Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4126

Appeal PA17-517

University of Ottawa

March 26, 2020

Summary: The requester sought access, under the *Freedom of Information and Protection of Privacy Act* to communications between an identified University of Ottawa employee and two third parties mentioning a specific online publisher. The university denied access to the responsive records, in part, and the requester appealed to the Information and Privacy Commissioner. The adjudicator upholds the university's decision to deny access to portions of two records under section 13(1) (advice or recommendations) and personal information in other records under the mandatory personal privacy exemption in section 21(1). The adjudicator finds that sections 17(1) (third party information) and 19 (solicitor-client privilege) do not apply, and she orders the university to disclose the non-exempt records. Finally, the adjudicator finds that the university conducted a reasonable search pursuant to section 24 of the *Act*.

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"), 2(3), 13(1), 17(1), 19, 21(1) and 24.

Orders and Considered: Orders MO-1285 and MO-1706.

Cases Considered: *Blank v. Canada* (*Minister of Justice*) (2006), 270 D.L.R. (4th) 257 (S.C.C.); *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)

OVERVIEW:

[1] This order determines the requester's access to University of Ottawa (the university) records naming his online publishing business and a specific university

employee, dating from 2015 to 2016. The requester submitted a request to the university under the *Freedom of Information and Protection of Privacy Act* (the *Act*), seeking access to "all files, records, documents and correspondence, including electronic data and communication naming, citing or referencing [a named online publisher] and [a named university employee], librarian," from August 1, 2015 to the date of the request.

[2] By way of background, the Attorney General of Canada was a defendant in a civil action and was represented by the Department of Justice. The university was not a party to the litigation, but the named university employee was a prospective witness. That university employee had communications with the Department of Justice Canada and also, separately, with counsel employed by a legal clinic, who represented another party in related litigation. The records the requester seeks relate to these matters.

[3] The university issued an access decision granting partial access to the records identified as responsive, which are mostly emails. Access to some records was denied in part or fully under sections 13(1) (advice or recommendations), 17(1) (confidential third party information), 19 (solicitor-client privilege) and 21(1) (personal privacy) of the *Act.*

[4] The requester, now the appellant, appealed the university's decision to the Information and Privacy Commissioner of Ontario (the IPC). A mediator was appointed to explore the possibility of resolution.

[5] During mediation, the appellant challenged the university's exemption claims and raised the issue of reasonable search because he believes that more records should exist. A mediated resolution of the appeal was not possible and it was transferred to the adjudication stage where an adjudicator may conduct an inquiry.

[6] I decided to conduct an inquiry and started by sending a Notice of Inquiry to the university to invite representations on the issues. After I received the university's representations, it was necessary to seek clarification about several details related to its section 17(1) claim. Once the university clarified its claim regarding that exemption, I sent a Supplementary Notice of Inquiry to two parties whose interests could be affected by disclosure of the records: the Department of Justice Canada (Justice) and a legal clinic within the university (the legal clinic). Given the university's exemption claims, I invited the legal clinic to provide representations on both the third party information and the solicitor-client privilege exemptions in sections 17(1) and 19 of the *Act*, respectively, while I invited Justice to provide representations on section 19 of the *Act* only. I provided relevant excerpts from the university's representations for response by each of the affected parties.

[7] Justice responded to the Notice of Inquiry and provided representations on section 19, but I did not receive submissions from the legal clinic, despite efforts to follow up. Next, I sent the Notice of Inquiry to the appellant and provided a non-confidential version of the university's representations, as well as those received from

Justice. I subsequently received representations from the appellant, which I shared with the university and affected parties. The university provided brief reply submissions, addressing the appellant's submissions only to clarify the legal clinic's mandate and respond to the search issue. The affected parties did not respond. Leading up to this order, Justice responded to my request for clarification about the status of litigation.

[8] In this appeal, I uphold the university's decision to deny access to portions of records 13 and 14 under section 13(1) of the *Act* and I find portions of records 4-6, 16, 17, 30 and 32 exempt under section 21(1). I find that the university properly exercised its discretion in withholding portions of records 13 and 14 under section 13(1). However, I do not uphold the university's exemption claims under 17(1) or 19 of the *Act*, and I order the non-exempt records disclosed. Finally, I find that the university conducted a reasonable search for responsive records pursuant to section 24 of the *Act*.

RECORDS:

[9] The records remaining at issue in this appeal consist of email chains in 25 records (87 pages), namely, records 3-6, 13-27 and 29-34. As these are consecutive email chains, there is some duplication of content. The university withholds duplicate portions of records 13 and 14 under section 13(1), duplicate portions of records 16 and 17 under section 21(1), and all of records 3-6, 29-30 and 33 under section 17(1). The university's section 19 claim applies to 23 of the 25 records (all, except for records 13 and 14).

ISSUES:

Preliminary Issue: Reference to the legal clinic's position in this appeal

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 personal privacy exemption at section 21(1) apply to the information at issue in records 16 and 17?

C. Does the discretionary advice or recommendations exemption at section 13(1) apply to the withheld portions of records 13 and 14?

D. Does the discretionary exemption for solicitor-client privilege at section 19 apply to the records?

E. Does the mandatory third party information exemption at section 17(1) apply to the records?

F. Did the institution exercise its discretion under sections 13(1)? If so, should this office uphold the exercise of discretion?

