Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4108

Appeal PA14-14-2

Carleton University

January 27, 2021

Summary: This order deals with the continuation of an appeal following the Divisional Court's dismissal of a judicial review application brought by Carleton University (the university) regarding Order PO-3576, which resolved Appeal PA14-14 under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The appellant sought access under the *Act* to the raw data and results of surveys that were conducted among students, faculty, and staff by a subcommittee of the university's Commission on Inter-Cultural, Inter-Religious and Inter-Racial Relations on Campus. In particular, the subcommittee's research was focused on better understanding the Jewish experience on campus. In Order PO-3576, the adjudicator did not uphold the university's decision that records responsive to the request were excluded from the *Act* under section 65(8.1)(a) (research exclusion) and the Divisional Court dismissed an application for judicial review of the IPC's order. Following the dismissal of the judicial review application, the university issued a further decision, again denying access to the requested records, but this time citing the mandatory personal privacy exemption in section 21(1), and the discretionary economic or other interests exemption in section 18(1)(c). The appellant again appealed. In this order, the adjudicator partially upholds the university's decision to withhold portions of the records under section 21(1), but finds that section 18(1)(c) does not apply. She orders the university to disclose the non-exempt portions of the records to the appellant.

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"), 18(1)(c), and 21(1), 21(2)(a), (f), (g), (h), (i), and 21(3)(d) and (h).

Orders and Investigation Reports Considered: Order PO-3576.

Cases Considered: *Carleton University v. Information and Privacy Commissioner of Ontario and John Doe, requester*, 2018 ONSC 3696.

OVERVIEW:

[1] This appeal is a continuation of an earlier appeal between Carleton University (the university) and a particular requester. The earlier appeal, Appeal PA14-14, arose out of a request that the university received under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to surveys conducted of a specific group of students and faculty. In response to the request, the university issued an access decision denying access to some records on the basis of the research exclusion in section 65(8.1)(a) of the *Act*.

[2] The requester appealed that decision to this office and Appeal PA14-14 was opened to address the issues. In Order PO-3576, Adjudicator Stephanie Haly found that the research exclusion did not apply and ordered the university to issue an access decision for records responsive to three parts of the appellant's request, parts 2, 6, and 7, which read:

> 2) Minutes of all meetings of the Commission on Inter-Cultural, Inter-Religious and Inter-Racial Relations on Campus [the commission] from the following months: January 2011; February 2011; April 2011; and from March 2012 until November 2012.
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> 6) The second survey and its results, as well as an explanation of the survey methodology, who designed the survey, who approved the survey, how it was conducted, and who analyzed the survey results.
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> 7) The raw data generated by the second survey.

[3] The university filed an application for judicial review of Order PO-3576. In *Carleton University v. Information and Privacy Commissioner of Ontario and John Doe, requester*,[1] the Divisional Court found that the adjudicator's decision was "reasonable and consistent with the evidence of legislative intent, a contextual analysis of the provisions in the *Act* and established interpretive principles." The court ordered the university "to decide what records responsive to parts 2, 6 and 7 they agree to produce and submit their response" to the appellant.

[4] Following the Divisional Court's decision, the university issued an access decision granting partial access to the responsive records.

[5] For the records responsive to part 2 of the request, the university stated that some of the information relates to advice and/or recommendations made by commission members to the university. The university withheld those portions of the

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[1] 2018 ONSC 3696.

records pursuant to section 13(1) of the *Act* (advice or recommendations). The university also withheld information that it claimed would affect its competitive position pursuant to section 18(1)(c) of the *Act* (economic or other interests).

[6] For parts 6 and 7, the university disclosed the two questionnaires in their entirety, but withheld all of the results and raw data. The university withheld the results and data under sections 18(1)(c) and 21(1) (personal privacy). The university referred to the presumptions at sections 21(3)(d), 21(3)(g), and 21(3)(h) in support of its position that disclosure of the raw data and survey results would result in an unjustified invasion of personal privacy.

[7] The appellant appealed the university's decision and Appeal PA14-14-2 was opened. A mediator was assigned to explore the possibility of resolving the issues in dispute. During the mediation stage, the appellant confirmed that he seeks access to the survey results and raw data, but no longer seeks access to the paragraph in the Meeting Summary of March 6, 2012 withheld under sections 13 and 18 of the *Act*. As a result, access to this portion of the record is no longer an issue on appeal. This was the only severance to the records responsive to part 2 of the request, and the only severance made on the basis of the advice or recommendations exemption in section 13. Therefore, the records responsive to part 2 of the request and the application of section 13 are no longer at issue.

[8] A mediated resolution was not achieved and the file was transferred to the adjudication stage. As the adjudicator, I decided to conduct an inquiry under the *Act*. In doing so, I invited both parties to provide written representations on the issues under appeal. The parties' representations were shared in accordance with *Practice Direction Number 7* and the IPC's *Code of Procedure*.

