Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3874

Appeal PA16-291

Queen's University

August 30, 2018

Summary: The appellant, a former student, sought access to records relating to an academic disciplinary matter he was involved in. The university withheld some information in the responsive records under sections 21 and 49(b) (personal privacy), section 49(c.1)(ii) (evaluative or opinion material), section 19 (solicitor-client privilege) and section 20 (danger to safety or health). The university also withheld some information in the responsive records on the basis it was not responsive to the appellant's request. The appellant appealed the university's decision to withhold responsive records, its decision that certain information was not responsive to his request, the reasonableness of the university's search for records and the fee the university charged him for the records it disclosed. The university subsequently withdrew its reliance on the section 20 exemption. The order upholds in part the university's decision regarding the responsiveness of records, and the application of the section 19, 49(c.1)(ii) and personal privacy exemptions. Some information withheld under sections 19, 49(c.1)(ii) and the personal privacy exemptions is ordered disclosed. The order upholds the university's fee, the reasonableness of the university's search for records and the university's exercise of its discretion regarding the discretionary exemptions it applied. The university is ordered to make an access decision on some responsive information that it had claimed was not responsive to the request.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 24, 19, 2(1) ("definition of personal information"), 21, 49(b), 49(c.1)(ii), 57; *Ontario Regulation 460*, sections 6, 6.1, 7, 8, 9.

Orders Considered: Orders PO-2711, PO-3615, PO-3094 and PO-3089-F.

OVERVIEW:

[1] The appellant, a former student of Queen's University (the university), made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the university for:

1. The notes of a named coach of a team he was part of.
2. Other named individuals' notes regarding the appellant and other members of a team he was part of.
3. A named individual's written recommendation to another named individual about the appellant.
4. All emails sent and received by four named individuals regarding the appellant.
5. Attendance records for all members of a team he was part of and all records of class sign-in and sign-out for all members of that team for a specified period.
6. The appellant's student file.

[2] The university issued an interim access decision and fee estimate advising the appellant that sections 21(1) (personal privacy) and 49(c.1)(ii) (evaluative or opinion material regarding admission to an academic program) of the *Act* would likely apply to some of the responsive records. The university assessed a fee of $120.00 for photocopying 600 pages of records and requested a 50% deposit.

[3] After receiving the deposit, the university issued a final access decision granting partial access to the responsive records. Access was denied to some information under sections 19(a) and (c) (solicitor-client privilege), 21(1) and 49(c.1)(ii). The university also noted that certain information was withheld as it was not responsive to the appellant's request.

[4] The university subsequently issued two supplementary decisions granting partial access to further responsive records. Some information in these records was withheld under the personal privacy exemptions at section 49(b) and section 21(1) of the *Act*. The university also withheld some information in the additional responsive records on the basis that it was not responsive to the appellant's request.

[5] The appellant appealed the university's decisions to this office.

[6] During mediation, the university issued a third supplementary decision granting further access to records previously withheld.

[7] The appellant advised the mediator that he had questions for the university regarding certain withheld records and believed that further records responsive to his

request existed at the university. He also requested an index of the withheld records.

[8] The university conducted a further search for the requested records and issued a fourth supplementary decision. In the supplementary decision, the university granted further access to records previously withheld, in addition to providing access to several additional records. The university also provided the appellant with an index of records. Information was withheld under sections 19(a) and (c), 20 (health or safety threat), 21(1), 49(b) and 49(c.1)(ii) of the *Act.* The university also withheld some information on the basis that it was not responsive to the request.

[9] The appellant continued to seek access to all of the information withheld by the university, including the information the university considered was not responsive to his request. The appellant also believes that further records responsive to his request exist at the university and takes issue with the fee assessed. The appellant asked that the appeal proceed to the next stage of the process. Accordingly, this appeal proceeded to adjudication, where an inquiry is conducted.

[10] Representations were invited and received from the university and appellant. These representations were shared with the parties in accordance with *IPC Practice Direction 7*.

[11] The section 20 exemption is not discussed in this order because the university withdrew its reliance on that exemption in its initial representations.

[12] This order partially upholds the university's decision to withhold information in the records from the appellant and orders further disclosure of some information. The university is ordered to make an access decision for some information that it withheld as not responsive that I find is responsive to the appellant's request. The order finds the university's search for records and fee are reasonable.

RECORDS:

[13] The information at issue is contained in six tranches of records collated by the university in response to the appellant's request. The records are described in further detail below. Because the university has disclosed some information in each tranche of records the total number of pages at issue in this appeal is fewer than the total number of pages listed in the table for each tranche of records.

University document index number	**Number of pages of records**	**Type of records**	**Grounds on which information withheld**
1	118	Coaching notes,	Sections 49(b), 21(1), Not

		meeting notes, emails	Responsive.
2	41	Handwritten notes, emails, team coaching reports	Sections 49(b), 21(1), Not Responsive.
3	574	Emails	Sections 19(a) and (c), 49(b), 21(1), 49(c.1)(ii), Not Responsive.
4	1	Attendance record	Section 21(1).
5	15	Interview notes and evaluation forms	Section 49 (c.1)(ii).
6	3	Spreadsheet	Sections 49(b), 21.

ISSUES:

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

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

C. Does the discretionary exemption at section 19, in conjunction with section 49(a) or on its own, apply to the records?

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

E. Does the discretionary exemption at section 49(c.1) apply to the information at issue?

F. Did the institution exercise its discretion under sections 49(c.1), 49(a), 49(b), and 19? If so, should this office uphold the exercise of discretion?

