Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER PO-4109-I

Appeal PA19-00306

Ryerson University

January 28, 2021

Summary: The appellant made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to emails and correspondence related to himself, or a named First Nation. Ryerson University (the university) denied access to the responsive records on the basis of section 19 (solicitor-client privilege). The appellant appealed the university's access decision, and claimed that additional responsive records ought to exist. In this order, the adjudicator upholds the university's decision to withhold information under section 49(a) (refusal of requester's own information), in conjunction with section 19. She finds, however, that the appellant has raised reasonable grounds for concluding that additional responsive records may exist, and she orders the university to conduct a further search.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 19, 24, 49(a), and 65(6).

Orders Considered: Order MO-3326.

OVERVIEW:

[1] The appellant in this appeal made a complaint to Ryerson University (the university) about a member of the university's staff (the Staff Member). Subsequently, the appellant made a request to the university under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for information regarding "e-mails, deleted emails, and letter correspondence between [the Staff Member], and any other person or organization, that mentions, relates to, references or otherwise indicates [the requester], and/or [a named First Nation]."

[2] In response to the request, the university identified 21 records and issued a decision withholding access to the records pursuant to the discretionary exemption at section 19 (solicitor-client privilege) of the *Act*. The requester, now the appellant, appealed the university's decision to this office.

[3] During mediation, the mediator had discussions with the appellant and the university. At the outset of mediation, the appellant advised the mediator he wished to add reasonable search as an issue on appeal as he believed additional responsive records should exist.

[4] Following discussions with the mediator, the university issued a revised decision and disclosed three records to the appellant in full. The university continued to rely on section 19 of the *Act* to withhold the remaining records. The university also shared an index of records with both the appellant and the mediator (the Index).

[5] Following further discussions with the mediator, the university agreed to expand the scope of its search to areas identified by the appellant.[1] The university then issued a revised decision and identified 102 additional responsive records. The university granted full access to some of the records. It relied on section 19 as well as the labour relations exclusion in section 65(6) of the *Act* to withhold access to the remaining responsive records.

[6] In subsequent discussions with the mediator, the appellant advised the mediator that he wished to proceed to the adjudication stage as he believes additional records exist and he continues to pursue access to the withheld records.

[7] No further mediation was possible and this file was transferred to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry under the *Act*. The issue of whether the records contain the appellant's personal information was added at the inquiry stage and the university was asked to make representations on section 49(a) (refusal of requester's own personal information). Representations were sought and received from the parties. In this order the adjudicator upholds the university's application of the exemption at section 49(a), in conjunction with section 19. The adjudicator finds, however, that the appellant has raised reasonable grounds for concluding that additional responsive records may exist, and she orders the university to conduct a further search.

RECORDS:

[8] There are 80 records at issue, which are numbered in the Index as follows: 1-18,

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[1] The mediator noted the university's agreement to expanding the scope of its search in its final report, but did not specify the parameters of the expanded search.

28-34, 39-47, 50-57, 62-87, 89, 90, 92-101.

ISSUES:

A. Does section 65(6) exclude Record 70 from the *Act*?

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(a), in conjunction with the section 19 exemption apply to the information at issue?

D. Did the university exercise its discretion under section 49(a), in conjunction with section 19? If so, should this office uphold the exercise of discretion?

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

DISCUSSION:

Issue A: Does section 65(6) exclude Record 70 from the *Act*?

[9] The university submits that section 65(6) applies to Record 70 and that as such, it is excluded from the *Act*. The university did not specify which paragraph of section 65(6) it was relying on. However, based on its representations, the relevant portions of section 65(6) are as follows:

> Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> > 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution […]
> >
> > 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[10] If section 65(6) applies to the records, and none of the exceptions found in section 65(7) apply, the records are excluded from the scope of the *Act*.

[11] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraphs 1 or 3 of this section, it must be reasonable to conclude that there is "some connection" between them.[2]

[12] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.[3]

[13] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.[4]

1. the record was collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or use was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; and

3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.

[14] The word "proceedings" means a dispute or complaint resolution process conducted by a court, tribunal or other entity which has the power, by law, binding agreement or mutual consent, to decide the matters at issue.[5]

[15] For proceedings to be "anticipated", they must be more than a vague or theoretical possibility. There must be a reasonable prospect of such proceedings at the time the record was collected, prepared, maintained or used.[6]

[16] The word "court" means a judicial body presided over by a judge.[7] A "tribunal" is a body that has a statutory mandate to adjudicate and resolve conflicts between parties and render a decision that affects the parties' legal rights or obligations.[8]

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[2] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).
[3] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.); see also Order PO-2157.
[4] Order PO-2157.
[5] Orders P-1223 and PO-2105-F.
[6] Orders P-1223 and PO-2105-F.
[7] Order M-815.
[8] Order M-815.