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

DISCUSSION:

Reference to the legal clinic's position

[10] As stated, I did not receive representations from the legal clinic in this appeal. As part of its initial representations, the university included the response provided by the legal clinic (and Justice) to the university upon notification of the request, prior to this appeal. In providing these responses, the university took the position that they were confidential and could not be shared with the appellant without the consent of the affected parties. For this reason, I asked the legal clinic and Justice, when seeking their representations, to address the issue of consent to sharing their notification responses with the appellant. Neither party responded and specifically addressed this issue. However, Justice provided representations in response to the Notice of Inquiry and did not oppose my sharing of them with the appellant. As a result, I provided Justice's submissions to the appellant and I have set them out in this decision.

[11] As stated, however, the legal clinic did not respond to the Notice of Inquiry or participate in the inquiry into this appeal. I made several attempts to seek the legal clinic's representations during the inquiry. When the Notice of Inquiry originally sent to the legal clinic did not elicit a response, the follow up done at my request resulted in the Notice of Inquiry being re-sent to this affected party. This, too, did not receive a response, even after an extension of time was granted for a response. There being no representations from the legal clinic submitted during the inquiry, I have considered its response to notification by the university of the access request in my decision. However, I refer to it only very generally in this order and only to the extent that such references do not in my estimation contain information that would fit within the confidentiality criteria set out in section 7 of the IPC's *Code of Procedure* and Practice Direction 7.

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

[12] The university withheld records 16 and 17 in full under section 19, as discussed below, but also withheld certain portions of them on the basis of the section 21(1) personal privacy exemption. In order to determine whether section 21(1) of the *Act* may apply to those records, I must first decide whether they contain "personal information" and, if so, to whom it relates, since section 21(1) can only apply to "personal information".

[13] Based on my review of them, it appears that other records in addition to records

16 and 17 may contain personal information. Additionally, some records contain information relating to the appellant, and I have considered whether this is his "personal information". A finding that the records contain the appellant's personal information would mean that his right of access to them would be determined under Part III of the *Act*,[1] and the exemption claims available to the university would be different from the ones it has claimed.

[14] To fit within the definition of "personal information" in section 2(1) of the *Act*, the information must be "recorded information about an identifiable individual," and it must be reasonable to expect that an individual may be identified if the information is disclosed.[2] Section 2(1) contains a non-exhaustive list of the types of information that qualify as "personal information." Information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[3]

[15] Sections 2(3) and (4) also relate to the definition of personal information. These sections state:

> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[16] 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.[4] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[5]

[17] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[6]

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[1] Section 47(1) gives an individual a general right of access to his or her own personal information held by an institution, while section 49 provides a number of exemptions from this right.
[2] Order PO-1880, upheld on judicial review in *Ontario* (*Attorney General*) *v. Pascoe*, [2002] O.J. No. 4300 (C.A.).
[3] Order 11.
[4] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[5] Orders P-1409, R-980015, PO-2225 and MO-2344.
[6] Order PO-1880, upheld on judicial review in *Ontario* (*Attorney General*) *v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

Representations

[18] The university submits that records 16 and 17 contain personal information, as defined in paragraph (d) of section 2(1) of the *Act*, because the records contain an identifiable individual's personal home address.

[19] The appellant's representations did not specifically address whether the records contain "personal information."

Analysis and findings

[20] Having reviewed the records, including records 16 and 17, I find that they contain the personal information of the university employee, including her home address, which fits into paragraph (d) of the definition in section 2(1), as well as other information about her revealing personal opinions or views under paragraph (e) of the definition. Specifically, I find that the university employee's personal information appears in records 4-6, 16, 17, 30 and 32.

[21] However, because of the exception in section 2(3) of the *Act*, I find that the remaining information related to the university employee in records 16 and 17 is not her personal information because it is about her in a professional capacity, including her work address and position at the university. I also find that this professional information does not reveal anything of a personal nature about her.

[22] I also reviewed all of the records at issue to see if any of them contain the appellant's personal information because, if any of them do, his right of access to them would be determined under Part III of the *Act*. The determination is made on a record-by-record basis.[7] Although there is recorded information relating to the appellant in several of the records, I find that this information relates to him in a business capacity according to the exception in section 2(3). I also find that this information does not reveal anything of a personal nature about him. Therefore, since the records do not contain the appellant's personal information, the relevant exemptions to consider are those claimed by the university, and not the ones listed in section 49 of the *Act*.

[23] I will now consider whether the personal information of the university employee is exempt from disclosure under section 21(1) of the *Act*.

B: Does the mandatory personal privacy exemption at section 21(1) apply to records 16 and 17?

[24] For the reasons that follow, I find that the university employee's personal information in records 4-6, 16, 17, 30 and 32 is exempt under section 21(1) of the *Act.*

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[7] Order M-352 sets out the method of analysis for dealing with requests for records of personal information, in which the unit of analysis is the whole record, rather than individual paragraphs, sentences or words contained in a record.

[25] Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information, unless one of the exceptions in paragraphs (a) to (e) of section 21(1) applies, or unless disclosure would not be an unjustified invasion of personal privacy in section 21(1)(f).

[26] If the information fits within any of paragraphs (a) to (e) of section 21(1), it is not exempt from disclosure under section 21. In this appeal, none of them applies. Under section 21(1)(f), however, if disclosure would not be an unjustified invasion of personal privacy, it is not exempt from disclosure. This exception, allowing disclosure if it would not be an unjustified invasion of personal privacy, requires consideration of additional parts of section 21.

[27] Sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Also, section 21(4) lists situations that would not be an unjustified invasion of personal privacy.