[9] For the following reasons, I partially uphold the university's decision to withhold portions of the records under section 21(1), but find that the section 18(1)(c) exemption does not apply in the context of this appeal. I order the university to disclose the non- exempt portions of the records to the appellant.

RECORDS:

[10] There are two records at issue, which consist of the survey results and raw data. One record contains the student respondents' survey responses, while the second record contains the faculty and staff respondents' responses.

[11] The survey questionnaires themselves, which have been disclosed to the appellant, each contained four sections. First, there was the "informed consent" section, and the related question confirming that the respondent consented to participating in the survey. Next, there was the "demographic questionnaire," which obtained information about the respondents' age, sex, religious and cultural beliefs, and employment or education at the university. That was followed by the bulk of the

survey, in which respondents were asked 18[2] multi-part questions about their experience as members of the university's Jewish community. The surveys concluded with an "informed consent for re-contact" section, in which respondents indicated whether they consented to being contacted with follow-up questions.

[12] In this order, I describe the content of the records as generally falling into two categories: "narrative responses" or "numerical responses."

[13] When completing the surveys, the narrative responses were entered by respondents into free-text text boxes. These responses typically explain the respondents' views or opinions in their own words, with reference to examples from their own personal experiences.

[14] The numerical responses reflect questions wherein respondents ticked a box to represent their answer. To record these responses, each box was assigned a number value, which is reflected in the records. For example, in response to a question asking respondents to identify their sex, the boxes associated with "male" and "female" were assigned the numbers 1 and 2, respectively. Therefore, if a respondent selected the "male" box, the number 1 would appear in the record to reflect that response.

[15] To further illustrate the types of numerical responses contained in the records, respondents may have been asked indicate the degree to which they agree with a particular prompt. The possible responses to such a question would range from 1 to 7, in which 1 would represent the "strongly disagree" response, and 7 would represent the "strongly agree" response.[3]

ISSUES:

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

B. Does the mandatory exemption at section 21(1) apply to the personal information at issue?

C. Does the discretionary exemption at section 18(1)(c) apply to the information that is not exempt under section 21(1)?

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[2] Note: This number is based on the survey distributed to university faculty and staff. The questions were not numbered in the survey that was distributed to students, but the format was the same.

[3] This is not an exhaustive description of the kinds of responses contained in the records, but classifying them as narrative or numerical responses is, generally, accurate.

DISCUSSION:

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

[16] The university relies on the mandatory personal privacy exemption at section 21(1) of the *Act* to withhold the records at issue.

[17] In order to determine whether the personal privacy exemption applies, first it is necessary to decide whether those records contain "personal information" and, if so, to whom that information relates. The term "personal information" is defined in section 2(1) of the *Act* as, "recorded information about an identifiable individual," including information that fits within the list of examples provided in paragraphs (a) to (h). The list of examples under section 2(1) is not exhaustive; information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[4]

[18] Exceptions to the definition of personal information exist for information about individuals that have been deceased for more than 30 years,[5] and information that would identify an individual in a business, professional, or official capacity.[6] However, even when information relates to an individual in a business, professional, or official capacity, it may still qualify as personal information if it reveals something of a personal nature about the individual.[7]

[19] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[8]

Representations

The university's representations

[20] By way of background, the university explains that as a post-secondary institution, it provides education to more than 28,000 full-time and part-time graduate and undergraduate students in the city of Ottawa.

[21] In 2010, the university announced the creation of its Commission on Inter-

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[4] Order 11.
[5] Section 2(2) of the *Act*.
[6] Sections 2(3) and 2(4) of the *Act*. 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. See, for example, Orders MO-1550-F and PO-2225.
[7] Orders P-1409, R-980015, PO-2225, and MO-2344.
[8] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v Pascoe*, [2002] ON NO 4300 (CA).

Cultural, Inter-Religious, and Inter-Racial Relations on Campus (the commission), which was intended to contribute to a "better context and understanding on the [university] campus and in the surrounding community." In 2011, the commission's mandate was expanded, and two subcommittees were created, to explore issues relating to Indigenous and Jewish students and faculty, as those groups "had reported low satisfaction with the climate of respect at the university."

[22] According to the university, the subcommittee that focused on Jewish experiences created surveys for Jewish students and faculty, and the results of those surveys were reported to the commission and included in its final report. Sometime thereafter, the appellant submitted his access request under the *Act* for records associated with the subcommittee's research. The university withheld the records that consisted of survey results and raw data.

[23] The university submits that the records at issue contain the personal information of identifiable individuals who are, or were, students, staff, or faculty of the university. In particular, the university says that the records contain the following types of personal information: sex, age, level of study (for example, undergraduate or graduate), year of study, year of hire, retirement status, race, ethnic origin, religious beliefs, political beliefs, and personal opinions.