[17] "Other entity" means a body or person that presides over proceedings distinct from, but in the same class as, those before a court or tribunal. To qualify as an "other entity", the body or person must have the authority to conduct proceedings and the power, by law, binding agreement or mutual consent, to decide the matters at issue.[9]

[18] The proceedings to which the paragraph appears to refer are proceedings related to employment or labour relations per se – that is, to litigation relating to terms and conditions of employment, such as disciplinary action against an employee or grievance proceedings. In other words, it excludes records relating to matters in which the institution has an interest as an employer. It does not exclude records where the institution is sued by a third party in relation to actions taken by government employees.[10]

[19] For section 65(6)3 to apply, the institution must establish that:

a. the records were collected, prepared, maintained or used by an institution or on its behalf;

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

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

[20] Previous orders have established that the phrase "labour relations or employment- related matters" applies in the context of a grievance under a collective agreement.[11]

The parties' representations

[21] In its initial representations the university states only that Record 70 "constitutes discussions or communications about labour relations or employment-related matters in which the university has an interest and is thus excluded pursuant to section 65(6) of the *Act*."

[22] The appellant submits that the university's assertion that it has "an interest" in the labour relations or employment-related matters conflicts with a letter he received from the university specifying that the issue between himself and the Staff Member was a private matter and that the university would not intervene. The appellant asserts that

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[9] Order M-815.

[10] *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 2008 CanLII 2603 (ON SCDC), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

[11] Orders M-832, PO-1769 and PO-3004.

because the university has already specified that it did not have an interest in the matters between himself and the Staff Member, section 65(6) does not apply.

[23] In reply, the university submits that Record 70 consists of email correspondence between university employees that was collected, prepared, maintained or used by the university during discussions about legal demands made by the appellant regarding the Staff Member in his complaint to the university. It submits that it relies on its initial representations, as well as the affidavits it provided in support of its representations.

Findings and analysis

[24] I reviewed all of the evidence provided by the university, including the affidavits it identified in its reply representations, and I find that it has not established that Record 70 is excluded from the application of the *Act* by section 65(6). The university did not provide record 70 to the IPC and in my view, the university has not provided sufficient detail about the content of this record for me to make a finding in this regard. As a result, I find that the section 65(6) exclusion does not apply to Record 70 and the record is subject to the *Act*.

[25] However, the university also claimed the application of section 19 as an alternate for its exclusion claim. Accordingly, I will consider whether it is exempt from disclosure under section 19.

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

[26] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. In particular, in this case, I need to decide whether the records contain the appellant's personal information, because his access rights are greater if they do.

[27] Personal information defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
>> (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 where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[28] 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.[12]

[29] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[13]

[30] The university says that the personal information in the records at issue relates to various legal demands the appellant made that relate to the Staff Member.

[31] The appellant says that he believes the records at issue contain his personal information, including information and/or views or opinions of the Staff Member or other university employees about his ancestry, race or ethnic origins.

[32] Based on the parties representations and on my review of the Index, I agree that the records contain information of a personal nature about the appellant that fits within the definition of "personal information" set out at paragraph 2(1) of the *Act*.

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

[33] Section 47(1) gives individuals a general right of access to their own personal

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[12] Order 11.
[13] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

information held by an institution. Section 49 provides a number of exemptions from this right. Section 49(a) reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

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

[35] Where access is denied under section 49(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[36] Section 19 of the *Act* states as follows:

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

[37] Section 19 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 (prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital) is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

[38] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege. Here, the university relies on solicitor-client communication privilege.

Solicitor-client communication privilege

[39] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[14] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[15] The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.[16]

[40] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[17]

[41] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.[18] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[19]

Loss of privilege

[42] Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily demonstrates an intention to waive the privilege.[20]

[43] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.[21]

[44] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[22] However, waiver may not apply where the record is disclosed to another

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[14] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[15] Orders PO-2441, MO-2166 and MO-1925.
[16] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)
[17] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[18] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[19] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)
[20] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).
[21] *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.
[22] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).

party that has a common interest with the disclosing party.[23]

Branch 2: statutory privileges

[45] Branch 2 is a statutory privilege that applies where the records were prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital "for use in giving legal advice or in contemplation of or for use in litigation." The statutory exemption and common law privileges, although not identical, exist for similar reasons. Here, the university relies on the statutory and common-law solicitor-client communication privileges.

The university's representations

[46] The university submits that the records are subject to both Branch 1 solicitor-client privilege, based on the common law and section 19(a) of the *Act*, and Branch 2 communication privilege, based on section 19(c) of the *Act*.

[47] The university says that the records were prepared for the purpose of conveying legal advice and, considered in their context, are part of the continuum of communications that sustain the solicitor-client relationship. Specifically, the university says that the records consist of email communications between its legal counsel, administrators, executives, and the Staff Member. The university refers to this group of individuals collectively as the "Parties." The university says that in the records, the Parties discuss legal advice received from legal counsel employed by the university in relation to legal demands made by the appellant regarding the Staff Member.

