Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER PO-3918-I

Appeal PA15-501

Queen's University

January 8, 2019

Summary: The appellant, a former student, sought notes made by a named team coach and notes from a meeting on a specified date from Queen's University (the university) pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*). The university withheld some information in the responsive records under section 21 (personal privacy). The appellant appealed the university's decision. During mediation, the appellant also raised the issues of reasonable search and responsiveness of records. At mediation, section 49(b) (personal privacy) was also added as an issue in the appeal. In this order, the adjudicator upholds the university's decision with respect to the personal privacy exemption and responsiveness of records. She orders the university to conduct a further search for the team coach's notes.

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"), 24(1), and 49(b).

Orders and Investigation Reports Considered: Orders PO-3874, PO-2711 and PO-3819.

BACKGROUND:

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

1. A named individual's (the former team coach) notes about the appellant and the team interactions with the appellant. The appellant stated that the notes were turned over to a named individual and another named individual when the former team coach left the program.

2. Details of the Threat Assessment Team (TAT) meeting called on a specified date by two named individuals.

The appellant stated that the meeting was held to discuss the appellant's future in a particular program. The appellant advised that the records should include the minutes of the meeting and the decision put forward as a result of the meeting.

[2] The university issued a decision granting partial access to the responsive records. Access was denied to the withheld information under section 21(1) of the *Act.* The university also assessed fees for photocopying, totalling $8.00 and noted that certain information was withheld as it was deemed not responsive to the request.

[3] The requester contacted the university regarding a specific record that was not disclosed in its initial decision. The university responded by issuing a supplemental decision, granting full access to one further record.

[4] The requester, now the appellant, appealed the university's original decision.

[5] During mediation, the mediator noted that the information withheld in the records related to both the appellant and individuals other than the appellant. The mediator raised the possible application of section 49(b) of the *Act* with the university. The university agreed and section 49(b) was added to the appeal.[1]

[6] The appellant advised the mediator that he believed that further records responsive to his request exist at the university. In response, the university conducted a further search. Following the completion of this search, the university issued a revised decision disclosing additional records responsive to the appellant's request. In its decision, the university also provided a description of the search conducted.

[7] The appellant continued to seek access to information withheld by the university, including the information the university determined was not responsive to the request. The appellant also believes that further records responsive to his request exist.

[8] As mediation did not resolve the appeal, it was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. The adjudicator initially assigned to this appeal invited the university and the appellant to provide representations on the issues in this appeal. He received representations from the parties on the issues set out below. These representations were shared in accordance with this office's *Code of Procedure* and *Practice Direction Number 7*. The appeal was then transferred to me to continue the adjudication stage of the appeal.

[9] In this order, I uphold the university's decision with respect to the application of the section 49(b) personal privacy exemption and responsiveness of records. I order the university to conduct a further search for the former team coach's notes.

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[1] Where a record contains a requester's own personal information, the correct personal privacy exemption to consider is the discretionary exemption at section 49(b) rather than the mandatory exemption at section 21(1).

RECORDS:

[10] Twenty-two records were identified by the university as responsive to the appellant's request. Nine have been fully disclosed. Thirteen records comprised primarily of handwritten notes and emails remain at issue, having been fully or partially withheld by the university under sections 49(b) and 21(1) or on the basis that information in the records is not responsive to the appellant's request.

[11] The withheld information in five of these thirteen records[2] was also at issue in appeal PA16-291, an appeal involving the same parties. The issue with respect to the overlapping withheld information is whether it is responsive to either or both requests. Appeal PA16-291 resulted in the issuance of Order PO-3874, where the adjudicator found that the overlapping withheld information was not responsive to the request at issue in that appeal. As discussed below, I find that these records are also not responsive to the request at issue in this appeal.

ISSUES:

A. 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 49(b) apply to the information at issue?

D. Did the university exercise its discretion under section 49(b)? If so, should this office uphold the exercise of discretion?

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

DISCUSSION:

A. What records are responsive to the request?

[12] The university withheld portions of several records on the basis that these portions were not responsive to the appellant's request.

[13] 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,

[2] Specifically, records 4 (page 4), 7, 8, 9, and 20.

> (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).

[14] 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.[3] To be considered responsive to the request, records must "reasonably relate" to the request.[4]

[15] The university submits that it included all responsive records in the index of records. It explains that the information it withheld as not responsive[5] relates to matters unrelated to the appellant's request. The university's representations (which were shared with the appellant) explain in detail the basis for withholding the information in the records as not responsive. The reasons include that the information in the records related to: a team that the appellant was not part of; a named person's personal circumstances; and an email from the director of team coaching to the former team coach.

[16] Although the appellant provided representations, his representations did not respond to the university's explanation or address the information withheld as not responsive.