[24] According to the university, the level and year of study are elements of the students' educational history, while the year of hire and retirement status are elements of faculty and staff members' employment history, as contemplated by paragraph (b) of the definition of "personal information."

[25] The university acknowledges that the survey results are associated with coded study numbers, rather than personal identifiers of individual participants. However, the university notes that all participants were or are members of the university's Jewish community. The university maintains that the records contain information about identifiable individuals because, when read in their entirety, the information "can be easily connected to the individual who provided the information given the specificity and frankness of the survey responses, and when combined with information such as the age, sex, and education and/or employment history of the individual." The university submits that this is especially true because "the Jewish community at the university is relatively small."

The appellant's representations

[26] The appellant disagrees with the background information provided by the university. First, he disagrees with the university's claim that all respondents are or were members of the university's Jewish community, and notes that non-Jewish individuals were also invited to complete the survey. The appellant maintains that knowing "what percentage of non-[Jewish people] participated in the survey is important given that the ostensible purpose of the survey was to discover what Jewish employees and students have experienced" at the university.

[27] The appellant also says that despite the university's representations, "the results of the survey were definitely not included in the [commission's] final report." He notes that Appendix E of the report specifically states, "[r]espondents to the survey participated on the condition of anonymity and therefore the results have not been distributed." According to the appellant, the report only included a "very general and not very informative" summary of the survey findings. Moreover, he maintains that because the responses were treated as confidential, it does not appear that the survey results were reported to the commission in "any meaningful way."

[28] Although the appellant says that he doubts that identification of respondents would be as easy as the university claims, he notes that "even [the university] recognize[s] that a combination of a respondent's comments with demographic data […] is needed for that individual to be identifiable."

[29] The appellant clarifies that he does not wish to know the identity of survey respondents, and suggests that the responses to the "demographic questionnaire" portion of the surveys could be withheld on this basis. Rather, he wishes to know the percentage breakdown of how many respondents were Jewish and non-Jewish, how many were current students and alumni, and how many were current and former employees. In the case of alumni and former employees, the appellant also wants to know when they were last students or employees at the university. He explains his reasons for desiring this information as follows:

> Knowing what percentage of non-[Jewish respondents] participated […] is important given that the ostensible purpose of the survey was to discover what Jewish employees and students have experienced at Carleton.
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> […] Since the Commission […] was focused on the "current climate on campus," it is useful to know what percentage of respondents were actually working or studying at the university when the […] survey was conducted.

The university's reply

[30] In response, the university submits that disclosing the status of survey participants as current or former students, faculty, or staff would amount to a disclosure of the raw data collected by the survey, which would reveal their personal information.

[31] The university also explains that although it distributed the surveys to non-Jewish students, faculty, and staff, participants were required to self-identify as Jewish in order to proceed to subsequent questions in the survey. Therefore, according to the university, there were no non-Jewish participants whose responses might have impacted the subcommittee's findings.

[32] The university does not dispute the appellant's submission regarding the

confidentiality of the survey responses. It explains that because respondents were assured that their responses would remain confidential, the commission was provided "an overview of what the survey revealed, which it used in formulating the report."

[33] The university maintains that the appellant did not formally narrow the scope of his request, and it has therefore proceeded based on the original request, which was for "second survey results," and "raw data gathered by the second survey." According to the university, the responses include opinions, which are within the definition of personal information under section 2(1) of the *Act*.

The appellant's sur-reply

[34] The appellant continues to dispute the university's position regarding non-Jewish respondents' participation in the survey. He states that "it would be extraordinarily misleading for the university to invite the participation of non-[Jewish respondents] in the survey, if its intention was actually to exclude them."

[35] The appellant also reiterates that he is not interested in obtaining information that would reveal the identity of survey respondents, such as their responses to the "demographic questionnaire" portion of the surveys.

Analysis and findings

[36] Throughout the parties' representations, they appear to disagree about the composition of the respondents to the survey and whether they were Jewish or not. I am satisfied that this issue does not affect the following analysis or findings on personal information. I address the issue in my discussion of the section 21 exemption below under issue B.

[37] Personal information is defined in section 2(1) of the *Act* as recorded information about an identifiable individual, including:

- information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual (paragraph (a));
- information relating to the education […] or employment history of the individual (paragraph (b)); and
- the personal opinions or views of the individual (paragraph (e)).[9]

[38] Having reviewed the records, I am satisfied they contain personal information, as

[9] Except where they relate to another individual.

described above. In particular, I find that in responding to the survey questions, students, faculty, and staff provided information that fits within paragraph (a) of the definition of "personal information," including their sex, age, and ethnicity and/or religion. The records also include information relating to respondents' education or employment history, as identified by the university, for the purpose of paragraph (b) of the definition. Finally, I am satisfied that the records reflect the personal views or opinions of the respondents regarding the Jewish experience on campus, which qualifies as "personal information" under paragraph (e) of the definition.