[48] The university says that the legal advice that its counsel provided was communicated in strict confidence and it denies that solicitor-client privilege has been waived. Additionally, the university says that "the records also fall within the statutory right afforded under the *Act*."

[49] In support of its representations, the university provided an affidavit from its Assistant General Counsel. The Assistant General Counsel attested that she reviewed the records at issue that are subject to the university's solicitor-client privilege claim. She says that the university's General Counsel and Secretary of the Board of Governors and Privacy Officer (General Counsel) provided legal advice on the demands made by the appellant regarding the Staff Member. She further specified that each of the 80 records at issue (listed in the Index) contained confidential communications between the General Counsel, the Staff Member and various university administrators and executives. The Assistant General Counsel said that she kept the records confidential and she believed that others had as well.

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[23] *General Accident Assurance Co. v. Chrusz,* cited above; Orders MO-1678 and PO-3167.

[50] The university's Index, referred to in the Assistant General Counsel's affidavit, contains a description of each record, specifies the number of pages, and identifies the sender and the recipient(s). According to the Index, the records are comprised of email correspondence between university employees, administrators and/or executives. The Index lists the Staff Member and the university's General Counsel, as well as other individuals with the following titles:

- Vice-Provost, Faculty Affairs;
- Assistant Vice-President, Human Resources;
- Senior Investigator;
- Director, Human Resources Consulting and Labour Relations;
- Professor and Dean of Arts;
- President and Vice-Chancellor;
- Acting Manager, Human Rights Services;
- Complaints Resolution Advisor;
- Acting Administrative Officer assisting General Counsel; and
- three Executive Directors.

[51] In the "description of record" category of the Index, the university specifies the email correspondence is about the following matters:

- The appellant's complaint against the Staff Member;
- the Staff Member's Twitter statements;
- a draft reply regarding the First Nation;
- the Staff Member and the First Nation; and/or
- the appellant's Human Rights complaint, and the First Nation.

[52] In the "additional information" category of the Index, the university says that in the email correspondence General Counsel provides legal advice about two letters the university received from the appellant and various employees and/or executives listed above acknowledge and/or discuss General Counsel's advice.

The appellant's representations

[53] The appellant says that the exemption at section 19 of the *Act* does not apply to

any of the records at issue. First, he submits that the solicitor-client privilege exemption does not apply to communications with the Staff Member because the university's legal counsel was prohibited from accepting the Staff Member as a client. The appellant cites a university "FAQ" that states that the university identifies clients as "faculty and staff and all employees acting in their capacity as Ryerson employees" and that the university does not "represent or provide legal advice to faculty members, staff or students on non-University or personal matters."

[54] The appellant says that the dates of the responsive records suggest that the university's section 19 claim is related exclusively to a complaint that he filed with the university against the Staff Member. The appellant says that the university rejected his complaint on the basis that it was a private dispute between himself and the Staff Member. The appellant asserts that because the university decided to treat his complaint as a private matter, the university was prohibited from accepting the Staff Member as a client.

[55] In support of this claim, the appellant provides a copy of a letter he received from the university which specifies that it decided that the matter between the Staff Member and the appellant was private in nature and that as such, the university would not intervene.

[56] The appellant also asserts that the university's legal counsel could not have represented the Staff Member because there was a conflict of interest. He says that the university's legal counsel knew, or ought to have known, that she could not represent the Staff Member and therefore there was no "client relationship". He says that the lack of a "client relationship" does not prevent the university's legal counsel from communicating with Staff Member to "obtain his representations, determine the facts and document the information." However, the appellant argues that these communications are not privileged since they are not communications between a solicitor and a client.

[57] In summary, the appellant submits that a solicitor-client relationship is essential to claiming solicitor-client communication privilege and, where this relationship is absent, the communications are not privileged. He asserts that despite the university's position that it would not intervene in the matter, the university's legal counsel continued to provide advice to the Staff Member. The appellant says that the Staff Member was not the university's legal counsel's client, and therefore the communications at issue are not subject to section 19 of the *Act*.

[58] The appellant also submits that some of the records at issue were shared with fifteen different people. He says that the proliferation of information raises questions about confidentiality of the information. He says that legal opinions are typically restricted to a few people on a need to know basis and protected by a high level of security, which was not done in this case.

[59] The appellant further asserts the following:

- the emails are not subject to privilege because they were not encrypted and because the university's policy says that users of the institutional email service do not have an expectation of complete privacy;
- that records that do not have a caution that the email is confidential and subject to solicitor-client privilege and are therefore not confidential;
- that the university's legal counsel was not included in approximately one-third of the emails for which section 19 was claimed; and
- that senior management, without any direct involvement in the matter, communicated independently with the university's legal counsel, and purportedly discussed legal advice without including the lawyer, and that this indicates the discussion was policy related and that the employees were not concerned about confidentiality.

