initially, or in response to the appellant's inquiry representations. With the exception of the former executive assistant to the past medical school dean (one of the individuals specifically identified in the appellant's search submissions), none of the further searches identified responsive records. The new search of the former dean's executive assistant's records resulted in the identification of record series 90, which were disclosed to the appellant almost in their entirety.[102]

Custody or control of medical residents' records

[160] For context, the university explains how, and under what conditions, students are given UWO email addresses. Noting that medical residents are students, Western submits that UWO email accounts are provided to students for the length of their studies, with deletion of the account occurring after the last add/drop period in January following the term in which the student was last registered. Following notification and a wait time of one to two weeks, the university will purge the account, but keep a back-up of it for 60 days. Western also notes that students are not required to use UWO email accounts for their communications with the university and sometimes provide faculty and staff with a different email address or decide to re-direct communications from their UWO account to another one.

[161] Western also describes – and provides a link to – the email policy in effect. The policy defines "acceptable use" of UWO email accounts, sets out user rights and responsibilities and also details the conditions under which accounts are monitored and may be accessed by university administration via information technology and/or security staff. According to Western, although UWO email accounts and addresses are the property of the university, the content of each account is considered the property of the student. In this context, the accounts may be used not only for Western-related communications, but also for incident personal uses. The policy does not set out any

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[100] Western cites Order PO-3798, but this is clearly a typographical error; the correct reference must be Order PO-3298 (University of Ottawa). See also Order PO-3257.

[101] For the analysis of this issue, I leave Western's references to "UWO" email accounts, the former short form for the university, intact.

[102] This disclosure occurred in a February 2014 supplementary decision issued to the appellant during the inquiry. I upheld Western's decision to withhold a portion of record 90-103 under section 49(a), together with section 19, above.

specific rules around retention and disposal of emails.

[162] For all the reasons described in the two paragraphs above, and based on the consideration of the factors commonly reviewed by the IPC in determining the issue, below, Western maintains that the UWO email accounts of medical residents are not in its custody or control. Not every point is set out, but Western's submissions on the determination of custody or control of medical residents' records include the following:

1. Creation: medical residents are students of the university, not employees, and their email suffix demonstrates the difference: while student addresses end with "@uwo.ca," the addresses of staff and faculty at the medical school end with "@schulich.uwo.ca."

2. Use: emails are sent and received by residents for purposes related to education or other incidental personal uses.

3. Possession: the university has "bare possession" of email in a resident's UWO email account by virtue of owning and operating the email server. Residents are under no requirement to actually use the account and many often do not, including the appellant herself whose emails with the university came from a Gmail account.

4. Content related to university's mandate and functions: since the university did not obtain records from medical residents' UWO email accounts, no comment is possible.

5. Authority to regulate use: the university has authority to regulate the use of the email server, but not the use of the records in a student's UWO email account.

6. Reliance: the university has not relied on medical residents' records in any way.

7. Integration of student UWO account records with other university records: emails on student accounts are stored in separate password protected accounts to which the university has no access, except as required for maintenance and security purposes in accordance with university policies.

8. Authority to dispose: Western has no authority to dispose of records on a student's UWO email account, only to delete the entire account when the resident is no longer enrolled at the university.

[163] Western also reviews the factors considered where the determination involves an institution's custody or control over records prepared by a third party. Some of the factors Western claims are relevant in this situation include:

- Residents own the email records on their UWO email accounts;

- Strictly speaking, no one pays for the creation of emails on a student account, although the university technically pays for emails from staff or faculty members to residents;

- By enrolling in the university and agreeing to the terms of service for UWO email accounts, the residents are implicitly giving the university bare possession of their emails on these accounts;

- Under its Email and Computing Resource policy, the university informed users that it would not access records in the UWO email accounts, except in limited circumstances related to maintenance and security purposes;

- By customary practice, students would consider their email records, whether in a UWO email account or otherwise, to be their personal and private records not subject to the *Act.* Although medical residents have not been asked to search their records, it could reasonably be expected that they would resist such a request because it would breach their personal privacy and because they are under no legal, or other, obligation to provide such records to the university.