[17] On my review, I find the withheld information does not "reasonably relate" to the appellant's request. I agree with the university that the withheld information relates to a team that the appellant was not part of, a named person's personal circumstances, and an email from the director of team coaching to the former team coach. Accordingly, I uphold the university's decision regarding the information it withheld as not responsive.

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

[18] In order to determine whether the personal privacy exemption at section 49(b) of the *Act* applies, it is necessary to decide whether the record contains "personal

[3] Orders P-134 and P-880.
[4] Orders P-880 and PO-2661.
[5] Information in record 4 at pages 2, 3 and 4, record 7 at page 1, record 8 at page 1, record 9 at page 1 and record 20 at page 1.

information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
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> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[19] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[6]

[20] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[7]

[21] The university submits that the records at issue contain personal information of

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[6] Order 11.

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

the appellant and other identifiable individuals. It submits that these records contain personal information of some of the appellant's former team members, along with the former team members' opinions of the appellant.

[22] Although the appellant provided representations, his representations did not address this issue.

[23] Based on my review of the records at issue, I find that they contain the personal information of the appellant and other identifiable individuals. Specifically, they contain personal information of the appellant and other individuals, which are inextricably intertwined, which would fall within paragraphs (a), (e) and (h) of the definition of "personal information" in section 2(1) of the *Act*. As these records contain personal information of both the appellant and other individuals, Part II of the *Act* applies and I must consider whether the records at issue are exempt pursuant to the discretionary exemption at section 49(b) of the *Act*.

C. Does the discretionary exemption at section 49(b) apply to the information at issue?

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

[25] Under section 49(b), where a record contains personal information of both the appellant and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the 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 appellant.[8]

[26] Section 49(b) states:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if the disclosure would constitute an unjustified invasion of another individual's personal privacy

[27] Sections 21(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy. 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 is not exempt under section 49(b).

[28] The appellant claims that the exception in section 21(1)(e) that permits disclosure for research applies to the withheld personal information.

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[8] See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 38(b).

[29] Section 21(1)(e) states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> (e) for a research purpose if,
>
> (i) the disclosure is consistent with the conditions or reasonable expectations of disclosure under which the personal information was provided, collected or obtained,
>
> (ii) the search purpose for which the disclosure is to be made cannot be reasonably accomplished unless the information is provided in individually identifiable form, and
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> (iii) the person who is to receive the record has agreed to comply with the conditions relating to security and confidentiality prescribed by the regulations; or

[30] In Order PO-3874, former Adjudicator Hamish Flanagan dealt with a related appeal, which involved the same parties. I note that the appellant also raised the possible application of the research exception argument in that appeal. With respect to section 21(1)(e), Adjudicator Flanagan states:

> 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.

[31] I agree with and adopt the reasoning stated above for this appeal. The circumstances in the present appeal are similar to those in Order PO-3874. As such, I do not find that the research exception in section 21(1)(e) applies to the personal information at issue in this appeal.

[32] I have reviewed the remaining paragraphs (a) to (d) of section 21(1) and find that none apply. In addition, I find paragraphs (a) to (d) of section 21(4) do not apply. Therefore, I will consider whether the factors in section 21(2) and the presumptions in section 21(3) are relevant to my determination. In deciding whether the personal information is exempt under section 49(b), this office weighs the factors and presumptions in section 21(2) and (3), and balances the interests of the parties.

Section 21(3) – presumptions

[33] If any paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 49(b).

[34] In the circumstances, the university claims that the presumption at paragraph (d) applies. Section 21(3)(d) states:

> 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;

[35] The university explains that the information at issue was created in the context of a specific program for the purposes of that program. It states:

> … The team coach is an integral part of the program and is relied upon by the team members to provide direction not just to the team as a whole but also to the members individually in a confidential manner. Team members are actively encouraged to "check-in" with the team coach to share their personal experiences, both positive and negative, and discuss challenges and obstacles to their success…

[36] The appellant does not address the application of this presumption to the information at issue.

[37] Past orders of this office regarding the application of the presumption against disclosure in sections 21(3)(d) and 14(3)(d) (the municipal equivalent of section 21(3)(d)) have determined that for information to qualify as "employment or educational history", it must contain some significant part of the history of the person's employment or education. What is or is not significant must be determined based on the facts of each case.[9]

[38] Based on my review of the university's representations and the records at issue, I am satisfied that much of the personal information at issue relates to the educational history of the appellant's former team members. In particular, many of the records are the former team coach's handwritten notes when she met with each of the appellant's former team members about the specific program, and more specifically about their experience on the team. Other records are the former team coach's handwritten notes or emails about the team members. I note that, in Order PO-3874, Adjudicator Flanagan found that this presumption applies to the undisclosed information in the records where it is about the core of the educational discipline matter or reveals something about an individual's education history more than the mere fact that they were enrolled at the university. I find that in the present appeal, the records contain detailed information about the individuals' experiences in the educational program that

[9] Order MO-1343, M-609.

is the subject of the request. As such, I find that disclosure of the withheld personal information in these records contains the educational history of other individuals and the presumption in section 21(3)(d) applies to it.