[60] In the alternative, the appellant says that if there was a solicitor-client relationship, then the Staff Member waived that privilege. He submits that the university claims that its legal counsel provided the Staff Member with legal advice and assistance in regard to his complaint, and that the Staff Member knew that that advice was privileged. He says that the Staff Member waived solicitor-client privilege by publicly disclosing the appellant's complaint and his "reprisal action," in contravention of a university policy and the Ontario *Human Rights Code*.

[61] The appellant says that the Staff Member had the authority to release any privileged information, which he "deliberately exercised by publicly disclosing the legal conclusions on Twitter." The appellant asserts that this "one sided disclosure placed [him] in an unfair position since neither [he], nor the public, could see the reasoning behind the decision and could not respond effectively." The appellant says that in the interests of fairness, the university should disclose all of the responsive records it located.

[62] Additionally, the appellant says that there was a meeting between the university's lawyer, the Staff Member and the university Ombudsperson about the manner in which the university handled the appellant's complaint. The appellant asserts that the university failed to keep the Ombudsperson communications confidential.

[63] In support of his arguments, the appellant refers me to two decisions. First, he says that in *Peach v. Nova Scotia*, the Supreme Court of Nova Scotia decided privilege was waived when an employee deliberately exercised his judgement and authority and released legal reports.[24] He also refers me to a 2017 British Columbia Emergency Health

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[24] *Peach v. Nova Scotia (Transportation and Infrastructure Renewal),* 2010 NSSC 91 (CanLii).

Services arbitration decision where he says an arbitrator concluded that it was "unfair" for BECHS to select which parts of their report to disclose while claiming privilege over the rest.[25]

Analysis and findings

[64] Based on my review of the evidence provided by the university, and for the reasons set out below, I accept its claim that section 49(a), read in conjunction with section 19, applies to all of the information at issue, subject to my consideration of the university's exercise of discretion.

[65] To begin, I find that records 1-5, 7-15, 17-18, 28-33, 40-42, 44-45, 50, 52, 55, 57, and 66-82 are email communications that include the university's General Counsel. Based on the descriptions of these records in the Index, I accept that the university's General Counsel is either providing legal advice or discussing that advice with the university employees and/or executives that are specified in the Index. In some instances, the employees and/or executives are acknowledging receipt of General Counsel's legal advice.

[66] The university submits in its representations that the legal advice that its General Counsel provided was communicated in strict confidence and that it has not been disclosed to outside parties. Furthermore, the affidavit of the Assistant General Counsel confirms that she reviewed the records at issue and she attests that the university's General Counsel provided legal advice on the demands made by the appellant regarding the Staff Member and that the communications were confidential.

[67] As a result, based on that evidence, I am satisfied that records 1-5, 7-15, 17-18, 28-33, 40-42, 44-45, 50, 52, 55, 57, and 66-82 are confidential communications that were exchanged for the purpose of seeking, obtaining or providing legal advice and as a result, the Branch 1 solicitor-client communication privilege applies.

[68] The remaining records, numbered in the Index as 6, 16, 34, 39, 43, 46-47, 51, 53-54, 56, 62-65, 83-90, and 92-101, are email communications that do not include the university's General Counsel. The university submits that these records are communications between its employees and/or administrators and executives where they discuss the legal advice received from its General Counsel in relation to legal demands made by the appellant regarding the Staff Member.

[69] I have carefully reviewed the parties to the communications and the descriptions of their email correspondence in the Index. I am satisfied that each of the correspondents is an employee and/or administrator or executive of the University who

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[25] *British Columbia Emergency Health Services and Ambulance Paramedics of British Columbia CUPE Local 873,* (2017) CanLii 19002 (BCLA).

was involved in dealing with the matter between the appellant and the Staff Member and that the legal advice provided by the university's General Counsel was being discussed.

[70] Previous orders of this office have found that the exemption for records subject to solicitor-client privilege in section 19 of the *Act* can apply to internal communications of an institution, even if they do not contain direct communication to or from a lawyer.[26] For example, in Order MO-3326, Senior Adjudicator DeVries summarized several past orders of this office dealing with this issue:

> While I acknowledge that the Group 2 records do not contain direct communications between city staff and city lawyers, I note that this office has previously applied section 12 to internal communications not involving a lawyer where disclosure would reveal the content of communications between a solicitor and client. For example, in Order PO-2087-I, Adjudicator Cropley considered whether briefing papers prepared by non-legal staff at the Ministry of Finance would qualify for solicitor-client privilege under section 19 of the *Freedom of Information and Protection of Privacy Act*, which is equivalent to section 12 under the Act. In doing so, she stated the following:
>
>> These records were prepared by non-legal staff in the Ministry. However, large portions of them refer to or reflect the legal advice that is contained in the other records at issue in these discussions. In my view, disclosure of this information would reveal the legal advice that was provided and should, therefore, be protected under section 19.
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> Moreover, in Order M-1112 Adjudicator Hale found that documents passing between employees of a client can be subject to solicitor-client privilege if they transmit or comment on communications with lawyers that are connected with legal advice or contemplated litigation. Similarly, in Order PO-1631, the adjudicator concluded that internal communications containing instructions to seek legal advice on a particular issue should qualify for exemption. Based on the analysis found in these orders, the solicitor-client privilege may apply to the Group 2 records, even though they are not direct communications with legal counsel. Rather, each record must be examined to determine whether its disclosure would reveal the content of solicitor-client communications.