[39] While the faculty and staff were invited to participate in the survey as a result of their professional affiliation with the university, I am satisfied that the "business information" exception to the definition of "personal information" in section 2(2) does not apply. In my view, the context in which the respondents' information appears in the records is inherently personal in nature, as it relates to their personal experience as members of the university's Jewish community. I find that the responses reveal something of a personal nature about the respondents, such that they qualify as the respondents' personal, not professional, information for the purposes of the *Act*.[10]

[40] I note that the appellant indicated on multiple occasions that he is not interested in obtaining access to the responses to the "demographic questionnaire" portion of the surveys. Accordingly, I find that the "demographic questionnaire" responses are no longer within the scope of the appellant's request, and I will not consider them in the remainder of this order.

[41] Even without the "demographic questionnaire" responses, I am satisfied that the narrative responses contain personal information as described in paragraphs (a), (b), and (e) of the definition in section 2(1), as well as under the introductory wording of the definition. Having reviewed the records, I find that the information contained in the narrative responses includes detailed, specific, and personal accounts of the respondents' experiences as members of the Jewish community. I accept the university's submission that its Jewish community is relatively small, and am satisfied that the narrative responses could reasonably be used to identify survey respondents.

[42] However, in my view, while the numerical responses relate to the respondents' views or opinions, as contemplated by paragraph (e) of the definition of "personal information," they do not, *on their own* (and especially without the demographic information), contain information that could reasonably be used to identify a particular survey respondent. As a result, I find that the numerical responses are not "personal information" for the purposes of the *Act*. Given that the numerical responses do not constitute personal information of identifiable individuals, it is not necessary for me to consider whether the mandatory personal privacy exemption in section 21(1) applies to

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[10] Order PO-2225.

those portions of the records. I will determine, below under Issue C, whether the numerical responses are exempt under the economic or other interest exemption at section 18(1)(c).

Issue B: Does the mandatory exemption at section 21(1) apply to the personal information at issue?

[43] Above, I found the narrative responses contain "personal information" for the purposes of the *Act*, even when the "demographic questionnaire" portions are removed from the scope of the appellant's request. Where a requester seeks access to the personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies. The sections 21(1)(a) to (e) exceptions are relatively straightforward. The information at issue in this appeal does not fit within any of paragraphs (a) to (e) of section 21(1).

[44] The section 21(1)(f) exception, allowing disclosure if it would not be an unjustified invasion of personal privacy, is more complex, and requires a consideration of additional parts of section 21. Sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy, while section 21(4) lists situations that would not be an unjustified invasion of personal privacy.

[45] 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 under section 21. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies.[11] None of the section 21(4) paragraphs are relevant in this appeal, and the public interest override has not been raised by the parties.

[46] If no section 21(3) presumption applies, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.[12] In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring disclosure in section 21(2) must be present. In the absence of such a finding, the exception in section 21(1)(f) is not established and the mandatory section 21(1) exemption applies.[13]

[47] 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

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[11] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).
[12] Order P-239.
[13] Orders PO-2267 and PO-2733.

21(2).[14]

Representations

The university's representations

[48] The university maintains that disclosing the records would result in an unjustified invasion of personal privacy, and that the records are therefore exempt from disclosure under section 21(1) in their entirety. In support of this position, the university relies on the presumptions in section 21(3)(d) and (h), and the factors weighing against disclosure in sections 21(2)(f), (g), (h), and (i).[15]

[49] The appellant's representations also suggest the application of section 21(2)(a). The relevant portions of sections 21(2) and (3) state:

> (2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
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> > (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
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> > (f) the personal information is highly sensitive;
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> > (g) the personal information is unlikely to be accurate or reliable;
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> > (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
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> > (i) the disclosure may unfairly damage the reputation of any person referred to in the record.
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> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > (d) relates to employment or educational history;
> >
> > (h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

[50] The university submits that the information in question includes details about the

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[14] Order P-99.
[15] The university withdrew its previous reliance on section 21(3)(g).

respondents' employment and education history, as well as their racial or ethnic origin, and their religious beliefs or associations. The university states that the simple fact that an individual completed the survey would reveal their ethnic origin and/or religious belief as a member of the Jewish faith. Accordingly, the university submits that the presumptions in both sections 21(3)(d) and (h) apply, such that disclosure is presumed to amount to an unjustified invasion of the survey respondents' personal privacy.

[51] However, the university maintains that if these presumptions are found not to apply, the four enumerated factors weighing against disclosure in section 21(2) also support withholding the records at issue.

[52] The university notes that the respondents were asked to provide information about whether they felt respected and engaged as a member of the Jewish community on campus. According to the university, it was "under the mask of anonymity" that the survey generated frank and unfiltered responses, including details of specific instances in which individuals may or may not have felt respected or engaged. Given the highly sensitive and "intimately personal nature" of the responses, the university submits that disclosure would cause significant personal distress as contemplated by the factor in section 21(2)(f).