[28] 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.[8]

[29] Once a presumed unjustified invasion of personal privacy is established under section 21(3), it cannot be rebutted by one or more factors or circumstances under section 21(2).[9] 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.[10] 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.[11] The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2).[12]

Representations

[30] The university submits that the mandatory exemption in section 21(1) of the *Act* applies to the withheld portions of records 16 and 17 because none of the exceptions in paragraphs (a) to (f) of section 21(1) of the *Act* applies. With respect to the exception at section 21(1)(f), where disclosure would not be an unjustified invasion of personal

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[8] *John Doe v. Ontario* (*Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767 (Div.Ct.).
[9] *John Doe v. Ontario* (*Information and Privacy Commissioner*), cited above.
[10] Order P-239.
[11] Orders PO-2267 and PO-2733.
[12] Order P-99.

privacy, the university argues that the personal information at issue was provided with an expectation that it would be treated confidentially, as contemplated by the factor in section 21(2)(h) of the *Act*. According to the university, therefore, disclosure of that personal information would constitute an unjustified invasion of personal privacy.

[31] The representations provided by Justice on section 19 refer to the personal information at issue as having been provided by the university employee in confidence.

[32] The appellant did not directly address this issue in his representations.

Analysis and findings

[33] According to the university's decision, at issue under section 21(1) is personal information of a university employee in records 16 and 17 that was provided to Justice in emails, information that is the same in both records. Consequent to my finding above that records 4-6, 30 and 32 contain her personal information as well, I will also be reviewing the application of section 21(1) to it due to the mandatory nature of the exemption.

[34] I have considered whether any of the presumptions against disclosure in section 21(3) apply in the circumstances of this appeal, and I find that none of them do. When the information is not subject to a section 21(3) presumption against disclosure, the analysis turns to the factors in section 21(2) to see if any are relevant in determining whether disclosure of the personal information at issue would constitute an unjustified invasion of personal privacy. The list of factors under section 21(2) is not exhaustive and, as stated, the university was required to also consider any circumstances that are relevant, even if they are not listed under section 21(2).

[35] The university argues that section 21(2)(h) of the *Act* is a relevant factor weighing against disclosure of the university employee's personal information and Justice agrees with the university's position. This section states that:

> 21(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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> > (h) the personal information has been supplied by the individual to whom the information relates in confidence;

[36] Section 21(2)(h) of the *Act* applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Section 21(2)(h) requires an objective assessment of the reasonableness of any confidentiality

expectation.[13]

[37] Given the context in which the personal information of the university employee was provided in the emails, and the overall circumstances, I am satisfied that this personal information was provided by her in confidence. I accept that she expected that it would be treated confidentially by its recipients, which were Justice (records 16, 17 and 32) and the legal clinic director (records 4-6 and 30), and that her expectation in this regard was reasonable. I am satisfied that the factor weighing against disclosure in section 21(2)(h) applies to this personal information.

[38] None of the parties in this appeal argue that any factors that weigh in favour of disclosure of the personal information at issue apply. In particular, the appellant does not argue that any of the listed factors favouring disclosure, such as public interest in scrutiny or fair determination of rights in sections 21(2)(a) and (d), respectively, apply. I see no basis on which they, or any other factors favouring disclosure, including unlisted ones, could apply in the circumstances, and I find that none do.

[39] In order to find that disclosure does *not* constitute an unjustified invasion of personal privacy, one or more of the factors and/or circumstances favouring disclosure in section 21(2) must be present. As I have found that the privacy protective factor in section 21(2)(h) applies and there are no factors favouring the disclosure of the personal information at issue, the exception at section 21(1)(f) has not been established. Therefore, I find that the withheld personal information of the university employee in records 4-6, 16, 17, 30 and 32 is exempt from disclosure under the mandatory exemption in section 21(1) of the *Act*.

C: Does the discretionary advice or recommendations exemption at section 13(1) apply to the withheld portions of records 13 and 14?

[40] The university claims the section 13(1) exemption to withhold portions of records 13 and 14. These records are an email chain, where record 14 includes an email response to record 13, and the withheld portion of the two records is identical. For the reasons outlined below, I find that section 13(1) applies to the withheld portions of records 13 and 14, and that none of the exceptions in section 13(2) apply in the circumstances of this appeal.

[41] Section 13(1) of the *Act* states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

[42] The purpose of section 13 is to preserve an effective and neutral public service

[13] Order PO-1670.

by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.[14]

[43] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[44] "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.[15]

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

[46] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.[16]

[47] The application of section 13(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 13(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 13(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.[17]

[48] Examples of the types of information that have been found *not* to qualify as advice or recommendations include:

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[14] *John Doe v. Ontario* (*Finance*), 2014 SCC 36, at para. 43.
[15] See above at paras. 26 and 47.
[16] Orders PO-2084, PO-2028, upheld on judicial review in *Ontario* (*Ministry of Northern Development and Mines*) *v. Ontario* (*Assistant Information and Privacy Commissioner*), [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario* (*Ministry of Transportation*) *v. Ontario* (*Information and Privacy Commissioner*), [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.
[17] *John Doe v. Ontario* (*Finance*), cited above, at para. 51.

- factual or background information[18]
- a supervisor's direction to staff on how to conduct an investigation[19]
- information prepared for public dissemination[20]

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

Representations

[50] The university refers to the purpose of the section 13(1) exemption, and submits that it serves the same purpose in the university context as in the broader public sector context.[21] The university submits that the withheld portions of records 13 and 14 consist of advice and specific recommendations for a course of action provided by the director of the law library to the university librarian and associate university librarian, and that such advice and specific recommendations were critical to the decision-making process.

[51] In addition, the university submits that none of the exceptions in section 13(2) of the *Act* applies to the information in the records at issue.

[52] The appellant did not specifically address the application of section 13(1) to records 13 and 14.

Analysis and findings

[53] Records 13 and 14 consist of an internal email chain and, based on my review of them, I accept that they represent an email exchange between the director of the university's law library and the university librarian named in the request, as well as another university librarian. As I observed above, the withheld portion of record 14 is identical to the withheld portion of record 13 in this email chain.