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[26] Or section 12 of the *Municipal Freedom of Information and Protection of Privacy Act,* which is equivalent to section 19 under the *Act*. See also: Orders PO-3046 and MO-3326; See also, *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

[71] I agree with this reasoning, and I find that it applies to records 6, 16, 34, 39, 43, 46-47, 51, 53-54, 56, 62-65, 83-90, and 92-101. Based on my review of the university's evidence, I am satisfied that these records are part of the continuum of communications between General Counsel and the university's employees, administrators and/or executives, that took place for the purpose of giving and receiving legal advice, and they are subject to the common law solicitor-client communication privilege exemption in section 19 of the *Act.*

[72] The university submits that the records at issue were treated as confidential communications at all times and were not shared with outside parties. I accept this evidence and based upon the supporting evidence in the affidavit of the Assistant General Counsel, I am satisfied that the solicitor-client privilege attaching to these records has not been waived.

[73] The appellant has made a number of arguments, which I do not accept, and I will address these below.

[74] First, the appellant says that the solicitor-client privilege exemption does not apply to communications with the Staff Member because the university's legal counsel was prohibited from accepting him as a client. The issue of whether the university's lawyer could or could not have accepted the Staff Member as a client is not relevant to this appeal. In this matter, the university is the client and the solicitor-client privilege belongs to it. I have considered the appellant's assertion that the university determined that the issues he raised about the Staff Member were a private matter. In my view, that determination does not impact the university's ability to seek legal advice about the matters raised by the appellant and/or whether or how to respond to those matters.

[75] Next, the appellant asserts that if solicitor-client privilege existed, the Staff Member waived that privilege by publicly disclosing the complaint and his "reprisal action," or by failing to keep other communications confidential. I have reviewed the appellant's representations and the documents he provided in support of his assertions and I am unable to identify any potential disclosures of legal advice in these documents. I find the appellant has not provided sufficient evidence to establish that solicitor-client privilege has been waived.

[76] The appellant also says that some of the records were shared with fifteen different people and that the proliferation of information raises questions about confidentiality of the information. I disagree that the fact that the number of participants in any of the communications suggests that the communications were not confidential. The university has identified each participant as part of the university, as either an employee, administrator or executive, and it provided their specific job title. I see no basis upon which to conclude that the number of participants in the communications raises questions about the confidentiality of the legal advice.

[77] Similarly, I do not accept the appellant's assertion that the emails are not subject to solicitor-client communication privilege because they were not encrypted or because

the university's policy says that users of the institutional email service do not have an expectation of complete privacy. First, encryption is not pre-requisite to solicitor-client privilege. Second, it is my view that the university's policy regarding its institutional email service does not prevent it from using that service to seek or obtain legal advice.

[78] With regard to the appellant's assertion that the records do not contain disclaimers that the emails are subject to legal advice, previous orders of this office have stated that confidentiality may be either express or by implication.[27] I accept that in this case, regardless of whether the records contain disclaimers regarding confidentiality, the communications were implicitly confidential due to the context in which the legal advice was sought, obtained and shared with the participants.

[79] Finally, I have reviewed the two decisions referred to by the appellant.[28] In *Peach,* the court concluded that solicitor-client privilege was waived when an employee revealed the "heart" of a legal opinion, including the reasons. In *BCEHS,* an arbitrator concluded that, in the context of that arbitration, one party could not waive privilege over part of a report while seeking to maintain privilege over another part of the same report.

[80] In my view, neither of these cases is analogous to the current situation. The appellant submits that the Staff Member waived solicitor-client privilege by publicly disclosing the "legal conclusion on Twitter." He says that this "one-sided disclosure" placed him in an unfair position since neither he, nor the public could see the reasoning behind the decision. I have reviewed Document 5, provided by the appellant, which is comprised of a series of "tweets." I am unable to identify any information in this document that could qualify as a "legal conclusion" or more broadly, any information that might reveal legal advice provided by the university's General Counsel. In circumstances where I do not see that any portions of the communications I have found are subject to solicitor-client privilege have been revealed, I find that that privilege has not been waived.

Issue D: Did the institution exercise its discretion under section 49(a) in conjunction with section 19? If so, should this office uphold the exercise of discretion?

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

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[27] Orders PO-3328 and MO-2936; See also: *General Accident Assurance Co. v. Chrusz* (1999), 1999 CanLII 7320 (ON CA), 45 O.R. (3d) 321 (C.A.).

[28] See footnotes 14 and 15, above.

[82] 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.