[39] However, I find that the withheld personal information on page 5 of record 1 does not relate to the educational history of the identifiable individuals. I also find that it does not fall within any of the other presumptions of section 21(3).

Section 21(2) – factors

[40] Section 21(2) of the *Act* lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy under section 49(b).[10]

[41] The university claims the application of the factor relating to non-disclosure in section 21(2)(f) which states:

> A head, in determining whether a disclosure of personal information constitute an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
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> The personal information is highly sensitive;

[42] The university submits that section 21(2)(f) is relevant to this appeal. It submits that, very early in the academic year, members of the appellant's team expressed frustration with the quality of the appellant's work and his behaviour, which continued throughout the fall and into the winter term. The university submits that, although the team members know that the appellant is aware of their concerns about him, disclosing their confidential words and feelings expressed to, and documented by, the team coach would subject them to further distress.

[43] The appellant does not claim the application of any of the factors favouring disclosure, nor does he raise any arguments suggesting that any unlisted factors apply.

[44] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.[11]

[45] The records contain the personal opinions of the appellant's former team members about him and their interactions with him. The record also contains personal information about some of the appellant's former team members. Based on my review of the records, I find it is reasonable to expect that disclosure of the information would cause significant personal distress to those individuals whose personal information is at issue.

[46] Therefore, I find the factor in section 21(2)(f) is relevant with respect to the

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[10] Order P-239.
[11] Orders PO-2518, PO-2617, MO-2262 and MO-2344.

withheld personal information at issue. In addition, I reviewed the remainder of the factors in section 21(2), including those in favour of disclosure, and find that none apply. Consequently, having considered and found that the presumption in section 21(3)(d) applies to most of the information and the factor in section 21(2)(f) applies to all of it, I find the information qualifies for exemption under section 49(b) of the *Act*.

D. Did the university exercise its discretion under section 49(b)? If so, should this office uphold the exercise of discretion?

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

[48] 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.

[49] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[12] This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

[50] In its representations, the university submits that it property exercised its discretion under section 49(b). It submits that it acted in good faith and took into account relevant factors when exercising its discretion. The university also submits that it withheld personal information about the appellant where such information was views and opinions expressed in confidence to the former team coach by an identifiable team member. It further submits that nothing in the withheld personal information would add to the appellant's understanding of how he was perceived; rather, disclosure of such records would unfairly attribute particular comments to particular individuals.

[51] Although the appellant provided representations on this issue, his representations did not address the university's exercise of discretion. His concern appears to be that he might have been able to prepare a defence at the two of the university's tribunal processes if he had a copy of the former team coach's notes. His other concern is that the university was aware of the "toxic" behaviour towards him from early on in the program but did not do anything about it.

[52] I have considered the circumstances of this appeal and the university's representations. I find the university considered whether the appellant was seeking his own personal information; whether the appellant had a sympathetic or compelling need

[12] Order MO-1573.

to receive the information; and the relationship between the appellant and the affected parties. I am satisfied that the university has not erred in its exercise of discretion with respect to its application of section 49(b) of the *Act*. I am also satisfied that it did not exercise its discretion in bad faith or for an improper purpose. Accordingly, I find that the university took relevant factors into account and I uphold its exercise of discretion on this appeal.

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

[53] 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.[13] 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.

[54] 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.[14] To be responsive, a record must be "reasonably related" to the request.[15]

[55] 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.[16]

[56] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[17]

[57] 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.[18]

[58] In this case, after receiving the package of records, the appellant emailed the Freedom of Information Coordinator (the FOIC) about the notes made by the former team coach during a meeting with his team on a specified date. Subsequently, the FOIC informed him that she found a typewritten record of the team meeting on the specified date, which appeared to be distributed to his group. Although not responsive to the appellant's request, the FOIC provided him with a copy of this record nevertheless.

[59] During mediation, the appellant told the mediator that he believes more responsive records should exist, specifically notes from the former team coach on a

[13] Orders P-85, P-221 and PO-1954-I.
[14] Orders P-624 and PO-2559.
[15] Order PO-2554.
[16] Orders M-909, PO-2469 and PO-2592.
[17] Order MO-2185.
[18] Order MO-2246.

specified date and notes from a Threat Assessment Team (TAT) meeting. The mediator raised this issue with the university. Upon further search, the university located an email record, which was missed in the original search because the email did not contain the appellant's last name. Subsequently, this email record was fully disclosed to the appellant.