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

H. Should the institution's fee be upheld?

DISCUSSION:

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

[14] The university withheld portions of several records on the basis that the records were not responsive to the appellant's request. Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

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

[15] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[2] To be considered responsive to the request, records must "reasonably relate" to the request.[3]

[16] The university submits that it included all responsive records in the index of records. It explains that the information it withheld as not responsive[4] relates to matters unrelated to the appellant's request. The university's representations (that were shared with the appellant) explain in detail the basis for withholding information in the

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[1]This is the version of section 24 that was in effect at the time of the request. The amendments to section 24 since that time have no bearing on my analysis and findings in this order.
[2] Orders P-134 and P-880.
[3] Orders P-880 and PO-2661.
[4] Information in tranche one at pages 143, 147, tranche two at pages 28, 35, 37, 45, 47, 49 and "additional page 1 of 2", tranche three at pages 3, 33, 69, 105-106, 251-252, 279 and 559.

records as not responsive. The reasons include that the information related to personal matters unrelated to the appellant, to teams that the appellant was not part of or to administrative matters for the program unrelated to the appellant.

[17] The appellant did not respond to the university's explanation or address the records withheld as not responsive.

[18] I have reviewed the information withheld as not responsive and the university's explanation for withholding it. I am satisfied that the withheld information does not "reasonably relate" to the appellant's request except for the emails at page 279 of the records. The emails withheld as not responsive on page 279 are to or from one of the named individuals in the appellant's request and relate to the appellant and his academic appeals, so are responsive to his request. Except for this information, I uphold the university's decision regarding the information it withheld as not responsive to the appellant's request. I order the university to issue an access decision regarding the information withheld as not responsive on page 279 of the records.

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

[19] Under the *Act,* different exemptions may apply depending on whether a record at issue contains the personal information of the requester (in this case, the appellant).[5] Where records contain the appellant's own personal information, access to the records is considered under Part III of the *Act* and the exemptions found at section 49 may apply. Where a record only contains personal information belonging to individuals other than the appellant, access to the records is considered under Part II of the *Act* and the exemptions found at sections 12 through 22 may apply.

[20] The correct approach is to review the entire record, not only the portions remaining at issue, to determine whether access to the record should be considered under Part II or Part III of the *Act*.[6]

[21] In order to determine which of the personal privacy exemptions of the *Act* can apply, it is necessary to decide whether the records contain personal information and, if so, to whom it relates.

[22] The term "personal information" is defined in section 2(1) as recorded information about an identifiable individual. The list of examples of personal information in section 2(1) is not exhaustive, so information not listed in section 2(1) may still qualify as personal information.[7]

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[5] Order M-352.
[6] Order M-352.
[7] Order 11.

[23] Section 2(3) is also relevant to the definition of personal information. This section states:

> Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[24] 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.[8]

[25] 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.[9]

[26] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[10]

Representations

[27] The university submits that most of the responsive records were created by either:

- the appellant's team members (fellow students)
- the appellant's team coaches
- other university faculty or staff

[28] The university says some records contain only personal information about individuals other than the appellant such as an individual's health status or personal email address. It says some, such as coaches' and other staff notes, are about the progress and personal circumstances of the team the appellant was a member of. It says these records contain a mix of personal information of the appellant and other team members, since the appellant was one member of the team being coached. The university says its approach to records of this type was to withhold information about team members and disclose comments that relate to the appellant. The university says that some records contain personal information of both the appellant and other individuals because the records contain information about the dynamics of the team the appellant was part of and actions relating to those dynamics. The university's

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

[9] Orders P-1409, R-980015, PO-2225 and MO-2344.

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

representations shared with the appellant in full contain further details about which types of records the university considered fell into each of the three categories outlined above.

[29] The appellant’s representations focus on the factors in section 21 rather than whether information is personal information and whose personal information it is.

Findings

[30] The records contain personal information of the appellant, the appellant’s team members and university faculty and staff. Some records contain only personal information of individuals other than the appellant but most contain a mix of the appellant’s and other individuals’ personal information including opinions about the appellant and others and opinions and statements about the events taking place within the team.

[31] I also note that most of the information created by university faculty and staff, including team coaches, is information created in their professional capacity so is not the personal information of those faculty and staff. There are exceptions, including a staff member’s personal health information discussed below.

[32] In short, most of the records at issue contain the appellant’s personal information, although some do not. Many of the records also contain the personal information of other individuals (the “affected parties”).

[33] Access to the records that contain the personal information of the appellant and other affected parties must be determined under Part III of the *Act*, in accordance with the exemptions at sections 49(a), 49(b) and (c.1)(ii). Access to the records that contain no personal information belonging to the appellant must be determined under Part II of the *Act*, in accordance with the exemptions at section 19 and 21(1).

C. Does the discretionary exemption at section 19, either alone or in conjunction with section 49(a), apply to the records?

[34] Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49(a) reads:

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

> where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.[11] (emphasis added)

[35] Section 49(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.[12]

[36] Where access is denied under section 49(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information. The university's exercise of discretion is addressed further below under Issue F.

[37] The university withheld some records (in tranche three) under the section 19(a) and (c) exemptions. Section 19 of the *Act* states in part:

> A head may refuse to disclose a record,
>
> (a) that is subject to solicitor-client privilege;
>
> …
>
> (b) 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.

[38] Many of the records for which the university claims section 19 contain the appellant's personal information, while others do not. In this case, where information withheld under section 19 contains the appellant's personal information, section 19 must be considered in conjunction with section 49(a).

[39] 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") is a statutory privilege. The institution must establish that one or the other (or both) branches apply. The university claims that both branches apply.