[83] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[29] This office may not, however, substitute its own discretion for that of the institution.[30]

[84] The university says it exercised its discretion before making its decision concerning the appellant's right of access to the records. The university submits that it reviewed the records in detail and weighed the appellant's right of access to his own personal information against its own interest and the public interest protected by the exemption in section 19. It says that it properly exercised its discretion pursuant to sections 49(a) and 19 of the *Act* by deciding to withhold the records which was necessary to prevent a waiving of solicitor-client privilege and not for any improper purpose.

[85] The university says it considered all the relevant circumstances when deciding to apply section 19 to the records and in doing so exercised its discretion pursuant to section 49(a). Specifically, it says it considered the purposes of the *Act*, including that information should be made available to the public and that individuals should have a right of access to their own personal information, and that the application of exemptions should be limited and specific. It says it considered whether the appellant was seeking his own personal information and whether the appellant had a sympathetic or compelling need to get access to the information in the records.

[86] The university submits that it considered the sensitivity of the information in the records and the wording of the section 19 exemption, as well as the interests the exemption seeks to protect, specifically, the need to allow for the giving and receiving of confidential legal advice. It also says that it considered that disclosure to the appellant would result in waiving solicitor-client privilege and whether it was possible to disclose a portion of the records without waiving solicitor-client privilege.

[87] On my review of the circumstances of this appeal and the university's representations on the manner in which it exercised its discretion, I am satisfied that the university considered a number of relevant factors when determining whether to

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[29] Order MO-1573.
[30] Section 54(2) of the *Act.*

disclose the records to the appellant, that it did not take into account irrelevant considerations, nor did it fail to take into account relevant considerations.

[88] As a result, I am satisfied that the university properly exercised its discretion to apply the section 19 exemption to the records, in conjunction with section 49(a). Accordingly, I uphold the university's decision to deny access to the records which I have found qualify for exemption under those sections.

[89] In making this finding, I note that the appellant did not make any specific representations about the university's exercise of discretion. However, he did allege the university's decision-making process was biased. The appellant's representations regarding bias relate specifically to the university's search for responsive records and I will consider his submission on that point later in this decision. However, I confirm that I considered whether there was any evidence of bias on the part of the university with regard to its exercise of discretion to withhold the records pursuant to section 19 in conjunction with section 49(a) and I find that there was not.

Issue E: Did the institution conduct a reasonable search for records?

[90] 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.[31] 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.

[91] 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.[32] To be responsive, a record must be "reasonably related" to the request.[33]

[92] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[34]

[93] 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.[35]

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[31] Orders P-85, P-221 and PO-1954-I.
[32] Orders P-624 and PO-2559.
[33] Order PO-2554.
[34] Orders M-909, PO-2469 and PO-2592.
[35] Order MO-2185.

[94] 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.[36]

The university's representations

[95] The university says that it concluded that records were responsive to the appellant's request if they were held by the Staff Member or any other person or organization at the university, if they were created within the specified dates, and contained the appellant's personal information and/or information related to the specified First Nation.

[96] The university says that it did not seek clarification from the appellant because the request included sufficient detail to enable an experienced employee of the university to conduct a search for responsive records, pursuant to section 24(1)(b) of the *Act*. It submits that the request description included information about dates and types of records, and the search was specifically limited to those dates and types of records.

[97] The university says it directed the Staff Member, the office where the Staff Member worked, the Faculty of Arts, and the Office of the Provost, Faculty Affairs, to perform the initial search for records. The university says the Staff Member conducted a thorough and logical search of his records, including his email account.

[98] The university provided an affidavit from the Staff Member describing his search. In the affidavit, the Staff Member attests that he searched his email, including the Inbox, Sent, Trash and other folders and located 11 records responsive to the appellant's request. He confirmed that it was his belief that those were the only responsive records in his possession and further swore that he did not destroy or delete any records after the date of the request.

[99] The university says that the Vice-Provost of Faculty Affairs also conducted a search of all emails using the appellant's search terms. The result of that search were described in an affidavit sworn by the Vice-Provost and provided in support of the university's representations.

[100] The university says that during mediation, it agreed to expand the scope of its search in the following departments: Human Rights Services, the Office of the Provost and Vice-President of Academic, and Human Resources. The university says it directed those departments to perform a secondary search for records. Affidavits were provided by the Director of Human Rights Services, a Senior Investigator in Human Rights

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[36] Order MO-2246.

Services, an Administrative Assistant in the Office of the Provost and Vice-President, Academic, and the Assistant Vice-President, Human Resources. Each affidavit describes the search the individual conducted, specifies how many records they located and confirms that each did not destroy or delete any records subsequent to the appellant's request.

[101] Finally, the university also provided an affidavit from its Compliance and Policy Administrator. The Administrator attests that she coordinated the search for responsive records. She says that she identified which individuals at the university needed to search for records and reviewed the responsive records that were returned to her office. She attests that none of the offices that searched for records indicated that records may have once existed but no longer do, or that any responsive records had been destroyed in accordance with the authorized records retention schedule. The Administrator swore that to the best of her information and belief, they had identified all of the responsive records.