[54] After reviewing the representations of the university and the records at issue, I am satisfied that the withheld portions of record 13 and 14 contain advice or recommendations for the purpose of section 13(1) of the *Act*. It is clear that records 13 and 14 contain the advice and recommendations of a senior university library employee to other university library employees related to the university's subscription to an online publication. The withheld information outlines available options and makes a recommendation about the university's subscription to it.

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[18] Order PO-3315.
[19] Order P-363, upheld on judicial review in *Ontario* (*Human Rights Commission*) *v. Ontario* (*Information and Privacy Commissioner*) (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.).
[20] Order PO-2677.
[21] Relying on Order PO-2861.

[55] Accordingly, I find that section 13(1) applies to the withheld portion of records 13 and 14. I have also reviewed the exceptions in section 13(2) of the *Act*, and I find that none of them apply in the circumstances of this appeal.

[56] Subject to my findings on the university's exercise of discretion below, I uphold the university's decision to withhold portions of records 13 and 14.

D: Does the discretionary exemption for solicitor-client privilege at section 19 apply to the records?

[57] The university claims that section 19 of the *Act* applies to records 3-6, 15-27 and 29-34, which represent all of the records at issue in this appeal other than records 13 and 14, which I have addressed above. For the reasons that follow, I find that section 19 does not apply in the specific circumstances of this appeal.

[58] 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.

[59] 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 university must establish that one or the other (or both) branches apply.

Common law privilege

[60] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

Solicitor-client communication privilege

[61] 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.[22] The rationale for this privilege is to ensure that a client may freely confide in their lawyer on a legal matter.[23]

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[22] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[23] Orders PO-2441, MO-2166 and MO-1925.

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.[24]

[62] 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.[25] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[26]

Litigation privilege

[63] Litigation privilege protects records created for the dominant purpose of litigation. It is based on the need to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial.[27] Litigation privilege protects a lawyer's work product and covers material going beyond solicitor-client communications.[28] It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[29] The litigation must be ongoing or reasonably contemplated.[30]

[64] 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.[31] 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.[32] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[33] However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.[34]

[65] Common law litigation privilege generally comes to an end with the termination

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[24] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.). See also *Canada* (*Office of the Information Commissioner*) *v. Canada* (*Prime Minister*), 2019 FCA 95.
[25] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[26] *Kitchener* (*City*) *v. Ontario* (*Information and Privacy Commissioner*), 2012 ONSC 3496 (Div. Ct.)
[27] *Blank v. Canada* (*Minister of Justice*) (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).
[28] *Ontario* (*Attorney General*) *v. Ontario* (*Information and Privacy Commission, Inquiry Officer*) (2002), 62 O.R. (3d) 167 (C.A.).
[29] *Ontario* (*Ministry of Correctional Service*) *v. Goodis*, 2008 CanLII 2603 (ON SCDC).
[30] Order MO-1337-I and *General Accident Assurance Co. v. Chrusz*, cited above; see also *Blank v. Canada* (*Minister of Justice*), cited above.
[31] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).
[32] *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.
[33] 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.).
[34] *General Accident Assurance Co. v. Chrusz*, cited above; Orders MO-1678 and PO-3167.

of litigation.[35]

Statutory privilege

[66] 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.

Representations

University's representations

[67] Stating that it "broadly accepts the summary of the applicable legal principles" set out in the Notice of Inquiry, the university submits that the withheld records are protected by both solicitor-client communication privilege and litigation privilege.

[68] The university acknowledges that it is not itself a party to litigation and it says that as such, it is the affected parties, Justice and the legal clinic, rather than the university, that are in the best position to explain why the information is subject to solicitor-client communication privilege and litigation privilege.

[69] According to the university, records 3-6, 29-30 and 33 involve a specific legal clinic within the university. It submits that in these records, the legal clinic's director is acting as a lawyer; as such, the records were prepared by counsel for use in giving advice or in contemplation of, or use in, litigation. In its reply representations, the university adds that the records were created in the context of active litigation, or in anticipation thereof. The university does not identify the specific litigation.

[70] The university also submits that records 15-27, 31-32 and 34 relate to Justice and are subject to litigation privilege because they were created for the dominant purpose of, or use in actual, anticipated or contemplated litigation.

[71] The university further submits that it has done nothing to lose or cause a waiver of the solicitor-client privilege, and it has maintained the confidentiality of the records.

Justice's representations

[72] At the request stage, Justice advised the university that all records about which it had been notified were created for the dominant purpose of use in actual, anticipated or contemplated litigation. According to Justice, the individual named in the access request, the identified university employee, was a (potential) witness in this litigation and the statutory privilege at section 19(b) of the *Act* applies to the records accordingly.

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[35] *Blank v. Canada* (*Minister of Justice*), cited above.

[73] During the inquiry, Justice maintained its position that the records relating to it should be withheld under section 19(b) of the *Act* because they consist of communications with a witness in an ongoing litigation and are protected pursuant to litigation privilege. According to Justice, "officials" within its department confirmed that litigation on the file was ongoing. Justice also said that "the records in question are communications between counsel and the client to obtain or provide legal advice, or reflect the legal advice given."

[74] In seeking clarification respecting the status of the litigation recently, I asked Justice to confirm my understanding, gleaned from public records, that the litigation in question had concluded and to clarify whether it continued to take the position that litigation privilege applied to the records. I asked Justice to specifically comment on the significance of the fact that litigation is concluded in this instance if it was maintaining the litigation privilege claim. In response, Justice confirmed that the litigation addressed in the records is concluded and the right to appeal has passed. However, Justice argues that litigation privilege continues to apply to records 18, and 22-27,[36] because, it says, there are five ongoing claims before the Federal Court involving the appellant's company that raise identical issues. Justice submits that due to the proximity of all of these files, the emails at issue in this appeal "remain subject to litigation privilege."