[40] Branch 1 encompasses two heads of privilege as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege.[13] The university claims solicitor-client communication privilege under Branch 1 and that the statutory

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[11] This is the version of section 49(a) that was in effect at the time of the request. The amendments to section 49(a) since that time have no bearing on my analysis and findings in this order.
[12] Order M-352.
[13] Order PO-2538-R; *Blank v Canada (Minister of Justice)* (2006), 270 DLR (4th) 257 (SCC) (also reported at [2006] SCJ No 39).

privilege in Branch 2 also applies.

[41] At common law, 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.[14] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[15] The privilege applies to "a continuum of communications" and covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.[16]

[42] The university submits that the emails it withheld under section 19 comprise legal advice provided by the university's internal counsel and/or an external lawyer retained by internal counsel to assist the university. The university's representations, which were shared with the appellant, provide further detail on the identity of the lawyers who the university says gave advice at different points of time.

[43] The university submits that these emails are within the scope of the common law solicitor-client privilege because they comprise confidential communications between counsel and university staff and faculty clients in the program area the appellant was a student in. The university submits that many of the emails are explicitly labelled as "confidential", but that even those that were not labelled "confidential" were intended to be kept confidential to provide for a free and frank exchange of information and legal advice.

[44] In response, the appellant submits that the university's internal counsel could not have provided advice to the university program area because the counsel's function in the university tribunal process is to be an impartial advisor to decision-makers regarding the proper application of procedural fairness. The appellant cites a university document in support of this submission. He submits therefore that to provide legal advice to both the program area and the university's tribunal would place the counsel in a conflict of interest. He submits that therefore it is unfair and inappropriate to claim section 19 over responsive records.

[45] The university responds that university counsel only acted for the program area in the matters involving the appellant. It says that the university's internal counsel recused themselves when asked for advice by an university appeal board chair, with external counsel retained to advise the chair instead. The university submits that at no time did internal counsel act for a university appeal body that was hearing appeals involving the appellant and also advise the program area. The university says it properly applied the section 19 exemption to records where internal counsel provided legal

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[14] *Descôteaux v Mierzwinski* (1982), 141 DLR (3d) 590 (SCC).
[15] Orders PO-2441, MO-2166 and MO-1925.
[16] *Balabel v Air India*, [1988] 2 WLR 1036 at 1046 (Eng CA).

advice to university personnel.

[46] The appellant did not address the university's submission regarding the function of university counsel in his reply submission.

[47] I have reviewed the emails withheld under section 19 of the *Act.* I am satisfied that most of the records comprise confidential communications between university staff and university internal or external counsel seeking or receiving legal advice for the program area and therefore fall within Branch 1 of section 19. Many of the withheld records comprise chains of emails where the latest email is a confidential communication between lawyer and client that is subject to privilege. The preceding forwarded emails in the chain form part of the information exchange between lawyer and client necessary for the provision of legal advice so are also subject to privilege. I note that because several university staff were involved in the appellant's appeals, there are many duplicate emails in the email chains.

[48] Some emails I find are not covered by Branch 1. These are emails between university staff and the chairs of university appeal committees (the Academic Progress Committee (APC) and the Academic Appeals Committee (AAC)).

[49] The first is an email from the Chair of the AAC to staff and copied to university internal counsel that is the first email on page 561 in tranche three of the records. The university submits that in order to avoid a conflict of interest with the counsel's pre-existing role as counsel to the program area, the university's internal counsel were not legal advisors to the university's tribunals. Therefore, the email from the tribunal member to university staff, even when copied to the internal counsel, is not a communication between a solicitor and their client and, in this context, does not form part of the continuum of communications between lawyer and client. I am satisfied, however, that the emails after the first email on page 561 do form part of the continuum of communications between solicitor and client and therefore fall within the scope of Branch 1.

[50] The first email on page 635 of tranche three of the records is also not between solicitor and client. It is an email from a staff member to the AAC Chair, copied to internal counsel, regarding hearing dates for an appeal. In context, I am satisfied that the email is not part of a continuum of communications. The email is written to the Chair and does not contain any information pertinent to the provision of legal advice. The second email in the chain on page 635 is from the AAC Chair to university staff and internal counsel. It is also outside the scope of the privilege for the same reasons as the email on page 561 discussed above. The third email in the chain begins on page 635 and is written to the appellant so this also is not subject to solicitor-client privilege. I am satisfied, however, that the next email, which begins at page 637 forms part of the continuum of communications between internal counsel and staff, as it involves staff seeking advice relating to an appeal hearing. The remaining emails in that chain are part of the forwarded email chain and therefore fall within the scope of the continuum

of communications necessary for provision of legal advice.

[51] The first email on pages 667 and 668 are from the Chair of the APC to staff and internal counsel and falls outside the scope of the privilege for the same reasons discussed above — the emails are not between a solicitor and their client. The emails in the email chain that follow these two emails (ending at page 669) are to the appellant so are also not subject to privilege.

[52] The university also claimed that the statutory privilege (section 19(c)) applies to the emails. For the reasons outlined above I am satisfied that the first branch of the statutory privilege ("prepared by or for counsel employed or retained by an educational institution … for use in giving legal advice") does not apply to the emails I found were not subject to the common law privilege.

[53] The university also briefly addresses the litigation privilege component of the statutory privilege ("prepared by or for counsel employed or retained by an educational institution or a hospital … in contemplation of or for use in litigation"). The university's representations reference the zone of privacy this part of section 19(c) protects without elaborating on its application to any specific withheld records. I am satisfied that the records above fall outside of any "zone of privacy" intended to be protected by litigation privilege, being emails of an administrative nature between staff including counsel for the program area and appeal committee chairs and which contain information that in many cases had already been shared with the appellant.

[54] The university submits that privilege in the records was not waived. From my review of the records and representations I find no evidence to suggest that privilege in the records was waived by the university for the records that are within the scope of section 19.