Appellant's representations

[102] The appellant denies that the university conducted a reasonable search for records. He says, in summary, that the university failed to search for records held by a number of different university employees and/or departments, including the following:

- a Human Resources Consultant;
- the Director of Human Resources, Consulting and Special Projects;
- the Office of the Vice-President, Equity and Community Inclusion;
- the President and Vice-Chancellor;
- an Intake and Administrative Assistant;
- the Chancellor;
- the General Counsel;
- the Board of Governors;
- the Vice President of Administration and Finance; and
- the Vice-President of Administration and Operations.

[103] The appellant provides references to the records at issue, as well as his own records and research as support for his assertions that these employees and/or departments should have responsive records. For example, he says that although the Human Resources Consultant confirmed with him by email that he was "connecting with his colleagues," about the matters the appellant raised, the university did not locate any

records related to the Human Resources Consultant.

[104] He raises a number of other examples where he believes the individuals noted above should likely have had records based on letters he sent or his understanding of how his complaint would have been dealt with administratively. For example, he says that both the Staff Member and the university's General Counsel were copied on Record 91, but that neither a letter from himself, nor the General Counsel's letter were located in the search of their records.

[105] The appellant also points to various university policies and information on its website to suggest that it is possible that responsive records may be located in other places, including with the Board of Directors and the Vice President of Administration and Finance.

[106] Finally, in addition to his representations about parameters of the university's search, the appellant submits that the university failed to act fairly and impartially during its search. He says that the Staff Member was directed to conduct a search of his own files. He says that the Staff Member has a reasonable expectation of bias against him because he has made public his hateful and discriminatory opinions about the appellant's ancestry. The appellant says that the Staff Member contravened the university's policy on the disclosure of confidential information and the Ontario *Human Rights Code* and that this is evidence of his bias.

[107] The appellant says that the university knew, or ought to have known, about the Staff Member's hateful and discriminatory comments and should have concluded that he would not be able to conduct his own search for records because he was not impartial.

[108] The appellant refers me to Order M-524, and asserts that an individual with a personal interest in the disclosure or non-disclosure of a record must not be the decision-maker who makes the determination with respect to disclosure. He argues that a breach of this fundamental rule of fairness will cause a statutory delegate, such as a delegated "head" under the *Act*, to lose jurisdiction and that the result of this loss of jurisdiction is to render his or her decision void.

The university's reply

[109] The university continues to maintain that its search for records was reasonable. It says that during mediation, it voluntarily agreed to conduct a second search and to expand the scope of the search to include records held by:

a. Human Rights Services;

b. the Office of the Provost and Vice-President, Academic; and

c. Human Resources.

[110] The university says that in relation to the records held by Human Resources, the appellant further clarified his request and asked that the university search the records held by the Assistant Vice-President of Human Resources. It says that its search for records held by Human Resources was specifically limited to the Assistant Vice-President.

[111] The university says that the Human Resources Consultant and the Director of Human Resources, Consulting and Special Projects referred to by the appellant in his representations were not identified by the appellant during mediation and therefore their records were beyond the scope of the second search.

[112] With regard to the appellant's claim that there is a reasonable apprehension of bias, the university says it relies on the affidavits of its Compliance and Policy Advisor and the Staff Member. The university denies that either were biased in conducting a search for responsive records. The university's representations were submitted by its Compliance and Policy Advisor and she specifies that it is her job to process and record requests for information in accordance with the *Act*. She says that with respect to the appellant's request, she instructed the Staff Member to conduct a search in accordance with the university's obligations under the *Act*. She says that the Staff Member swore an affidavit to that effect and she submits that she took that affidavit into consideration.

[113] The university submits that, in the absence of evidence demonstrating that the Staff Member did not conduct a reasonable search, the affidavits of the Compliance and Policy Advisor and the Staff Member are sufficient as evidence that there is no reasonable apprehension of bias in the university' search for records.

Additional representations

[114] Both the university and the appellant made further representations about the reasonableness of the university's search for records. These representations focus on the scope of the second search the university conducted during mediation. In short, the university says that the second search was limited to specific employees in each department, while the appellant says that that search included additional employees and that additional records should have been located.

Finding and analysis

[115] Based on my review of the parties' representations and evidence, I am satisfied that the university conducted a reasonable search for records related to the appellant's request, with the exception of its search for records held by the Human Resources department.

[116] For the reasons set out below, I will order the university to conduct a further search for any responsive records held by the Human Resources Department.

[117] To begin, I accept that the university's evidence that the Staff Member, the

office where the Staff Member worked, the Faculty of Arts, and the Office of the Provost of Faculty Affairs, all conducted searches for responsive records. Given that the appellant's request was specifically for emails and/or correspondence between the Staff Member and any other person or organization, I find that it was reasonable for the university to have the Staff Member conduct a search of his records.

[118] The affidavit from the Staff Member describing his search indicated that he searched his email, including the Inbox, Sent, Trash and other folders and located 11 records responsive to the appellant's request. He confirmed that it was his belief that those were the only responsive records in his possession and further swore that he did not destroy or delete any records after the date of the request.