The legal clinic's representations at the request stage

[75] I reviewed the legal clinic's response to the university upon notification of the request and, generally stated, the legal clinic takes the position that the records were created in the context of active litigation, or in anticipation thereof, involving the clinic's client.

Appellant's representations

[76] The appellant disputes the university's submission that "[t]he basis for the confidential nature of the records is that they are privileged records that relate to litigation involving clients of the legal clinic," because, he submits, the legal clinic "has no clients" and "there is no litigation." According to the appellant, the legal clinic's director has, in a private capacity and separate from his role at the legal clinic, acted as counsel for defendants in copyright litigation with the appellant's company; that is, he represented parties unrelated to this appeal who were not clients of the legal clinic. The appellant submits that, as a result, the university cannot claim confidentiality or legal privilege "involving clients of the legal clinic" where none exists.

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[36] Justice said that, based on the passage of time and to be consistent with another related file not before me, it had decided to "disclose additional information." I understand Justice to be suggesting that it was providing consent to disclose certain records (or portions). As there is no revised decision from the university before me, I am reviewing the application of section 19 to all records according to the university's access decision.

Analysis and findings

[77] The records that the university withheld under section 19 of the *Act* consist of email chains dated between November 2015 and November 2016. Many of the email chains include duplicates and some have attachments.

[78] Records 3-6, 29-30 and 33 consist of email chains between an employee of the university and the director of the legal clinic, while records 15-18, 22-27, and 31-32 and 34 are emails exchanged between the university employee and Justice. Records 19-21 and 34 are emails originating with Justice that the named university employee forwarded to, or exchanged with, other university employees.

The statutory privileges do not apply

[79] I begin by dismissing the university's claim that the records are exempt under branch 2, the statutory solicitor-client communication and litigation privileges.

[80] The statutory privileges are found in sections 19(b) and 19(c). As the university is an educational institution, the relevant statutory privilege in this appeal is section 19(c).[37]

[81] Section 19(c) gives the university the discretion to deny access to a record "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." The records at issue are emails between the university employee and either the director of the legal clinic or legal counsel or other staff at Justice. Neither the legal clinic director nor legal counsel for Justice were employed or retained by the university as its counsel, as required for the application of section 19(c). As the records at issue in this appeal were not prepared by or for counsel employed or retained by the university as an educational institution, I find that the statutory privilege in section 19(c) does not apply to the records at issue in this appeal. I now turn to the common law privileges.

No solicitor-client relationship exists to support common law communication privilege

[82] The common law solicitor-client communication privilege in section 19(a) 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.[38] As noted above, confidentiality is an essential component of the privilege and this requires the institution to demonstrate that the communication was made in

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[37] Justice also referred to section 19(b), the statutory privilege that protects records "prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation". Justice did not specifically argue that it is "Crown counsel" for the purposes of section 19(b) and the term "Crown" in section 19(b) is understood to refer to the Crown in relation to Ontario, not Canada. Therefore, as section 19(b) only applies to government institutions that are subject to *FIPPA*, it does not apply here.

[38] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

confidence, either expressly or by implication.[39]

[83] Based on my review of the records at issue, I accept that at least some of them bear the hallmarks of confidentiality. However, even if the communications were made in confidence, the university has not provided evidence to establish the requisite solicitor-client relationship in this situation. First, there is no solicitor-client relationship between the university, or its employee, and Justice. The university was not a party to the litigation being discussed in the records, which was litigation brought against the Attorney General of Canada by the appellant's company where Justice was representing the defendant. The university was not Justice's client and there is no evidence of common interest between the university and the Attorney General of Canada.

[84] I am similarly not satisfied of the existence of a solicitor-client relationship between the university, or its employee, and the legal clinic. The university is not a party to the litigation alluded to in the emails and was not the legal clinic's client. Even if I were to consider that the university was assisting with the litigation in which the legal clinic was engaged, there is no basis on the evidence before me upon which I could find a common interest between the university and the legal clinic's client.

[85] For these reasons, I find that the records are not solicitor-client communication privileged at common law, under section 19(a) of the *Act*.

Common law litigation privilege is not established because the litigation has ended

[86] I have also carefully considered whether the records are exempt because of the common law litigation privilege in section 19(a), and I conclude that they are not.

[87] The test for litigation privilege requires that the record have been prepared or gathered by counsel or someone under counsel's direction, that this preparation or gathering was done in anticipation of litigation, and that the dominant purpose of the creation of the records was preparing for that litigation.[40] The onus rests with the party or parties asserting the position, which in this appeal are the university and Justice, as well as the legal clinic.

Emails with the legal clinic's director

[88] Records 3-6, 29-30 and 33 are the emails between the university employee and legal clinic director. The university's position on these records was limited to acknowledging that it was not a party to any litigation and suggesting that the legal clinic was in the best position to explain why the records are subject to litigation privilege. Despite my efforts to obtain representations from the legal clinic on this issue, which I outlined above, it did not provide any.

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[39] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[40] *General Accident Assurance Company v. Chrusz*, cited above.