[55] Subject to my findings on the university's exercise of discretion, except for the emails discussed above which are not exempt under section 19, the emails the university withheld under section 19(a) and (c) of the *Act* can be withheld under section 49(a) in conjunction with section 19(a) or under section 19(a) alone. For those emails that are not exempt under section 19, I will discuss whether the personal privacy exemptions at section 21(1) and 49(b) apply to any of the information in them below.

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

[56] As noted above, section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49(b) is another of the exemptions from this right. Section 49(b) provides:

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

> where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

[57] Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. Since the section 49(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.[17] Section 49(b) introduces a balancing principle, which involves weighing the requester's right of access to his own personal information against the other individual's right to protection of their privacy. On appeal, to uphold the application of section 49(b), I must be satisfied that disclosure of the information would constitute an unjustified invasion of another individual's personal privacy.[18] Sections 21(1) to (4) provide guidance in determining whether the threshold for an unjustified invasion of personal privacy under section 49(b) is met.

[58] In contrast, under section 21(1), where a record contains personal information of another individual but *not* the requester, the institution is prohibited from disclosing that information unless one of the exceptions in sections 21(1)(a) to (e) applies, or unless disclosure would not be an unjustified invasion of personal privacy (section 21(1)(f)).

[59] Where a record (taken as a whole rather than just the portions remaining at issue), contains "mixed" personal information (the personal information of both the appellant and another individual), section 49(b) in some cases permits an institution to disclose information that it could not disclose if section 21(1) were applied.[19] This record-by-record analysis is significant because it determines what exemptions that the records as a whole (rather than only certain portions of it) must be reviewed under. Only where an entire record does not contain personal information of the appellant can the section 21 exemption apply. A critical difference between section 21 and 49(b) is that section 49(b) requires an exercise of discretion whereas section 21 is a mandatory exemption. I will discuss the implications of this distinction when discussing the university's exercise of discretion below under Issue F.

[60] In some instances, the university applied section 21 to personal information of individuals other than the appellant when the record also contained personal information of the appellant. The record-by-record approach dictates that the discretionary personal privacy exemption in section 49(b), rather than the mandatory personal privacy exemption in section 21 is the correct exemption to apply in that circumstance. Of the records the university withheld citing only section 21, only tranche

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[17] See below in the "Exercise of Discretion" section (Issue F) for a more detailed discussion of the institution's discretion under section 49(b).
[18] Order M-1146.
[19] Order MO-1757-I.

one pages 25-26, 29-30, 85, 141 and 148 and tranche three pages 23-24 and 333 are records that do not contain the appellant's personal information. The remaining records withheld under section 21 contain personal information of the appellant and I will therefore consider whether section 49(b) applies to them.

[61] Despite this, I am satisfied that the university analysed the records in good faith and their representations address the section 21 factors, which is the critical task in considering either of the personal privacy exemptions. I will consider the various factors raised by the university and the appellant below.

Section 21(1)(a)–(e)

[62] If the information fits within any of paragraphs (a) to (e) of section 21(1), disclosure is not an unjustified invasion of personal privacy and the information cannot be withheld under either sections 21(1) or 49(b). Neither party addresses the exceptions in section 21(1)(a) to (d) and I find that they are not relevant here.

[63] The appellant submits that the exception in section 21(1)(e) that permits disclosure for research applies to the withheld information in Record 6 which contains the appellant's team members' evaluation comments about the appellant as part of a performance expectation contract the appellant was placed on by the university. The appellant says Record 6 is an evaluation and the result of the program's research on the team.

[64] Section 21(1)(e) requires that a research agreement between the institution and the individual who is to receive the record must exist. The university opposes disclosure of the record the appellant seeks so has not entered into a research agreement. The requirements for this exception to apply therefore cannot arise in the circumstances of this appeal. I note also that the university submits that section 21(1)(e) does not arise because section 21(1)(e) is about disclosure of records for a certain purpose (research) not disclosure based on the purpose for which the record was created. I agree with the distinction the university draws and its application to Record 6.

Section 21(4)

[65] If any of paragraphs (a) to (d) of section 21(4) apply, disclosure is not an unjustified invasion of personal privacy and information cannot be withheld under sections 21(1) or 49(b). The university submits that section 21(4) does not apply and the appellant does not raise it. From my review of the records, no section 21(4) factors apply.

21(1)(f) or 49(b): would disclosure be an unjustified invasion of privacy?

[66] The appellant submits that disclosing the withheld information would not be an unjustified invasion of personal privacy.

[67] In considering the section 49(b) and 21(1) exemptions, sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy.

Sections 21(2) and (3)

[68] If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy.

[69] For records considered under section 21(1) (ie., records that do not contain the requester's personal information), a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if a section 21(4) exception or the "public interest override" at section 23 applies.[20] I have already found no section 21(4) factors arise and section 23 is not at issue. Therefore in this appeal, a finding that section 21(3) presumptions apply to information claimed to be exempt under section 21(1) means this information must be withheld.

[70] For the records not covered by a presumption in section 21(3), section 21(2) lists various factors that may be relevant in determining whether disclosure of the personal information would be an unjustified invasion of personal privacy and the information will be exempt unless the circumstances favour disclosure.[21]

[71] For information claimed to be exempt under section 49(b) (ie., records that contain the requester's personal information), this office will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance 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.[22]

Do any of the presumptions in section 21(3) apply?

[72] The university submits that section 21(3)(d) applies to the records on the basis that they are educational records. The university says the records were created in the context of one of its degree programs, for the purposes of that program.

[73] The appellant does not address the presumption.