[60] In its representations, the university acknowledged that a reasonable search was not initially conducted as revealed in the course of the further searches for records. In support of its representations, the university attached an affidavit sworn by the FOIC, whose responsibilities include dealing with requests for information under the *Act*. The affidavit referred to the scope of the appellant's request and noted that she requested the Associate Dean of Student Services and Community Relations and the director of the program in question to search for TAT meeting notes and the former team coach's notes, respectively. Once she received records from these two individuals, she reviewed and identified those that were responsive to the request. She noted that some of the records from the former team coach were not notes about the appellant and the team interactions with him, but rather notes of an administrative nature. Shortly afterwards, she emailed the decision letter to the appellant with an Index of Records. She also noted that upon payment of the requested fee, she sent the records to the appellant. Subsequently, he emailed her about notes made by his former team coach during a meeting with his team on a specified date. Shortly afterwards, she provided him with the typewritten record of the team meeting.

[61] During mediation, the FOIC noted that the mediator informed her that the appellant believed there were additional responsive records, and requested the university to conduct another search. Shortly afterwards, the FOIC contacted both the Associate Dean of Student Services and Community Relations and the director of the program asking them to search again for records. The former informed her that upon conducting another search, she located an email record that had been missed in the original search because the email did not contain the appellant's last name. The latter informed her that she had turned over the complete set of records from the former team coach when first asked for records.

[62] In response, the appellant raised three issues. He asked why the former team coach's notes provided in the supplemental decision letter did not match, in any way, the form of the former team coach's previous notes. The appellant also asked about the handwritten notes of the former team coach on a specified date. He states that he observed her taking handwritten notes on a specified date. Finally, he asked why there was no email to the director of team coaching from the former team coach. He states that based on the records, the former team coach made a practice of emailing the director of team coaching after observing team meetings.

[63] The university had the following responses to the appellant. It submits that the former team coach's notes do not match the form of her previous notes because this record was not the former team coach's notes. The university submits that its supplemental decision letter stated:

> We did not find any [of the former team] coach's notes with regards to that meeting; however, there is a typewritten record of the meeting that appears to have been distributed to the group…

[64] The university also submits that the former team coach emailed the director of team coaching in the early days of the program, not after each team meeting. It submits that the director of team coaching confirmed that communications between her and the former team coach normally occurred through telephone and in-person conversations.

[65] In response, the appellant reiterates his concern that he observed the former team coach writing notes during that specified date. He submits that the record details, and is evidence of the fact, that she made a practice of handwriting notes during the team meetings she observed.

[66] In addition, the appellant submits that the record documents the fact that the former team coach would email her observations of the team meeting to the director of team coaching after each meeting she observed. He reiterates his concern that there is no record of notes from this specified date or of an email from the named individual to the director of team coaching has been provided when the record shows that it was the former team coach's practice to email the director of team coaching after each meeting she observed.

[67] Based on my review of the parties' representations and evidence, I am satisfied that the university conducted a reasonable search for emails of the former team coach. I accept the evidence that the former team coach only emailed the director of team coaching in the early days of the program, not after each meeting. I also accept the evidence that communications between the former team coach and the director of team coaching normally occurred through telephone calls and in-person conversations.

[68] However, I am not satisfied that the university conducted a reasonable search for the former team coach's notes. I understand that the director of team coaching asked the former team coach to return everything pertaining to the specific program shortly after she left the program. The FOIC's affidavit states:

> … When [the former team coach] left the program as of a [specified date], she was asked to return everything pertaining to the program and accordingly sent a box by Purolator to the [specific program] including her notes.

[69] I accept the university's evidence that it had reviewed all the documents contained in the box provided by the former team coach. However, I do not find that to be sufficient. The university did not ask the former team coach directly whether she may have any responsive records when it conducted an additional search. The university also did not ask the former team coach to search her office for any notes, in case there are any that she did not return upon leaving the program. Accordingly, I will order the university to ask the former teach coach to search her office for these notes.

ORDER:

1. I uphold the university's decision that the information it withheld as not responsive is not responsive to the appellant's request.

2. I uphold the university's decision to withhold the remainder of the information with respect to the personal privacy exemption at section 49(b) of the *Act*.

3. I order the university to conduct a further search for the former team coach's notes. More specifically, I order the university to request that the former team coach search for the specified notes in her office.

4. I order the university to provide me with an affidavit sworn by a person who has direct knowledge of the further search. This person should be the former team coach herself unless the university can provide a satisfactory explanation why another person swears the affidavit. The affidavit is to include the following information:

    - The name and position of the person who conducted the search
    - The steps taken in conducting the search
    - The results of the search

5. I order the board to provide me with the affidavit by **February 5, 2019.**

6. If the university locates records as a result of the search, I order the university to provide the appellant with an access decision in accordance with the requirements of the *Act*, treating the date of this interim order as the date of the request.

Original Signed by: January 8, 2019

Lan An
Adjudicator