[89] Common law litigation privilege contemplates legal counsel seeking information to prepare for trial since the privilege exists to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial.[41] The legal clinic's position appears to be that the records relating to it are exempt under section 19 because they were created in the context of active litigation involving a client of the clinic. However, in the absence of representations from the legal clinic directly addressing this issue during the inquiry, I have no reasonable basis upon which to find that litigation privilege over these records continues to exist, assuming it ever did. The legal clinic has given me no information about the litigation, including whether it is ongoing. At common law, once the litigation ends, so does the litigation privilege. It is also an open question whether the university could claim the privilege, which would have belonged to the legal clinic's client and not the university. However, I do not need to decide that question.

Emails with Justice

[90] Records 15-18, 22-27 and 31-32 consist of communications between the university employee and Justice, while records 19-21 and 34 are emails sent or received by the university employee in email exchanges with other university employees following email communications that originated with Justice. The university's employee was a potential witness in the litigation in which Justice was involved with the appellant's company and so it is arguable that all of these records were prepared for the dominant purpose of litigation.

[91] However, as Justice has confirmed, the litigation in which the university employee might have appeared as a witness has concluded and the right of appeal has passed. Justice argues that litigation privilege continues to apply to records 18 and 22-27 regardless of that fact, because there are "related litigation files" – ongoing matters where the appellant's company is before the Federal Court and the litigation purportedly raises the same issues. The argument is that the "proximity of all of these files" means that the records at issue in this appeal remain subject to litigation privilege.

[92] With respect to the common law litigation privilege provided for in section 19(a) of the *Act*, it is an open question whether section 19 would apply, since the university was not a party to the litigation for which the emails were gathered or created.[42]

[93] In any event, the evidence before me shows that the litigation for which all of these emails were created or relate has concluded. Justice has not claimed, and I simply do not have sufficient evidence to find, that these emails were created or relate to the other litigation Justice now mentions. Justice appears to be seeking to extend the

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[41] *Blank v. Canada* (*Minister of Justice*) (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).

[42] In any event, in view of my finding about the conclusion of the litigation, I do not need to make a determination on whether the common law privilege in section 19(a) can serve to protect the privilege of a party other than the institution.

reach of the common law litigation privilege on the basis that the appellant's company may have other, ongoing litigation in the same venue as, or relating to matters similar to, the concluded litigation to which the records at issue relate. But, Justice provides no authority for the application of privilege by association. And as stated, the evidence before me, including the reported case and the evidence of Justice itself that there has been no appeal of it, is that the relevant litigation has concluded. Accordingly, as it is clear that the communications at issue were created and relate to the concluded litigation, I find that any common law litigation privilege that may have existed terminated with the litigation in question.[43]

[94] The onus rested on the university, as the party claiming the exemption for privileged records, to establish the application of common law litigation privilege to the records.[44] The university, relying on the representations made by Justice, has not met its onus. As the relevant litigation has concluded, and common law litigation privilege ends with the termination of litigation, I find that it does not apply to the records at issue.

[95] Given my conclusion that neither the common law nor statutory solicitor-client communication or litigation privileges apply, I find that the records are not exempt under section 19 of the *Act*.

E: Does the mandatory third party information exemption at section 17(1) apply to the records?

[96] The university confirmed during the inquiry that its claim of section 17(1) applies to records 3-6, 29-30 and 33, all of which are records involving email correspondence between its employee and the legal clinic's director. It claims that the records contain the information of the legal clinic's client, which is protected by section 17(1). For the reasons given below, I find that section 17(1) does not apply to the identified records.

[97] Section 17(1) states:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> > (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

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[43] Even if the litigation were ongoing, litigation privilege would not apply to the underlying facts contained in the records, because the privilege is not intended to shield from disclosure relevant facts that do not, on their own, constitute a lawyer's work product. See *Ontario* (*Provincial Police*) *v. Assessment Direct Inc.,* 2017 ONSC 5686.

[44] *Blank*, cited above.

> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
>
> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[98] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[45] Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[46]

[99] For section 17(1) to apply, the university and/or the legal clinic was required to satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

[100] The types of information listed in section 17(1) mentioned by the university in its representations have been discussed in prior orders, as follows:

> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information

[45] *Boeing Co. v. Ontario* (*Ministry of Economic Development and Trade*), [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).
[46] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.[47]

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.[48] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[49]

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[50]

Part 2: supplied in confidence

Supplied

[101] The requirement that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[51]

[102] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[52]

[103] The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party.[53] There are exceptions to this general rule, but it is unnecessary to set them out here, for reasons I discuss below.

In confidence

[104] In order to satisfy the "in confidence" component of part two, the parties

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[47] Order PO-2010.
[48] Order PO-2010.
[49] Order P-1621.
[50] Order PO-2010.
[51] Order MO-1706.
[52] Orders PO-2020 and PO-2043.
[53] This approach was approved by the Divisional Court in *Boeing Co., cited above, and in Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 (CanLII) (*Miller Transit*).

resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[54]

[105] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case are considered, including whether the information was:

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.[55]

Part 3: harms

[106] The party resisting disclosure 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.[56]

[107] The failure of a party resisting disclosure to provide detailed evidence will not necessarily defeat the claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 17(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.[57]

Representations

[108] The university submits that the information in records 3-6, 29-30 and 33 is of a "special kind" and it says that each record relates to litigation involving the technical, commercial, or financial information of the legal clinic's client. According to the university, the records were supplied to the university by the legal clinic in confidence; and the disclosure of the records could reasonably be expected to cause harm to it.

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[54] Order PO-2020.
[55] Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis,* 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.
[56] *Ontario* (*Community Safety and Correctional Services*) *v. Ontario* (*Information and Privacy Commissioner*), 2014 SCC 31 (CanLII) at paras. 52-4.
[57] Order PO-2435.