[74] The context of this appeal is similar to Order PO-2711, another appeal involving the university. In that order, the presumption in section 21(3)(d) was found to apply to documentation relating to an academic dishonesty matter. Adjudicator Loukidelis stated in that appeal:

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[20] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.
[21] Order P-239.
[22] Order MO-2954.

> I am persuaded that the records before me form a significant and integral part of the affected party's education-related association with the University. For all of these reasons, I find that the information relates to the affected party's educational history within the meaning of the presumption in section 21(3)(d).

[75] Many of the records in this appeal relate to an academic disciplinary process involving the appellant. However, unlike Order PO-2711, which involved a small number of key documents, the current appeal involves hundreds of records, including many emails. Many of these records on their own do not relate to the matter of educational discipline or to educational history in any substantial way and reveal little or nothing about the educational history of the individual the information relates to. For example, section 21(3)(d) clearly is not relevant where the only withheld information is a personal email address. It would be an overbroad application of 21(3)(d) to apply the presumption to all records generated by an educational institution such as the university simply because of the identity of the entity creating them. A narrower approach is consistent with the purposes of the *Act* and with the approach to the other branch of section 21(3)(d) regarding employment history. Even though employee emails disclose something about their employment history, the employment history presumption does not apply to every record generated by an employee. Rather, the employment history presumption in section 21(3)(d) is more commonly applied to a narrower range of records that reveal an individual's employment history over time, such as a resume, CV or a record that contains details about a specific incident or disciplinary matter. In my view, the education history presumption should be approached in the same way.

[76] In the circumstances, I am satisfied that section 21(3)(d) applies to the undisclosed information in the records where it is about the core of the educational discipline matter or reveals something about an affected party's educational history more than the mere fact that they were enrolled at the university.

[77] Though not raised by the parties, I also find that there are small amounts of information in the records[23] that fall within the scope of the section 21(3)(a) presumption for medical information because the information relates to an employee's health.

Information withheld under section 21: conclusions

[78] Of the information withheld under section 21(1), some contains educational and employment history of the appellant's team members. I note also that in one instance the information about the appellant's team members reveals information within the scope of the section 21(3)(g) presumption, because it would reveal the individual's religious beliefs and ethnic origin.

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[23] For example, the withheld information in tranche 3 at page 653.

[79] Accordingly, in addition to information that falls within the section 21(3)(g) presumption, I find that the disclosure of the portions of the records that relate directly to the academic discipline issue, or otherwise reveal meaningful information about an individual's education or employment history is presumed to constitute an unjustified invasion of personal privacy under section 21(3)(d).

[80] As outlined above, for information withheld under section 21(1), no one factor, or combination of factors, in section 21(2) can overcome a section 21(3) presumption so I do not need to review the possible relevance of the considerations in section 21(2) for that information. Accordingly, I find that disclosing the withheld information in the records that does not contain the appellant's personal information and to which sections 21(3)(d) or (g) apply would constitute an unjustified invasion of personal privacy. The exception to the section 21(1) exemption in section 21(1)(f) therefore does not apply, and the personal information is exempt under section 21(1). The information that falls within this category is the withheld information in tranche one at pages 25-26 (some of the withheld information also falls within the scope of the section 21(3)(g) presumption), pages 29-30, 85 and 148 and the information in tranche three at pages 23-24.

[81] The information withheld under section 21 that does not fall within one of the section 21(3) presumptions is the information in tranche one at page 141 and in tranche three at page 333, which comprises withheld email addresses. The parties do not address whether any other relevant factors apply to these email addresses. Accordingly, I am satisfied that as the appellant has not raised any factors favouring disclosure, disclosing the email addresses would be an unjustified invasion of personal privacy. I uphold the university's decision to withhold them.

[82] In summary, I uphold the university's application of section 21(1) to the withheld information in records in tranche one at pages 25-26, 29-30, 85, 141 and 148 and the information in tranche three at pages 23-24 and 333.

Presumptions and factors relevant to section 49(b): analysis and conclusions

[83] As outlined above in discussing section 21(1), the section 21(3)(d) presumption applies to some of the information withheld under section 49(b). No other presumptions were raised by the parties. I will proceed to consider the section 21(2) factors and any other relevant factors for the information withheld under section 49(b).

[84] Section 21(2) states, in part:

> 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,
>
> ...

(d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

…

(f) the personal information is highly sensitive;

…

(h) the personal information has been supplied by the individual to whom the information relates in confidence [.]

[85] I will discuss the section 21(2) factors raised by the parties in turn:

21(2)(d): fair determination of rights

[86] The appellant raises this factor, which the university submits does not apply.

[87] For section 21(2)(d) to apply, the appellant must establish that:

(1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and

(2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and

(3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and

(4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.[24]

[88] I recognize the parties' arguments about whether the university's processes afforded the appellant a fair hearing. However, the key point for the purpose of this appeal is that the university's appeals process is complete, so the requirements of section 21(2)(d) cannot be met. The appellant acknowledges that the appeals process is complete. He does note that at the time of this appeal, he still had an outstanding issue with the university with respect to fees, but he does not indicate the relevance of the withheld information to the fee issue, and I do not consider from my review of the withheld information that it has a bearing on that issue. Section 21(2)(d) is therefore

[24] Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

not a relevant factor.

21(2)(f): highly sensitive

[89] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.[25]

[90] The university cites this provision as a factor in withholding some records. The university says there is a risk to relationships and that, at least at one point in time safety concerns were considered by the university with respect to the team's relationship with the appellant.

[91] I accept that for some affected parties there is a fear of retaliation if their views about the events at issue are disclosed. These fears may have diminished over time. Nonetheless, I accept that section 21(2)(f) is a factor for some of the more personal evaluative material.