[164] The university submits that interpreting the term "custody or control" to include the personal records of medical residents would not advance the democratic values underlying the *Act.* Referring to *City of Ottawa*, Western maintains that it cannot have been intended that a medical resident's mere use of its email server for personal purposes would result in the resident being bound by the record keeping obligations of the *Act* in respect of his or her email. Further, citing *Canada (Information Commissioner) v. Canada (Minister of National Defence),*[103] Western submits that the second requirement is not established because even if the records on a medical residents' email account were related to a "departmental matter," the university could not reasonably expect to obtain the records for the reasons already explained. According to the university,

> the [appellant's] position is simple: medical residents have university email accounts and emails sent or received by these accounts would be contained on servers owned and/or operated by the university; therefore, the records are in the possession and control of the university… This argument is akin to stating that letters held in community mailboxes are subject to the federal *Access to Information Act* because Canada Post owns and operates the mailboxes. It's also an argument that has been expressly rejected by the Ontario Divisional Court when it held that "it is not reasonable for emails belonging to a private individual to be subject to

[103] 2011 SCC 25.

> access by members of the public merely because they are sent or received on a government email server."[104]

[165] In reply, the appellant claims that there was a tripartite agreement between the requester, St. Joseph's and Western that both institutions would conduct independent searches and then compare the results, an assertion expressly rejected by both Western and the hospital.[105] Western replies that it did not agree to do any such thing, insisting that it would never have agreed to search the records of medical residents because it has always maintained that students' personal records are not in its custody or control.

[166] The appellant disputes several aspects of the university's submissions, including the claim that UWO email accounts are deleted after the student completes their studies at the university. The appellant maintains that she has "permanent access" to her medical school email account notwithstanding her dismissal from the program; therefore, while the university may delete the accounts of undergraduates, this does not happen with medical residents and the relevant resident accounts must still exist. On this point, Western clarifies differences between university and faculty-issued email accounts, but notes that its email use policy is applicable to both types of accounts and submits that what type of account a resident has is "irrelevant to the issue of custody or control."

[167] The appellant submits that Western's email policy provides that the accounts and addresses are the property of the university and because faculty and staff emails have been produced in response to this request, there is no principled basis for excluding emails in the residents' accounts. The appellant argues that residents' email accounts are covered by the same policy and stored on the same servers as the other accounts from which responsive records were produced and notes the advisory to users that records may be subject to the *Act.* Further, the appellant submits that there is nothing in Western's email policy that says the email *content* is considered the property of the student. The appellant also disputes Western's claim that it has always taken the position that students' email records are not in its custody or control by referring to specific parts of the university's email policy that refer to the possible application of the *Act.* The appellant submits that if Western "understood that the emails were not in its custody or control, it would not make reference to the *Act* and potential disclosure thereunder in its email policy."

[168] The appellant relies on Order PO-2842 for the finding that emails on university servers were in the custody or under the control of the institutions, notwithstanding the university's claims that they were private and unrelated to university business. The appellant outlines the part of the reasons quoting from Order PO-1725, which

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[104] *City of Ottawa, supra,* para 53.

[105] Order PO-3689 elaborates on the disputed terms of this purported agreement from the hospital's perspective.

addressed this issue in the context of a request for the electronic agenda of a staffer in the Premier's Office, a record that contained intertwined personal and professional entries. In both of these decisions, records claimed to be private or personal were found to be in the custody or control of the relevant institution. The appellant highlights the fact that in Order PO-2842, I dismissed the University of Ottawa's submission that it did not possess, or have the right to posses, the identified individual's "personal email account or its contents." The appellant adds that I pointed out that the institution in that appeal was not entitled to "carve out an exception from the Act for records otherwise in its lawful custody simply by asserting that they were created in the author's personal capacity."