[109] The university relies on Order PO-2020 and states that "in order to determine that a record was supplied in confidence, either explicitly or implicitly, it must be demonstrated that an expectation of confidentiality existed and that it had a reasonable basis." According to the university, "[t]he basis for the confidential nature of the records is that they are privileged records that relate to litigation involving clients of the legal clinic."

[110] To this, the university adds that it is the "affected third parties, rather than the university, that are in the best position to provide submissions explaining why it is reasonable to expect that the disclosure will result in harm." The university also submits, apparently alluding to section 17(1)(c), that the prospect of disclosure of the records could reasonably be expected to result in "undue loss of the legal clinic's clients if records were to be disclosed under the *Act*."

[111] The submissions made by the legal clinic to the university at the request stage rely on the exemption in section 17(1)(b) of the *Act*, and suggest that disclosure would adversely affect the legal clinic's capacity to fulfil its mandate.

[112] The appellant takes issue with the university's submission that the confidentiality of the records is based on them being privileged in relation to "litigation involving clients of the legal clinic." The appellant submits that the legal clinic "has no clients and there is no litigation." According to the appellant, a lawyer "who happens to be associated with the clinic acted as defendants' counsel for third parties in copyright litigation with us."

[113] The appellant adds that the legal clinic's director never said that his personal clients were the legal clinic's clients. The appellant submits that, as a result, the university cannot claim confidentiality "involving clients of the legal clinic" where none exists.

[114] The university's reply representations do not directly address the appellant's position on this point, other than to maintain that he has mischaracterized its position about the legal clinic director's clinic, as opposed to personal, clients.

Analysis and findings

[115] Based on the nature and content of the records withheld by the university under section 17(1), and the representations provided by the parties, I find that records 3-6, 29-30 and 33 are not exempt on this basis.

[116] As stated above, section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[58] It is intended to limit disclosure of third party confidential

[58] *Boeing Co.,* cited above.

information that could be exploited by a competitor in the marketplace.[59] Viewing the exemption through that lens helps to explain why it does not apply in this appeal.

[117] As I also noted above, there is a three-part test to establish the application of section 17(1) and each part of it must be met.

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

[118] To begin, I am not persuaded that the information at issue is the type of information covered by section 17(1) of the *Act*. These are emails between the university employee and the director of the legal clinic and, based on my review of them, none contain technical or financial information, as claimed. It is not technical information relating to the applied sciences or mechanical arts and it does not describe anything about a structure, process, equipment or thing from those categories. The information also does not consist of specific financial data in the form of methods, pricing, overhead or operating costs.

[119] Further, any commercial information related to the "buying, selling or exchange of merchandise or services" in these records relates in large part to online services provided by the appellant's company to the university, pursuant to an agreement between them. This information is not an informational asset of the legal clinic as that term is understood in section 17(1) of the *Act* and, in particular, part 1 of the test under the exemption.

[120] Even if I were to accept that the first part of the test for exemption under section 17(1) is met on the basis of the records containing commercial information, I find that the second part of the test under section 17(1) is not. These emails clearly demonstrate that the legal clinic's director was seeking information from the university employee, not the other way around. It was the university employee who provided the information to the legal clinic. Therefore, any commercial information there might be in the records was not "supplied to" the university, as required by part 2 of the test in section 17(1).

[121] Given my finding that records 3-6, 29-30 and 33 do not contain information that was supplied to the university by the legal clinic, I find that part 2 of the test is not met. Since all three parts of the test must be satisfied for section 17(1) to apply, I find that these records are not exempt under section 17(1) of the *Act*.

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[59] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

F: Did the university properly exercise its discretion under section 13(1)?

[122] Given my finding above that section 13(1) applies to portions of records 13 and 14, I will now review the university's exercise of discretion. Section 13(1) is discretionary and permits an institution to disclose information, despite the fact that it could withhold it.

[123] An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so. 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.

[124] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[60] However, this office may not substitute its own discretion for that of the institution under section 54(2) of the *Act*.

[125] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[61]

- the purposes of the *Act*, including the principles that:
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization

[60] Order MO-1573.
[61] Orders P-344 and MO-1573.

- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

Representations

[126] The university submits that it exercised its discretion in responding to the request in good faith and that it considered all relevant factors without considering irrelevant ones. With respect to the application of section 13(1), the university submits that it withheld the identified records pursuant to this exemption where it determined that it was necessary to do so in order to preserve space for the provision of confidential advice.

[127] The appellant's representations did not address the university's exercise of discretion.

Analysis and findings

[128] Based on my review of the representations and the records, I find that the university exercised its discretion to withhold the records found to be exempt under section 13(1) of the *Act.*

[129] I find that the university properly considered the purpose of the section 13(1) exemption and the interests that it seeks to protect, the free and frank provision of advice or recommendations within the deliberative process of government decision-making. I am satisfied that the university balanced the purpose of the advice or recommendations exemption in section 13(1) against the appellant's right to access to information held by the university. More generally, I am satisfied that the university took into account relevant considerations and did not act in bad faith in exercising its discretion to withhold information under section 13(1). Therefore, I uphold the university's exercise of discretion to withhold portions of records 13 and 14.

G: Did the university conduct a reasonable search for records?

[130] The appellant claims that the university has not conducted a reasonable search for the records responsive to his request. For the reasons outlined below, I find that the university did conduct a reasonable search, and I uphold it.

[131] 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 of the *Act*.[62] 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.

[132] 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.[63] To be responsive, a record must be "reasonably related" to the request.[64]

[133] 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.[65]

[134] 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.[66]

[135] 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.[67]

Representations

[136] The university submits that it did not contact the appellant for additional clarification about the request because its wording was clear and the university was able to respond literally to it. The university submits that its search was conducted by the university employee named in the request and it maintains that she was the most qualified person to perform the search in this matter. The university adds that the records were located in its library shared drive (which is used by library employees to store documents on the university's secure servers), as well as the university employee's workstation, Microsoft Outlook mailbox and paper files.