21(2)(h): supplied in confidence

[92] This factor applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and whether that expectation is reasonable in the circumstances. Thus, section 21(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.[26]

[93] The parties vigorously argued whether an expectation of confidentiality was reasonable in the various settings in which the record were created.

[94] I am satisfied with respect to records between individual team members and their team coach that a reasonable expectation of confidentiality existed. The appellant argues that team members' comments to coaches arise in a context where feedback is expected to be shared, so confidentiality is not expected. The university acknowledges that feedback is part of the team dynamic and that team members were encouraged to provide feedback to the appellant. However, the nature of many of the withheld records, because they relate to aspects of the appellant's performance in the team, were sensitive and were provided to the team coach exclusively, in some cases solicited by the team coach as part of the university's process to manage the appellant's performance and in other cases, unsolicited. I am satisfied that the context and content of the withheld information supports the university's position that confidentiality was expected with respect to many of the exchanges.

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[25] Orders PO-2518, PO-2617, MO-2262 and MO-2344.
[26] Order PO-1670.

Other factors/relevant circumstances under section 21(2)

[95] The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2).[27]

Absurd Result

[96] The appellant raises the "absurd result" principle with respect to the record in tranche four, which is the attendance record for the appellant and his teammates.

[97] Under the absurd result principle, where the requester originally supplied the information, or the requester is otherwise aware of it, the information may not be exempt under section 49(b), because to withhold the information would be absurd and inconsistent with the purpose of the exemption.[28]

[98] The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement[29]
- the requester was present when the information was provided to the institution[30]
- the information is clearly within the requester's knowledge[31]

[99] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.[32]

[100] I accept that the appellant has some recollection of when his teammates attended class. However, I do not believe that the appellant's knowledge is as comprehensive as that contained in the record, which provides an official record of every class the appellant's teammates attended. I also agree with the university's submission that disclosing the attendance record would be inconsistent with the purpose of the personal privacy exemption. It is information the section 21(3)(d) presumption applies to, and there is a tangible difference between the appellant's general knowledge of his teammates' attendance and the information disclosed in the official university attendance record. I note that the portion of the attendance record that relates to the appellant has already been disclosed to him.

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[27] Order P-99.
[28] Orders M-444 and MO-1323.
[29] Orders M-444 and M-451.
[30] Orders M-444 and P-1414.
[31] Orders MO-1196, PO-1679 and MO-1755.
[32] Orders M-757, MO-1323 and MO-1378.

[101] The absurd result does apply to some information in the records, including withheld emails the appellant sent or received. In some cases, duplicate copies of these emails have already been disclosed to the appellant. The university sometimes withheld these emails the appellant sent or received when the emails were part of a chain of email exchanges and the appellant was not copied on later emails in the chain. The emails the appellant sent or received in the chain can be severed from the other emails in the chain and disclosed to the appellant. I have indicated in the copy of the records accompanying the university's copy of this order the emails that should be disclosed to the appellant on this basis.

[102] Some of the emails I found section 19 did not apply to contain personal information of individuals other than the appellant. In most cases that personal information has already been disclosed to the appellant in other records, so I am satisfied that it is not an unjustified invasion of personal privacy to disclose it to the appellant. The exception is some medical information in one sentence in the first email on page 635. The personal information clearly identifies the employee who the medical information is about. It would be an unjustified invasion of the employee's personal privacy to disclose that information to the appellant. I have highlighted the personal information that must be withheld in the copy of the email accompanying the university's copy of this order.

Conclusion:

[103] Balancing the factors, except for the information to which the "absurd result" factor applies, I am satisfied that disclosing the personal information of affected parties is an unjustified invasion of personal privacy under section 49(b).

[104] Section 10(2) of the *Act* obliges the university to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt. The university says its general approach was to withhold information about team members and disclose comments that relate to the appellant. From my review of the records, I am satisfied that some comments about the appellant can be severed and disclosed to him without disclosing personal information about other identifiable individuals.[33] I have indicated the information about the appellant that can be disclosed to him in a copy of the records accompanying the university's copy of this order. Some of this information duplicates information the university has already disclosed to the appellant in other records.

E. Does the discretionary exemption at section 49(c.1) apply to the information at issue?

[105] Under section 49(c.1), an institution may refuse to disclose an individual's personal information, including evaluative or opinion material in certain circumstances.

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[33] Under sections 10(2), 54(1) and 54(3).

[106] The university relied upon section 49(c.1)(ii) to withhold:

- six pages of information in tranche five of the responsive records, comprising two completed evaluation forms (four pages) and handwritten applicant interview notes (two pages)[34]
- portions of three pages of emails in tranche three of the records[35].

[107] The university submits that the withheld records are of the same type as those in other appeals where the exemption was applied and upheld.[36]

[108] Section 49(c.1)(ii) reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > (c.1) if the information is supplied explicitly or implicitly in confidence and is evaluative or opinion material compiled solely for the purpose of,
> >
> > > (ii) determining suitability, eligibility or qualifications for admission to an academic program of an educational institution [.]

[109] The evaluation forms state that the information supplied in them will be held in complete confidence in accordance with the university's policy. The information is clearly evaluation and opinion material that was compiled for the purpose of determining the appellant's suitability for admission to a university program.

[110] The emails supply the evaluation forms and, in the case of one of the emails, some supplementary evaluative material about the appellant's suitability for admission to a university degree program. I am satisfied that the emails also fall within the scope of section 49(c.1)(ii).

[111] The university states the purpose of the interview that led to the creation of the notes was to determine the appellant's suitability, eligibility or qualifications for admission to the program. I accept that the notes were compiled solely for the purpose of determining the appellant's suitability, eligibility or qualifications for admission to an academic program of an educational institution.