[169] In reply, Western challenges the applicability of the authorities cited by the appellant for several reasons: first, the authorities address situations where an employee receives and sends personal email unrelated to employment using an institution's server, not where an individual who is *not* an employee of the institution or acting in any official capacity on its behalf uses an institution's server for personal use, as is the case here; second, the appellant avoids reference to *City of Ottawa*, which "is now the authority on access to personal records in the possession of an institution." Western highlights the fact that the individual whose records were sought in *City of Ottawa* was an employee of the city, unlike the situation here, where medical residents are only students. Western submits that following *City of Ottawa* in this appeal demonstrates that personal emails would not become subject to the custody or control of an institution merely because the institution has bare possession of such records and limited access and monitoring rights in relation to them.

[170] Western concludes by stating that the goal of government accountability will not be furthered by the invasion of the personal email accounts of the residents, which means that requiring the university to search such accounts is not justifiable under a purposive interpretation of the *Act.* Related to this submission is the appellant's closing argument that there is "no purposive or legal rationale" for distinguishing between a university employee and university medical resident for the purpose of determining custody or control, but there *is* a "purposive basis for distinguishing … the nature of records sought" because the personal emails may relate to an institution's mandate. The appellant suggests that "the emails sought are those involving one medical resident referring to or commenting about another resident in their official capacity at the university," which distinguishes *City of Ottawa* from this appeal on the facts.

Analysis and findings

[171] Under *FIPPA,* the adequacy of an institution's search is measured by its reasonableness. While the *Act* does not require proof "with absolute certainty" that further records do not exist, the institution must still tender sufficient evidence to demonstrate that a reasonable effort was made to identify and locate responsive

records that are in its custody or under its control.[106] 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.[107] In this appeal, I am satisfied that Western has met this standard, both in relation to records actually searched and with regard to the record holdings of medical residents, which it did not search.

[172] To begin, I accept Western's evidence that reasonable searches were conducted by contacting relevant individuals in the faculty and departmental offices named by the appellant in her request. In saying this, I acknowledge that Western did not search all of the areas or incorporate all of the search terms initially suggested by the appellant. However, based on Western's representations, including the specific directions for search given to the individuals contacted, I am satisfied that this was a reasonable approach to take in the circumstances. When it comes to search, the reasonableness standard makes room for different individuals executing the necessary searches differently – for example, in this appeal, based on "the extent of their interaction with [the appellant] and the way in which they maintained their paper and electronic records."

[173] In making this finding, I refer to Order PO-3689, where I accepted as reasonable the approach taken by SJHC in responding to the requests the hospital and Western had both received from the appellant. The appellant's expressed concern in that appeal was that the hospital had not properly searched the records of the departmental chief because it handed over responsibility for the search to Western, which had access only to her university email account. In that decision, I accepted the hospital's evidence that by agreement with SJHC, Western was taking responsibility for the departmental chief's records because of the connection with the university's academic mission. I also accepted the evidence that records identified by Western's searches had been transferred to the hospital for an access decision because they "would technically be under the custody and control of the hospital." I was satisfied by the evidence before me in that appeal, that:

> … the searches were approached on the basis of the individual being asked, not the institution to which their "multiple email addresses" belonged. It was up to each individual consulted to search their various email accounts or repositories of records, not the institution, which did not have access to the other institution's accounts. Having provided the results of their searches to whichever institution requested the search, the institution was then responsible for transferring any records as required pursuant to section 25 of the *Act*. I find this approach to be reasonable.[108]

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[106] Orders P-624 and PO-2559.
[107] Orders M-909, PO-2469 and PO-2592.
[108] Order PO-3689 at para 110.

In this appeal with Western, I am similarly satisfied that reasonable efforts were made by experienced employees, in cooperation with SJHC, to conduct reasonable searches for responsive records, wherever they might be located. The appellant's representations do not persuade me that additional responsive records could reasonably be thought to be located by further searches. As I am satisfied in this regard, I uphold this aspect of Western's search.