[137] The university gives the specific date that its employee performed her search and provides a list of three key words related to the appellant's company, as named in the request, that were used for the electronic search. It provided an affidavit sworn by the employee, who is a university librarian, to support its search for the records responsive to the request.

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[62] Orders P-85, P-221 and PO-1954-I
[63] Orders P-624 and PO-2559.
[64] Order PO-2554.
[65] Orders M-909, PO-2469 and PO-2592.
[66] Order MO-2185.
[67] Order MO-2246.

[138] The appellant questions the difference in the number of pages identified as responsive in this request to the University of Ottawa compared with the number of pages identified by the federal Department of Justice in his request under the federal *Access to Information Act* (*ATIA*).[68]

[139] The appellant further questions the university's decision to allow its employee to personally vet her own documents in compiling records for release, noting that the university's IT staff could have performed the search function in order to avoid any "apparent conflict, obvious self-interest or contested appeal." The appellant submits that there were other options for conducting its search and the university chose not to employ them.

[140] In response to the appellant's concern that Justice identified more responsive records upon receipt of the appellant's access request under the *ATIA,* the university says that it is not in a position to provide an explanation as to why Justice identified more pages than the university, nor does it know the parameters of the request made to Justice. The university says it can only make assumptions as to why there may be fewer records held by the university. According to the university:

> The [u]niversity [l]ibrarian was asked to be a witness by [Justice] in litigation involving the [a]ppellant's employer. As such, it is … to be expected for her name to appear in [Justice]'s records. It is possible that her name only appears once in a large document that was reproduced numerous times, including draft versions of the same document which may explain the discrepancy between the number of pages identified as responsive. Furthermore, the [u]niversity's index of records only identifies the record number and not the number of pages associated with each responsive record. This in itself may have led the [a]ppellant to believe that there are missing pages, when in fact a similar amount of records were located.

[141] The university also submits that, given the nature and scope of the request, it has provided sufficient evidence to show that it has made reasonable effort to identify and locate records responsive to the request.[69]

[142] In reply to the appellant's representations about who conducted the search, the university submits that the university librarian conducted the search for records within her possession and it maintains that she was the most knowledgeable person to conduct a search of her own records. According to the university, the university librarian conducted an exhaustive search of her records to locate ones that were responsive to the request. The university therefore maintains that it conducted a reasonable search for responsive records as required by section 24 of the *Act*.

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[68] R.S.C., 1985, c. A-1.
[69] Order P-624.

Analysis and findings

[143] Based on the evidence provided, I find that the university conducted a reasonable search for responsive records.

[144] This appeal does not require me to speculate about any discrepancy in the number of pages identified as responsive in this request to the university under the *Act* compared to the appellant's request to Justice under the *ATIA*. The only search that is before me in this appeal is the one carried out by the university under the *Act*.

[145] The appellant alleges that the university employee who conducted the search may have acted in self-interest or in a conflict of interest, because the records she searched were her own. In Order MO-1285, Adjudicator Laurel Cropley discussed the factors to consider when addressing whether a conflict of interest exists. She wrote:

> Previous orders of this office have considered when a conflict of interest may exist. In general, these orders have found that an individual with a personal or special interest in whether the records are disclosed should not be the person who decides the issue of disclosure. In determining whether there is a conflict of interest, these orders looked at (a) whether the decision-maker had a personal or special interest in the records, and (b) whether a well-informed person, considering all of the circumstances, could reasonably perceive a conflict of interest on the part of the decision maker (see, for example: Order M-640).

[146] I adopt the adjudicator's approach in Order MO-1285 here. I find no basis upon which to conclude that the university employee who conducted the search had a personal or special interest in whether the records are disclosed, even if she had been the individual who decided disclosure, which she was not. Nor am I persuaded by the appellant's briefly-put allegation that any conflict of interest exists here, simply because the individual who conducted the search was searching for records related specifically to her. In any event, the appellant's assertions on this point do not assist him in establishing a reasonable basis upon which I could conclude that additional responsive records may exist but have not been found by the university.

[147] In my view, the university has conducted a reasonable search. An institution is not required to prove with absolute certainty that additional responsive records do not exist. Rather, institutions are required to demonstrate that they have made a reasonable effort to locate records. In this appeal, I am satisfied that the university understood and properly interpreted the appellant's request and conducted an appropriate search for such records, using an experienced employee knowledgeable in the subject matter of the request.

[148] I uphold the university's search as reasonable under section 24 of the *Act.*

ORDER:

1. I uphold the university's decision to withhold portions of records 13-14 under section 13(1) and the denial of access to portions of records 4-6, 16, 17, 30 and 32 under section 21(1).

2. I do not uphold the university's decision to deny access under sections 17(1) or 19, and I order it to disclose the remaining non-exempt records to the appellant by providing him a copy of the records by **April 30, 2021** but not before **April 25, 2021**. For certainty about the severances to be applied to the records under section 21(1), I have provided a highlighted copy of records 4-6, 16, 17, 30 and 32 to the university with its copy of this order.

3. I uphold the university's search as reasonable.

4. In order to verify compliance with order provision 2, I reserve the right to require the university to provide me with copies of the records it discloses to the appellant.

5. The timelines in order provision 2 may be extended if the university is unable to comply in light of the current COVID-19 situation, and I remain seized to consider any resulting extension request.

Original Signed by: March 26, 2020

Daphne Loukidelis
Adjudicator