[119] I have considered the appellant's assertion that the Staff Member should not have been charged with conducting a search of his own records due to his alleged impartiality. I understand the appellant to be suggesting that, due to his expressed opinions, the Staff Member may have deliberately failed to identify relevant responsive records. I have reviewed all of the representations and supporting information provided by the appellant in support of his position that the Staff Member was biased and I find that there is insufficient evidence to support a finding in that regard. To be clear, I have reviewed the "Twitter posts," as provided by the appellant, and in my view, the fact that the Staff Member expressed these opinions publicly does not, in and of itself, lend in favour of a decision that he was incapable of conducting a search of his records. The Staff Member attested that he did not locate any further emails, nor did he delete or destroy any records after the date of the request and I accept those sworn statements.

[120] As noted above, the appellant referred me to Order M-524, and asserts that an individual with a personal interest in the disclosure or non-disclosure of a record must not be the decision-maker who makes the determination with respect to disclosure. In my view, this case is not relevant, since the Staff Member was tasked only with locating the responsive records and was not the decision-maker who would make the ultimate decision regarding disclosure of the information at issue.

[121] I find that the affidavits provided by the Compliance and Policy Administrator, the Vice-Provost, Faculty Affairs, the Director of Human Rights Services and the Administrative Assistant in the Office of the Provost and Vice-President, Academic, support the university's assertions that each of those individuals conducted a reasonable search for records they each held that would be responsive to the appellant's request.

[122] I note that the appellant asserts that various individuals may have additional records, such as the Board of Directors, the Vice-President of Administration and Operations or the President and Vice Chancellor, based on his understanding of how the university processes complaints works, or because he sent a letter to a particular individual's attention. In my view, these assertions are speculative and without further supporting evidence I am not persuaded that the appellant has provided a reasonable basis on which I should order a further search for responsive records in these locations.

[123] As noted above, the university and the appellant disagree about the scope of the secondary search the university conducted during mediation. I am not privy to many of the matters discussed during mediation and cannot resolve that issue based on the evidence before me.[37] However, I find that the appellant has provided sufficient evidence to establish that there is a reasonable basis to conclude that additional responsive records may exist in the Human Resources department.

[124] The appellant has provided emails that indicate he communicated with a Human Resources Management Consultant about his concerns regarding the Staff Member. The Consultant advised the appellant that he had updated his Director and that his concerns were being investigated. A further email to the appellant from the Consultant specified that the Director was connecting with colleagues and that he could expect an update soon.

[125] The university provided an affidavit from the Assistant Vice-President of Human Resources which specifies that she conducted a search of her own records for records that would be responsive to the appellant's request. In circumstances where there are emails indicating that other employees from the Human Resources department were communicating with the appellant, and/or each other, about matters relevant to his request for information, I find there is a reasonable basis to expect that there may be additional responsive records in the Human Resources department. As such, I will order the university to conduct a further search for records of all employees in its Human Resources department, as well as anyone else that any employees from the Human Resource department communicated with about matters relevant to the appellant's request.

[126] If the university locates additional records as a result of this search, it must provide the appellant with an access decision in accordance with the requirements of the *Act*.

ORDER:

1. I uphold the university's decision to withhold access to the records at issue pursuant to section 49(a), read with section 19 of the *Act*.

2. I order the university to conduct a further search for records responsive to the appellant's request held by any employee and/or contractor in the Human Resources department, as well as anyone else that any employees and/or

[37] The mediator noted the university's agreement to expanding the scope of its search in its final report, but did not specify the parameters of the expanded search.

contractors from the Human Resource department communicated with about matters relevant to the appellant's request.

3. I order the university to issue an access decision to the appellant regarding access to any records located as a result of the search ordered in Order Provision 2, in accordance with the *Act*, treating the date of this order as the date of the request.

4. I order the university to provide me with a copy of their decision rendered to the appellant in accordance with Order Provisions 2 and 3.

5. The university shall send their representations on the new search referred in Provision 2 and to provide me, by **March 1, 2021**, an affidavit outlining the following:

   (a) the names and positions of the individuals who conducted the searches;

   (b) information about the types of files searched, the nature and location of the search, and the steps taken in conducting the search;

   (c) the results of the search; and

   (d) details of whether the record could have been destroyed, including information about record maintenance policies and practices such as retention schedules.

   The university's representations may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for submitting and sharing representations is set out in this office's *Practice Direction Number 7*, which is available on the IPC's website. The university should indicate whether it consents to the sharing of their representations with the appellant.

6. I remain seized of this appeal in order to deal with the outstanding issues arising from provisions 2 and 5 of this interim order.

7. The timeline noted in Order Provision 5 may be extended if the university is unable to comply in light of the current COVID-19 situation. I remain seized of the appeal to address any such requests.

Original Signed by:	January 28, 2021
Meganne Cameron Adjudicator	