[174] On the related matter of searching medical residents' records, Western acknowledged to the appellant and submitted to this office that it did not conduct searches of residents' records because of its position that such records are not in the custody or under the control of the university for the purposes of *FIPPA*. As I wrote in Order PO-3689,[109] the custody or control of medical residents' records has a clear impact on the determination of the reasonableness of the searches since there is a right of access under section 10(1) of the *Act only* to records that are in the custody or under the control of an institution.

[175] In considering the issue, the approach taken by this office and the courts has been a broad and liberal one, as required to give full effect to the transparency purposes of the *Act.*[110] This office has developed a non-exhaustive list of factors to consider in determining whether or not a record is in the custody or control of an institution.[111] Some of the listed factors may not apply in a specific case, while other unlisted factors may apply. In determining whether records are in the "custody or control" of an institution, these factors are considered contextually in light of the purpose of the legislation.[112]

[176] Based on the representations of the parties, it was clear to me in Order PO-3689, as it is here, that there was ambiguity about the terms of a working agreement between the hospital and university regarding searches of medical residents' records in response to the appellant's request. In the end, neither the hospital nor the university searched medical residents' records. In Order PO-3689, based on my consideration of the relevant factors, I concluded that the hospital's obligation to "conduct a search that is reasonable in the circumstances ought to have included all relevant staff, including … medical residents."[113] I ordered a search accordingly.

[177] Past orders of this office have affirmed that medical residents are *both* students

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[109] At para 113.
[110] *Ontario (Criminal Code Review Board)* v. *Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072 *Canada Post Corp.* v. *Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.), and Order MO-1251.
[111] Orders 120, MO-1251, PO-2306 and PO-2683.
[112] *City of Ottawa, supra*.
[113] At para 111. SJCH was, therefore, ordered to conduct searches of the records of the relevant medical residents by provision 6 of Order PO-3689.

of the university and employees of the hospital for the purpose of *FIPPA.*[114] Therefore, where an appeal about a medical resident arises in the context of disputing the access decision issued by a hospital, such individuals are considered to be employees. Where there is an appeal of the access decision of a university, the very same medical resident is classified as a student. In Order PO-3298, cited by the university in support of its position that medical residents are students, Adjudicator Stephanie Haly was actually addressing a claim by the University of Ottawa to the labour relations and employment exclusion in section 65(6)3 over records related to its relationship with a medical resident. However, deciding custody or control is an essential threshold matter for determining whether records may be the subject of an access request at all. A decision to rely on section 65, which excludes certain classes of records from the scope of the *Act*, or one of the exemptions in the *Act*, can only be made for records in an institution's custody or control.[115] Regardless, past orders do not appear to have directly addressed the conjoined issues of search and custody or control in a situation where a post-secondary institution is being asked to search the records of *other* students (medical residents) who were enrolled in a (postgraduate medical education) program with the requester.

[178] In Order PO-3689, I noted that the accepted duality of medical residents as both employees (hospital) and students (university) had practical implications for the search responsibilities of each institution, since each institution's record holdings could not be considered watertight compartments.[116] In that appeal, I agreed with the appellant that no reasonable basis existed for distinguishing between the custody or control of hospital physicians' records, many of whom also serve as clinical faculty and professors with the university, and those of medical residents. In that appeal, I concluded that the appropriate approach was to ask the relevant individual to conduct the required searches. This entailed directing medical residents – as employees of the hospital – to search their records.

[179] In this appeal, however, based on the view that medical residents are students for the purposes of *FIPPA*, the circumstances and my consideration of the factors relevant to the issue of custody or control generally, I conclude that the personal email accounts of the medical residents are not in the custody or under the control of Western. In my view, Western's custody of such records does not amount to more than "bare possession," and I am persuaded that a "contextual analysis" that includes reference to custom and practice dictates such a finding.

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[114] See Orders PO-3257, PO-3287, PO-3298, PO-3346, PO-3358, PO-3408 and others: the dual status of medical residents as both students enrolled in a post-secondary medical program and employees at a teaching hospital is acknowledged and is also captured by a collective agreement between the Professional Association of Residents of Ontario (PARO) and the Council of Academic Hospitals of Ontario (CAHO). See also para 116 of Order PO-3689.
[115] Order PO-3009-F
[116] At para 116.