[112] While I accept the purpose of the interview as stated by the university, I conclude from my review of the notes themselves that they are the note-taker's

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[34] Pages 1-2, 3-4 and 14-15 of tranche five.
[35] Pages 5,6 and 9 of tranche three.
[36] PO-3615, PO-3094 and PO-3089-F.

recording of the appellant's response to questions. The notes do not comprise "evaluative or opinion material" as required under 49(c.1)(ii) as they are simply a record of the appellant's responses to questions without an evaluation or opinion of that record. The exception is a handwritten checklist at the top of the first page of the notes which takes the form of categories and checkmarks, that I understand to be a shorthand checklist of whether the appellant has met various criteria for entry.

[113] I also find it doubtful that the notes meet the section 49(c.1)(ii) requirement that the notes be explicitly or implicitly supplied in confidence. The notes are not expressly stated to be confidential. Given that the appellant supplied the information in the notes, it would be somewhat absurd to find that that he supplied that information in confidence with the effect that he may not then be able to access the information he supplied. It would be different if the information was evaluative or opinion material that were not the appellant's own. The exception to my finding is regarding the checklist I identified above. That contains evaluation and option material that, given the purpose of the interview, was supplied implicitly in confidence to the university by the note taker.

[114] In reaching my finding regarding the notes I have considered the previous orders cited by the university. All of these involved opinions or evaluative material produced by third parties; none involved information supplied by a requester. I therefore distinguish those orders with respect to the notes.

[115] In summary, I uphold the university's application of section 49(c.1)(ii) to the forms, emails and the checklist and checkmarks in the notes it withheld under that exemption, subject to considering whether it properly exercised its discretion under section 49(c.1)(ii) below.

F. Did the institution exercise its discretion under sections 49(a), 49(b), 49(c.1)(ii) and 19? If so, should this office uphold the exercise of discretion?

[116] The section 49(a), 49(b), 49(c.1)(ii) and 19 exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

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

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

[118] In either case, this office may send the matter back to the institution for an

exercise of discretion based on proper considerations.[37] This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

[119] Considering the evidence before me and the content of the records, I accept that the university's exercise of discretion was reasonable and that it considered relevant factors and did not consider irrelevant ones.

[120] Specifically regarding section 49(c.1)(ii), the university references the reasons cited in previous appeals for withholding records like the forms. These reasons include the chilling effect that the disclosure of the information would have on the long standing and established practices around confidentiality of academic admissions processes.

[121] I am satisfied that the university did not exercise its discretion in bad faith or for an improper purpose, took into account all relevant factors, including the presence of the appellant's own personal information in the records, and did not rely on irrelevant factors. The university acted in good faith in withholding records from the appellant to protect its interests and those of affected parties. While I have found that additional records can be disclosed to the appellant, this does not affect my conclusion that the university acted appropriately in exercising its discretion. I uphold the university's exercise of its discretion.

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

[122] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24.[38] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[123] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[39] To be responsive, a record must be "reasonably related" to the request.[40]

[124] 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.[41]

[125] A further search will be ordered if the institution does not provide sufficient

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[37] Order MO-1573.
[38] Orders P-85, P-221 and PO-1954-I.
[39] Orders P-624 and PO-2559.
[40] Order PO-2554.
[41] Orders M-909, PO-2469 and PO-2592.

evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[42]

[126] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[43]

[127] A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable.[44]

[128] The institution provided a written summary of all steps taken in response to the request.

[129] The appellant's representations are focused on handwritten notes of a named team coach he says should have been located. In particular, he says he witnessed the team coach creating notes at a meeting he attended on a particular date. He does not accept the university's response that it did not retain notes of this type.

[130] The university advises that the named team coach did not have a habit of retaining handwritten notes. The university says it complied with its records management program including its records retention schedules. It particularly notes that it provides guidance to employees in various forms about managing transitory records and notes that this guidance states that drafts, convenience copies and other kinds of records can be deleted as transitory. The university submits it is not obliged to retain every record it creates. The university also refers to a supplementary decision it issued in response to a set of questions from the appellant that directly addressed the existence of the record the appellant refers to in his representations. The university advised that no responsive records of the type requested exist.

[131] The appellant maintains that the notes would relate to the university's sanction decisions and should have been preserved.

[132] The university also provided affidavit evidence that outlines the steps it took to search for responsive records. That affidavit refers to the additional disclosure and direct response to the appellant's request for the records he seeks in this inquiry. The affidavit evidence is that the named team coach was asked for all responsive records and she provided them and was asked again following the appellant's insistence that certain records should exist.

[133] I am satisfied from the university's evidence that it has conducted a reasonable

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[42] Order MO-2185.
[43] Order MO-2246.
[44] Order MO-2213.

search for the handwritten notes of a named team coach the appellant believes should exist. Because the records sought by the appellant are handwritten notes, the university has no other method to search for the records than by asking the individual who created them to search for them. The university's affidavit shows that the university did this twice. I am satisfied that the university no longer has the notes.

[134] I appreciate the appellant's concern that the notes should have been retained because they may contain information pertinent to the sanctions the university imposed on him. However, it is not clear that the coach's notes are more than transitory records and the university did retain and disclose to the appellant a full range of responsive records regarding sanctions against him. Based on the evidence before me, I am satisfied that the university appropriately searched for responsive records. In any event, there is no purpose in ordering a further search for records that no longer exist. I uphold the university's search as reasonable.

H. Should the university's fee be upheld?

[135] Section 57(1) requires an institution to charge fees for requests under the *Act*. That section states:

> A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,
>
> (a) the costs of every hour of manual search required to locate a record;
>
> (b) the costs of preparing the record for disclosure;
>
> (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
>
> (d) shipping costs; and
>
> (e) any other costs incurred in responding to a request for access to a record.