[53] To further substantiate this claim, the university advises that following the Ontario Divisional Court's decision and the resulting media coverage, it was contacted by several individuals seeking assurances that their responses would remain confidential. The university expresses its concern that if the records are disclosed, the respondents may be subject to confrontation or harassment by other individuals regarding the views they expressed in confidence. This, according to the university, is another reasonable basis for personal distress as contemplated by section 21(2)(f).

[54] With respect to the factor in section 21(2)(h), the university explains that when it sought input from students, faculty, and staff, it did so with an express assurance that their responses would remain confidential. Accordingly, the university says that both it and the respondents had a reasonable expectation that the survey results would be treated as confidential. The university submits that while it has taken steps to anonymize the survey results through the use of coded study numbers, this does not guarantee that the respondents would not be identifiable to members of the university's community, such as the appellant. The university maintains that this is especially true because "the Jewish community at the university is relatively small."

[55] The university claims that the factor weighing against disclosure in section 21(2)(g) is relevant because the survey responses are subjective and were not verified for accuracy. The university also submits that considering how long ago the survey was conducted, the responses may not be an accurate reflection of the attitudes of staff, faculty, and students today.

[56] In support of its reliance on the factor in section 21(2)(i), the university maintains that disclosing the responses could result in reputational damage to the

respondents, which it says would be unfair considering that they provided frank and unfiltered answers under the promise of confidentiality. The university claims that this risk of unfair reputational damage is particularly relevant because the views and opinions expressed in the survey are now almost a decade old, and may have changed in the interim period.

[57] Finally, the university claims that it considered its obligations under section 10(2) of the *Act*,[16] but ultimately determined that it was not possible to sever and disclose portions of the records without revealing information that is exempt. According to the university, if it withheld only the portions of the records that qualify for the exemptions, the "data would be incomplete, which would render the data unintelligible." As a result, the university submits that it cannot disclose any portion of the records without compromising the integrity of the records and undermining the university's position with respect to the exemptions claimed.

The appellant's representations

[58] In response to the university's reliance on the factor at section 21(2)(g), the appellant maintains that this consideration is intended to relate to the reliability or accuracy of personal information, not the reliability or accuracy of the views or opinions themselves. He submits that despite the subjective nature of the survey responses, they were used by the commission to develop a set of policy recommendations that "would have a direct impact on members of the [university] community."

[59] The appellant also maintains that the university's claim that the data is dated and may not reflect current attitudes on campus is "completely irrelevant." He submits that the university's argument is "rather ironic," since the university itself has prevented him from obtaining the information during the elapsed time.

[60] Finally, with respect to the severability of the record, the appellant maintains that the university could sever the "demographic questionnaire" and "informed consent for re- contact" portions of the survey responses, but disclose the remaining portions. He says that if any of the responses in the remaining portion of the records include information that could identify a respondent, then that identifying information could also be redacted. However, such redactions should only be made "when absolutely necessary, solely in order to protect the identity of a respondent." According to the appellant, this approach would protect personal privacy, while also promoting transparency in accordance with the purposes of the *Act*.

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[16] Section 10(2) of the *Act* requires the university to disclose as much of any responsive record as can reasonably be severed without disclosing information that is exempt.

The university's reply

[61] The university reiterates its position that the records are exempt pursuant to section 21(1) of the *Act*, for the reasons cited in its initial submissions. In response to the appellant's representations, the university notes that views and opinions are "personal information" under section 2(1), and are therefore covered by the factor in section 21(2)(g).[17]

Analysis and findings

[62] The records at issue contain the answers provided by members of the university's past and current student, faculty, and staff populations, in response to a survey regarding the Jewish experience on campus. As set out above, the responses reflected in the records can be described as being either narrative or numerical in nature. Above, I found that the numerical responses are not "personal information" for the purposes of the *Act*, and therefore cannot be exempt under section 21(1). Therefore, I will only be considering the application of section 21(1) to the respondents' narrative responses.

[63] Based on my review of these records and the parties' submissions, I am satisfied that the presumptions in sections 21(3)(d) and (h), and the factors in sections, (f) and (h), are relevant in the circumstances of this appeal and weigh in favour of non-disclosure of the personal information at issue. I am also satisfied that the factor in section 21(2)(a) and the unlisted factor of ensuring public confidence in an institution are relevant in the circumstances and weigh in favour of disclosing the personal information.

The section 21(3) presumptions

[64] Regarding the presumption against disclosure in section 21(3)(d), I find that some of the narrative responses reveal information relating to the respondents' educational or employment history. For example, some responses include personal anecdotes that reveal information identifying a respondent's faculty, or their seniority (if faculty or staff) or level of study (if a student). I find that these portions of the records are exempt under section 21(1) on the basis that their disclosure would be a presumed unjustified invasion of personal privacy under section 21(3)(d).[18]

[65] In addition, I find that other portions of records include information relating to the respondents' religious and/or ethnic beliefs or associations as contemplated by the

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[17] The appellant's sur-reply representations reiterate what has been summarized in paragraphs 58-60.