[180] As suggested by my comment that past orders have not directly addressed this specific issue, it is also the case that there is no directly applicable court precedent. Nonetheless, there is guidance available to me from past orders and the case law. Specifically, as the court observed in *City of Ottawa, supra,* where there is a question of whether an institution has more than bare possession of records that are in its physical possession, the relationship between the institution's public mandate and the records is a key consideration. Similarly, whether a finding that the records are in Western's custody or control would advance the transparency purposes of the *Act* is also critical, given that the addition of universities as institutions under *FIPPA* was intended to make them "… even more transparent and accountable to the people of Ontario."[117] In the reasons that follow, I set out my consideration of the factors relevant to custody or control over the records of medical residents contextually in light of the purpose of the legislation.[118]

Do records in student email accounts relate to the university's "core," "central" or "basic" activities and its "mandate and functions"?

[181] Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?[119] Is the activity in question a "core", "central" or "basic" function of the institution?[120] Does the content of the record relate to the institution's mandate and functions?[121] In my view, the answer to all of these questions is no. For the purpose of determining custody or control, past orders have described the central mandate of universities as involving teaching, research, and related administrative functions.[122] Further, in the course of carrying out the university's academic mission, some records *created by faculty* may be in the university's custody or control insofar as they reflect representation of that mandate and under certain conditions.[123] I am simply not persuaded that records *created by students* in their university email accounts can be characterized as having the requisite relationship to

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[117] Order PO-3009-F at para 97 and also at para 133, referring to comments made by M.P.P. Wayne Arthurs for the government upon third reading of Bill 197, the *Budget Measures Act, 2005*, amending *FIPPA* to add universities as institutions covered by the *Act.* Also quoted and discussed in Order PO-2693.
[118] *City of Ottawa, supra,* para 31.
[119] Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above.
[120] Order P-912.
[121] *Ministry of the Attorney General v. Information and Privacy Commissioner*, *supra*; *City of Ottawa v. Ontario*, *supra*; and Orders 120 and P-239.
[122] Order PO-3009-F at page 51. This order addressed the issue in the context of access to professor's records under *FIPPA*, including complex considerations involved in academic freedom.
[123] Order PO-3009-F at page 54: 1. records or portions of records in the possession of an [professor] that relate to personal matters or activities that are wholly unrelated to the university's mandate, are not in the university's custody or control; 2. records relating to teaching or research are likely to be impacted by academic freedom, and would only be in the university's custody and/or control if they would be accessible to it by custom or practice, taking academic freedom into account; 3. administrative records are prima facie in the university's custody and control, but would not be if they are unavailable to the university by custom or practice, taking academic freedom into account.

the administration of the university's mandate to result in these factors weighing in favour of Western's custody or control over such records. Given my conclusion that students, as the authors or recipients, of records in their email accounts cannot be considered to be representing the exercise of the university's mandate, it also follows that such records would not contribute to informing the public about the operations and administration of the university.

Were the records created by officer or employee of the university?

[182] Contrary to appellant's position, there is no persuasive evidence before me that medical residents act in any "official capacity" on behalf of the university, in the sense that they are authorized to conduct business on its behalf. Specifically, the evidence does not establish that medical residents are involved in any decision-making related to other residents in the program or that they are otherwise empowered to act on behalf of the university.[124] This stands in contrast to the role played by clinical faculty. Order PO-3298 determined whether the University of Ottawa exercised custody or control over the records of the Director of Cardiac Surgery in the context of an access request by a former cardiology resident. Adjudicator Haly concluded that the university did not have control over records related to the physician's clinical duties in a clinical setting (although the hospital would), but found that "… as faculty members, these physicians are involved in evaluating the appellant's performance as a resident for the purpose of his postgraduate medical training."[125] The adjudicator found this factor to be indicative of the university's control over this type of information. It is worth noting that Western did not decline to search the records of its clinical faculty, apparently recognizing the orders from this office that records related to their evaluation of the performance of medical residents are in its custody and under its control for the purpose of the *Act.* As stated, however, I conclude that there is no evidence to support a finding that medical residents play any formal role in the evaluation of other residents. A related conclusion is that the university does not rely on records created by medical residents in their personal email accounts to administer the postgraduate medical education program. This accords with the past finding that the *creation* of a record by an employee supports the institution having custody and control of that record, although the factor must also be considered in light of the customary practice with respect to such records.[126]