[136] More specific provisions regarding fees are found in sections 6, 6.1, 7 and 9 of Regulation 460. The relevant sections read:

> 6.1 The following are the fees that shall be charged for the purposes of subsection 57(1) of the *Act* for access to personal information about the individual making the request for access:
>
> 1. For photocopies and computer printouts, 20 cents per page.
>
> 2. For records provided on CD-ROMs, $10 for each CD-ROM.

> 3. For developing a computer program or other method of producing a record from machine readable record, $15 for each 15 minutes spent by any person.
>
> 4. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

7. (1) If a head gives a person an estimate of an amount payable under the *Act* and the estimate is $100 or more, the head may require the person to pay a deposit equal to 50 per cent of the estimate before the head takes any further steps to respond to the request.

9. If a person is required to pay a fee for access to a record, the head may require the person to do so before giving the person access to the record.

[137] Section 57(5) provides that a person who is required to pay a fee may ask the Commissioner to review the amount of the fee or the head's decision not to waive the fee.

[138] With respect to a fee waiver, section 57(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. Section 8 of Regulation 460 sets out additional matters for a head to consider in deciding whether to waive a fee. Those provisions state:

57. (4) A head shall waive the payment of all or any part of an amount required to be paid under subsection (1) if, in the head's opinion, it is fair and equitable to do so after considering,

> (a) the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);
>
> (b) whether the payment will cause a financial hardship for the person requesting the record;
>
> (c) whether dissemination of the record will benefit public health or safety; and
>
> (d) any other matter prescribed by the regulations.

[139] This office may review an institution's decision to deny a request for a fee waiver, in whole or in part, and may uphold or modify the institution's decision. The appellant must have first asked the institution for a fee waiver, before this office can

review whether a fee waiver should be granted.[45]

[140] The university submitted that the appellant never requested a fee waiver and this was not contested by the appellant. There is no evidence before me that the appellant requested a fee waiver from the university. Therefore no fee waiver decision was made by the university that I can review. I can however "review the amount of the fee" under section 57(5) to ensure that it was reasonable.

[141] The university issued an interim decision and fee estimate advising the appellant that sections 21(1) and 49(c.1)(ii) of the *Act* would likely apply to some of the responsive records. The university understood the request to be for the appellant's personal information so, in accordance with section 6.1 of the *General Regulations,* only charged for photocopying of records and not for searching for records or redacting information.

[142] The university assessed a fee of $120.00 for photocopying 600 pages and requested a 50% deposit in accordance with section 7 of the *General Regulations.* Upon receipt of the deposit payment, the university issued a final access decision granting partial access to the responsive records.

[143] On appeal, the appellant took issue with the assessed fee. In particular in his representations the appellant submits that the university "sent a great amount of duplicated documentation and also a great amount of documents that were entirely redacted because they did not pertain to the matter and items requested. Approximately 75% of the material sent was duplication or not aligned to the appellant's record request."

[144] The university responds that it went to great lengths to remove duplicate material. The university acknowledges that there are many duplicate records but that this is the nature of email records and submits that it spent a significant amount of time removing hundreds of pages of duplicate records to reduce the cost to the appellant. It also states that it sent the appellant 711 pages of records but only charged for 600 due to (remaining) duplication.

[145] It also submits that all documents sent to the appellant were responsive to his request.

[146] The appellant responds that he seeks a partial refund of fees that were charged for the records.

[147] The fee provisions in the *Act* establish a user-pay principle which is founded on the premise that requesters pay the prescribed fees associated with processing a request unless it is fair and equitable that they not do so. The fees referred to in section

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[45] Order M-858.

57(1) and outlined in Regulation 460 are mandatory unless the requester can present a persuasive argument that a fee waiver is justified on the basis that it is fair and equitable to grant it or the *Act* requires the institution to waive the fees.[46]

[148] As I noted above, the uncontested evidence of the university is that the appellant did not seek a fee waiver. The appellant's arguments in the inquiry are essentially an argument for a fee waiver. As the appellant did not seek a fee waiver from the university, there is no fee waiver decision by the university for me to review.

[149] Notwithstanding the lack of a fee waiver decision, I have reviewed the reasonableness of the fee assessed by the university in accordance with section 57(5).[47] The fee was accurately calculated in accordance with the *Act* and accompanying regulations set out above. I note that the university submits that it provided 711 pages of records to the appellant but only charged the appellant for 600 pages in order to compensate for unavoidable duplication in the records, which the university worked with the appellant to attempt to minimize. I am satisfied that the university's fee was reasonable.

ORDER:

1. I uphold the university's decision to withhold records in part. I order the university to disclose to the appellant by **October 11, 2018,** but not before **October 2, 2018**:

    a. the notes withheld under section 49(c.1)(ii) at pages 14-15 of tranche five of the records that I found that did not fall within the scope of that exemption;

    b. the information I found section 19 did not apply to (1st email page 561, 1st email page 65 and to the end of page 636, except for the highlighted information on the copy of page 635 accompanying the university's copy of this order that it would be an unreasonable invasion of personal privacy to disclose, 1st email page 667 through to the end of page 669);

    c. the information withheld under the personal privacy exemptions that can be severed and disclosed, as indicated in the copy of the records accompanying the university's copy of this order.

2. I order the university to issue an access decision regarding the information I found to be responsive to the appellant's request on page 279 of the records treating the date of this order as the date of the request.

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[46] Order PO-2726.
[47] M-868, M-914.

3. I uphold the university's fee, exercise of discretion and search for responsive records.

Original Signed by: ____________________ August 30, 2018

Hamish Flanagan
Adjudicator