[18] As I noted above, in deciding whether personal information is exempt from disclosure under section 21(1), a section 21(3) presumption, once established, cannot be overcome by any of the factors in section 21(2).

presumption in section 21(3)(h). From my review of the records, I accept the university's evidence that if a respondent did not identify as Jewish during the opening "demographic questionnaire" portion of the survey, then the survey did not proceed to the remaining questions. As a result, simply by completing the entire survey, the respondents reveal that they are of the Jewish faith.

[66] However the mere fact that a respondent was able to complete the whole survey does not, on its own, satisfy me that the entirety of their responses fall within the presumption in section 21(3)(h), such that they are exempt under section 21(1). Rather, in my view, it is only when a response provides specific detail about the respondents' own ethnic origin or religious beliefs, and not more general information about the atmosphere on campus, for example, that this presumption applies. Accordingly, I find that the narrative responses that specifically refer to the respondents' religious and/or ethnic beliefs or associations are exempt under section 21(1) on the basis that their disclosure would be a presumed unjustified invasion of personal privacy under section 21(3)(h).

[67] These findings do not cover the entirety of the narrative responses, however. I find that there are responses in the records that do not fit within the presumptions in paragraphs (d) or (h) or section 21(3), as they do not contain information revealing the respondents' employment or educational history, nor do they reveal information relating specifically to the respondents' religious and/or ethnic beliefs or associations. I have also considered the remaining presumptions in section 21(3), and I find that they do not apply to these remaining portions of the records.

[68] I will now turn to the section 21(2) factors weighing for and against disclosure.

The section 21(2) factors

[69] There are a number factors in section 21(2) that weigh against disclosure. In particular, as noted above, I am satisfied that the factors weighing against disclosure in sections 21(2)(f) and (h) apply. Based on the evidence before me, I accept that the respondents provided honest, specific, and detailed written responses to the survey questions, based on the understanding that they would remain confidential. Evidence in support of this is found in the Informed Consent page of each survey, which states, "[t]he data collected in this survey are confidential," as well as in the parties' submissions, where they note that even the commission did not receive a copy of the responses themselves, and instead received a summary of the subcommittee's findings. Accordingly, I find that both the respondents and subcommittee had an objective and reasonable expectation of confidentiality with respect to the responses provided and collected as a result of the surveys, such that the factor in section 21(2)(h) weighs in favour of privacy protection.

[70] Moreover, having reviewed the survey responses in detail, I am also satisfied that the narrative responses contain intimate details of the respondents' personal experiences as students, faculty, and staff on campus at the university. I accept that

this information is highly sensitive, and that there is a reasonable expectation of the respondents' suffering significant personal distress if the information is disclosed.[19] Accordingly, I find that the factor in section 21(2)(f) also applies, and weighs against disclosing those narrative responses.

[71] I now turn to factors favouring disclosure. Although the appellant did not specifically raise any of the listed or unlisted factors favouring disclosure, in my view, his submissions implicitly raise the factor in section 21(2)(a) and the unlisted consideration of "ensuring public confidence in an institution,"[20] which serves a similar purpose.

[72] Based on the parties' submissions, I accept that the subcommittee reported a summary of its findings on the Jewish experience on campus to the commission. The subcommittee's findings were based on the survey responses obtained from past and current students, faculty, and staff, as documented in the records at issue. With this information, the commission went on to craft policy recommendations that, as the appellant claims, "would have a direct impact on the [university] community." On this basis, I am satisfied that disclosure of the withheld information is desirable for the purposes of ensuring transparency and accountability in the university's policy-making process, such that section 21(2)(a) and the unlisted factor of ensuring public confidence in the university apply.

[73] Considering the applicable factors together in the context of this appeal, I find that the section 21(2)(f) and (h) factors regarding the highly sensitive nature of the information, and the respondents' reasonable expectations of confidentiality, outweigh the factors favouring disclosure of the personal views or opinions expressed in the respondents' narrative responses. This finding is informed by the highly sensitive nature of the narrative responses, as well as the fact that some degree of public accountability and transparency has already been achieved through the commission's 2012 report and the records that have previously been disclosed by university to the appellant. Accordingly, I find that the respondents' narrative responses are exempt from disclosure under section 21(1).

[74] Next, I will consider whether the numerical responses are exempt under section 18(1)(c).

Issue C: Does the discretionary exemption at section 18(1)(c) apply to the information that is not exempt under section 21(1)?

[75] The university also withheld the records in full based on the exemption at section

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[19] Orders PO-2518, PO-2617, MO-2262, and MO-2344.
[20] Orders M-129, P-237, P-1014, and PO-2657.