Western's physical possession or "bare possession" of student email accounts

[183] Overall, although the university may house the records in student email accounts on its servers, I conclude that this form of possession is bare possession only and does not support a finding of custody or control for the purposes of the *Act.* Although

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[124] This latter point alludes to the concept of agency and its implications for custody or control. See Order MO-1251 at pages 10-13.
[125] Order PO-3298 at para 26.
[126] Orders PO-3009-F and PO-3689.

physical access can be a persuasive indicator of custody or control, it can be overridden by more important factors, which is what happened in the *City of Ottawa* case, where records on the city's e-mail server were found not to be in the city's custody or control simply because the city had the ability to access them.

Western's authority to regulate content, use and disposal of student email accounts

[184] Western's evidence is that it has the authority to monitor student email accounts on its servers for maintenance and security purposes or to determine whether students, including medical residents, are complying with university policies for proper email and internet use. Western can, therefore, access student email accounts. Respecting the custody or control factor of integration, I note here that student email accounts would likely be considered to be integrated with the rest of the university's record holdings. However, as with physical possession of the records, this factor alone does not dictate a finding that Western has custody or control over the accounts.[127] Ultimately, I accept Western's position that its policies do not endow it with unlimited authority to regulate matters of content, use or disposal in respect of student email accounts.

[185] In arguing that the university has custody or control, the appellant points to certain terms in these policies and submits that if Western "understood that the emails were not in its custody or control, it would not make reference to the Act and potential disclosure thereunder in its email policy." This submission overlooks the fact that section 2.0 of Western's use policy applies to *all* university-assigned accounts, listing the individuals who may hold such accounts as "faculty, staff, students, alumni, retirees, visiting faculty, and other third parties…" As I have already observed, the records of faculty and staff are, with some exceptions, subject to the *Act.* Therefore, references to access and privacy matters and *FIPPA* in the institution's policies cannot be construed as applying only to student email accounts or as indicative of the university's position on custody or control of those accounts.

[186] Further, I accept that the use policies at Western merely circumscribe its prohibition powers: they do not deal with the creation of records; nor do they establish any authority under which Western can dictate the related matters of use or disposal of such records. Western does have a limited authority to dispose of records, but only insofar as it can delete a student email account in certain circumstances. I am satisfied that medical residents, as students of the university, maintain ownership of the contents of their accounts and can create, retain and dispose of their emails as they so choose, subject only to the operation of "appropriate use" policies. Accordingly, I find that Western's authority to regulate its email servers and systems does not support a finding of custody or control.

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[127] See Order PO-3009-F at para 173.

Would records in student email accounts be available to university administration by custom or practice?

[187] The question of Western's customary practice, and that of other universities, in relation to possession or control of records of this nature, in similar circumstances, is relevant.[128] Under the analysis of customary practice and custody or control in the university context to date, a general guarantee of non-intrusion into the working records of professors on the basis of academic freedom has developed, within limits that are discussed in depth in Order PO-3009-F. In addressing the records of university *students*, not professors, the principles related to academic freedom are not really applicable. Western submits that by customary practice in a university setting, students would consider their email records to be personal and private records that would not be subject to *FIPPA.* Certainly, applying the two-part test endorsed by the Supreme Court of Canada in *National Defence, supra,* student email records may, or may not, contain content touching upon a "departmental matter," (i.e., related to university mandate), but it seems clear that Western could not reasonably expect its students to hand over records from their personal email account - accounts that, by custom, they consider personal. To this extent, student email records appear analogous (but not identical) to the first type of records outlined in Order PO-3009-F, namely records "in the possession of a [student] that relate to personal matters or activities that are wholly unrelated to the university's mandate, [and which] are not in the university's custody or control.[129]