18(1)(c) of the *Act*, which states:

> A head may refuse to disclose a record that contains,
>
> > (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution.

[76] The purpose of section 18 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.[21]

Section 18(1)(c): prejudice to economic interests

[77] The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.[22]

[78] This exemption is arguably broader than section 18(1)(a) (information that belongs to government) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.[23]

Representations

The university's representations

[79] In support of its decision to withhold the survey responses and raw data pursuant to section 18(1)(c), the university maintains that it considered the following interests in determining that disclosure could reasonably be expected to negatively affect its economic interests and competitive position:

- The recruitment of prospective students and retention of returning students;

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[21] *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy, 1980* (The Williams Commission Report), Toronto: Queen's Printer, 1980.
[22] Orders P-1190 and MO-2233.
[23] Orders PO-2014-I, MO-2233, MO-2363, PO-2632, and PO-2758.

- The recruitment and retention of contract instructors, faculty, librarians, researchers, and staff ("staff and faculty");

- The potential for significant loss of funding; and

- The university's ability to collect feedback from its community members in order to address systemic concerns or issues.

[80] The university maintains that it competes against other higher education institutions at the municipal, provincial, national, and international levels, and notes that within the city of Ottawa alone, it competes with two publicly funded universities, two publicly funded colleges, and approximately 25 private career colleges. Given the competition, the university argues that disclosing the records would negatively impact its reputation which would, in turn, negatively affect its economic interests and competitive position by impeding its ability to attract and retain students, faculty, and staff.

[81] The university acknowledges that it is difficult to quantify the reputational impact to the university. With respect to the economic impact, however, the university claims that "for every student that decides not to attend, or to continue to attend the university as a result of the information disclosed by the survey results, the university stands to lose a minimum of $3,033.50 [and up to $5,261.00] per academic term." The university calculated the $3,033.50 amount based on a student taking a minimum of four courses in the fall term of a Bachelor of Arts program, which "is the cheapest program offered by the university."

[82] In addition to tuition, the university explains that it receives funding from the Government of Ontario based on several performance criteria, one of which is enrollment. The university maintains that if its reputation becomes such that it is unable to attract or retain students, then its provincial funding will be reduced. The university further submits that this result would directly affect its ability to attract quality faculty and staff.

[83] According to the university, it also receives a "substantial amount of research funding." The university says that the organizations that provide that funding are "unlikely to continue to support the university if its reputation becomes such that it is undesirable to partner with." The loss of research funding would be "devastating" to the university, as those funds are used for a variety of purposes that make the university competitive, such as improving research facilities and infrastructure, supporting professors, researchers, and students, funding scholarships, and other financial incentives that allow the university to attract "elite scholars and students."

The appellant's representations

[84] The appellant refers to Justice Thorburn's comments in Carleton University v Information and Privacy Commissioner of Ontario and John Doe, requester,[24] where she stated:

> The University's concerns that a decision to not exclude this information on the basis that it is "research" would have serious adverse consequences for academic freedom or erode the competitiveness of Ontario universities by making it more difficult to conduct university research initiatives, or attract and maintain elite researchers or students are speculative. No evidence was adduced to substantiate this claim.

[85] The appellant maintains that the university has still failed to substantiate its claim regarding the alleged economic harm that could reasonably be expected to result from disclosure of the requested information.

[86] In addition, the appellant submits that the university's own submissions contradict its position. For example, with regard to the university's claim that the Divisional Court decision and resulting media coverage have resulted in reputational damage, the appellant notes that any such damage did not negatively impact the university's enrollment, which increased in the year following the decision.[25]

[87] Moreover, the appellant notes that in the 2019 President's Report,[26] the university president wrote, "[w]ith more than 31,000 students on campus (including about 4,000 graduate and 4,500 international students) we are larger than ever, and **with our confirmations going up four percent for next year**, we are continuing to grow" (emphasis added by appellant). The appellant points out that in the same report, the president also reported that in 2019, the university ended its $300-million Collaborate fundraising campaign, which was the "largest in [the university's] history and the largest- ever successful campaign in the National Capital Region." Additionally, the president reported that the university recorded its "biggest year increase in research funding, from $55 million to $70 million (a jump of more than 25 percent)…"

[88] The appellant also refers me to the university's Board of Governors Chair's Report 2018/2019,[27] in which the Chair "emphasized that the university currently enjoys

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[24] 2018 ONSC 3696.
[25] The appellant refers me to https://oirp.carleton.ca/databook/2017/students/tables/table-SE1-2_hpt.htm and https://oirp.carleton.ca/databook/2018/students/tables/table-SE1-2_hpt.htm for enrollment figures.
[26] Available online: https://carleton.ca/president/wp-content/uploads/cu-presidents-report-2019.pdf.
[27] Available online: https://carleton.ca/secretariat/boardofgovernors/wp-content/uploads/BOG-Chairs-Report-2018-2019.pdf.

a position of financial strength."