[188] In *City of Ottawa*, the Court emphasized the importance of analyzing the purposes of the *Act*, and in particular, its purpose related to transparency and accountability, in determining the issue of custody or control. Paraphrasing the question posed by the court in *City of Ottawa*, I must ask whether interpreting the term "custody or control" to include the personal and/or private communications of medical residents unrelated to the university's business would do anything to advance the purpose of the legislation? All things considered, I agree with the university that interpreting the term "custody or control" to include such personal records would not advance the democratic values underlying the *Act.* The decisions relied on by the appellant to support the application of the *Act* in this matter are distinguishable, either because the more likely answer to the paraphrased question, above, was "yes, possibly" (Order PO-1725) or due to the identity of the creators of the responsive records – professors participating in an external committee found to be related to the university's mandate (PO-2836, PO-2842, PO-2846).[130] A finding in this appeal that medical residents' records are covered by the *Act* does not have the potential, in my view, to facilitate public access to information that is necessary to participate meaningfully in the democratic process or to ensure that the university remains accountable to the public in fulfilling its teaching and

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[128] Order MO-1251.
[129] See footnote 123.
[130] In all these related appeals, the responsive records that I ordered each of the universities to issue access decisions in relation to were ultimately found to be excluded from the *Act*, pursuant to section 65(8.1)(a), the research exclusion.

research mandate.

[189] In summary, I find that any records in the emails accounts of medical residents are not in Western's custody or under its control for the purpose of section 10(1) of the *Act*. Therefore, based on the evidence provided by the parties, I find that Western's search for records responsive to the request was reasonable according to section 24 of the *Act*. I dismiss this aspect of the appeal.

ORDER:

1. I uphold Western's claim of the exclusion in section 65(6)3 of the *Act* to records 1-5 to 1-11, 1-18 to 1-19, 1-300 to 1-306, 1C-34, 50A-2 to 50A-10 and 50B-69 to 50B-92.

2. I partly uphold Western's decision respecting non-responsiveness.

3. I partly uphold Western's decision to deny access to information in the following records, or parts of them, pursuant to section 49(b): 1-32, 1-61, 1-79, 1-80, 1-92, 1-123, 1-125, 1-134, 1-137, 1-138, 1-140 to 1-142, 1-144 (duplicate of 1-142) to 1-146, 1-153, 1-157, 1-167, 1-168, 1-175, 1-209, 1-275, 1-283, 1B-5, 1B-7, 1B-8, 1B-20, 1C-25, 1C-32, 1C-33, 5-2, 8-3, 11B-45, 11B-120, 11B-164, 50B-10, 50B-41 to 50B-52, 60E-115, 60E-116 and 60E-118.

4. Where I have varied Western's decision, copies of these records as they are to be disclosed are provided with the university's copy of this order. The information exempt under section 49(b) is highlighted in orange.

5. I partly uphold the university's claim of section 49(a), together with section 13(1), in relation to the following records, or parts of them: 1-53 to 1-56, 1-127 (part), 1-141, 1-175, 1-209 (duplicated at 5-2), 1-268, 1-310 to 1-311, 50B-19, 60E-116 to 60E-118.

6. Where I have varied Western's decision, copies of these records as they are to be disclosed are provided with the university's copy of this order. The information exempt under section 49(a), together with section 13(1), is highlighted in pink.

7. I uphold Western's exemption claim under section 49(a), in conjunction with section 19, in its entirety.

8. I also uphold the exercise of discretion by Western in relation to the information I have found to be exempt under sections 49(a), together with sections 13(1) and 19, and section 49(b).

9. For the records identified in provisions 3 and 4, I order Western to disclose them to the appellant by **May 5, 2017**, but not before **May 1, 2017**.

10. I uphold the university's search for responsive records.

Original Signed by: March 29, 2017

Daphne Loukidelis
Adjudicator