[89] With this in mind, the appellant argues that even if reputational damage were a genuine concern, it does not seem relevant in the case before me.

[90] He also submits that the only mention of "reputational harm" in the *Act* is in section 21(2) and it refers to reputational harm to an *individual*, not an institution. The appellant maintains that if institutions were permitted to withhold information on the basis of reputational harm, the *Act* "would be rendered meaningless" and it would undermine the public good of institutional transparency, as "institutions will naturally seek to conceal their unethical behaviours."

The university's reply

[91] In response, the university says that although it "successfully navigated the fallout" from the Ontario Divisional Court decision and related media coverage, that alone does not mean that disclosing the survey results would have any less of an impact.

[92] The university clarifies that it is not seeking to withhold the records based on reputational harm alone. Rather, it maintains that the reputational harm will translate into economic harm in the form of decreased enrolment, which will, in turn, impact public and research funding. While the university says it cannot quantify the expected economic impact, such harm is "inevitable if the information is disclosed."

The appellant's sur-reply

[93] The appellant views the university's initial and reply representations as contradicting each other, in terms of the reputational harm that the university did, or did not, suffer as a result of the Ontario Divisional Court decision.

Analysis and findings

[94] For section 18(1)(c) to apply, the institution must provide detailed evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[28]

[95] The failure to provide detailed evidence will not necessarily defeat the institution's claim for exemption where harm can be inferred from the surrounding

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[28] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

circumstances. However, parties should not assume that the harms under section 18 are self-evident or can be proven simply by repeating the description of harms in the *Act*.[29].

[96] I have considered the arguments put forward by the parties in their representations. I have also carefully reviewed the information remaining at issue in the records (namely, the numerical responses). I agree with the appellant's submissions to the effect that the university has not provided sufficiently detailed evidence to establish that disclosure of the information at issue could reasonably be expected to prejudice the university's economic interests or its competitive position, as contemplated by section 18(1)(c).

[97] I accept that a portion of the university's funding is directly tied to student enrollment in the form of tuition and provincial funding. I also accept the university's submission that a decrease in research funding may negatively affect its ability attract faculty and students. Therefore, I acknowledge that *if* disclosing the information at issue could reasonably be expected to result in a decrease in student enrollment or research funding, then the university could reasonably expect to see a loss in funding.

[98] However, I note that the subcommittee's findings regarding the Jewish experience on campus were already communicated to the commission and published in the commission's 2012 report.[30] Therefore, in my view, the general sentiments expressed by Jewish students, faculty, and staff, and the themes of their experience at the university, can reasonably be said to be in the public realm already.

[99] With this in mind, I am not persuaded that disclosure of the information at issue could reasonably be expected to result in the university no longer being able to attract or retain students, staff, and faulty as the university suggests. I am also not persuaded that disclosure could reasonably be expected to result in a loss of research funding. Without further evidence to link the disclosure of the numerical responses with the identified harms, I find the university's arguments to be speculative. I also find that the university's position is not supported by its own submissions under section 21(1), where it argued that the responses are now dated, and cannot be relied upon to accurately or reliably reflect the current atmosphere on campus. Accordingly, I am not persuaded that disclosure of the numerical responses could reasonably be expected to result in harm to the university's economic interests or competitive position under section 18(1)(c). Therefore, I find that the exemption does not apply.

[100] Above, I noted that the university has argued that the records cannot reasonably

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[29] Order MO-2363.

[30] Available online: https://carletoncommission.weebly.com/uploads/9/4/8/7/9487347/report__appendices_a-e.pdf

be severed to disclose information that is not exempt, as to do so would render the data "unintelligible." In my view, however, the records do lend themselves to reasonable severance in accordance with section 10(2), such that exempt and non-responsive portions can be withheld, while disclosing the responsive and non-exempt information. I am not satisfied that the resulting disclosures would be unintelligible, as claimed by the university. I note that the appellant has already received the surveys that were distributed to students, faculty, and staff, and would therefore be able to piece together the questions to which the disclosed responses correspond. Therefore, I will order the university to sever the records and disclose the responsive and non-exempt information, as described in my order provisions, below.

ORDER:

1. I uphold the university's decision regarding section 21(1), in part, and order the university to withhold the narrative responses contained in the records on this basis.

2. I do not uphold the university's decision regarding section 18(1)(c).

3. I order the university to disclose the responsive but not exempt numerical responses to the appellant by **March 3, 2021** but not before **February 26, 2021.**

4. In order to verify compliance with order provision 3, I reserve the right to require the university to provide this office with a copy of the records it discloses to the appellant.

5. The timelines noted in order provision 3 may be extended if the university is unable to comply in light of the current COVID-19 situation, and I remain seized of this appeal to consider any resulting extension request.

Original signed by: January 27, 2021

Jaime Cardy
Adjudicator