Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4187

Appeal PA19-00123

University of Toronto

September 20, 2021

Summary: The appellant sought access under the *Freedom of Information and Protection of Privacy Act* to records related to complaints of harassment made against him. Prior to submitting his access request to the University of Toronto (the university), the appellant had commenced civil proceedings against the three complainants for damages allegedly arising out of their complaints to the university about him.

The university granted partial access to the responsive records. The university denied access to portions of the remaining responsive records (email communications, handwritten notes and occurrence reports) under the mandatory personal privacy exemption in section 21(1) and the discretionary exemptions at section 49(a) (discretion to refuse requester's own personal information), in conjunction with section 19 (solicitor-client privilege), and section 49(b) (personal privacy).

In this order, the adjudicator upholds the university's decision to deny access to the withheld records or portions of records under sections 21(1), 49(b), and 49(a), in conjunction with section 19.

Statutes Considered: *Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. F.31, sections 2(1) (definition of personal information), 19, 21(1), 21(2)(d), (e), (f), (h), and (i), 21(3)(b), 49(a), and 49(b).

Orders Considered: Orders M-852, MO-3900, PO-1688, PO-3448 and PO-3750.

Cases Considered: Doe v. Metropolitan Toronto (Municipality) Commissioners of Police (June 3, 1997), Toronto Doc. 21670/87Q.

OVERVIEW:

[1] In this appeal, the requester sought access to records related to complaints of harassment made against him by three individuals to the University of Toronto (the university or U of T) Campus Community Police (Campus Police). Prior to submitting his request to the university, the requester had commenced civil proceedings against the complainants for damages allegedly arising out of their complaints to the university about him.

[2] The request to the university under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) sought access to:

> All eligible records mentioning or accusing [named requester] (me) of Criminal Harassment, or any related sexual misconduct, by several females (no arrest, no charge resulted) including but not limited to:
>
> 1. [first named complainant]
>
> 2. [second named complainant]
>
> 3. [third named complainant]
>
> The records should be held by the Campus Community Police and the Department of [name], at University of Toronto.

[3] The requester noted that he was seeking general occurrence reports, memorandum book notes, witness statements, contact information, emails and officers' notes. The requester also provided a list of university staff who may be in possession of responsive records.

[4] The university issued a decision granting partial access to the records responsive to the request. Access to the withheld information was denied pursuant to sections 21(1) or 49(b) (personal privacy) and section 49(a) (discretion to refuse requester's own personal information), in conjunction with sections 14(1) (law enforcement) and 19 (solicitor-client privilege) of the *Act*. The university noted that information deemed non-responsive to the request was also withheld.

[5] The requester (now the appellant), appealed the decision to the Information and Privacy Commissioner of Ontario (the IPC), and a mediator was appointed to explore the possibility of resolving the issues.

[6] During the course of mediation, the appellant advised the mediator that he was seeking access to the withheld information and believed that further records responsive to his request exist at the university.

[7] In response, the university conducted a further search for responsive records and subsequently issued a revised decision granting partial access to the additional records located. Access to the withheld information was again denied pursuant to

sections 21(1) or 49(b) and section 49(a) in conjunction with sections 14(1) and 19 of the *Act*.

[8] Following further discussions, the appellant advised the mediator that he wished to continue to pursue access only to the withheld information in the records and that the university's search for records was no longer at issue.

[9] As no further mediation was possible, this appeal proceeded to adjudication where an adjudicator may conduct an inquiry.

[10] I decided to conduct an inquiry and sought the university's representations initially, which were sent to the appellant, except for the confidential portions.[1] The university also issued a supplementary decision letter to the appellant disclosing further records and providing him with an up-to-date index of the records remaining at issue.

[11] In its representations, the university decided to withdraw its reliance on the exemption at section 49(a), in conjunction with section 14(1)(c), regarding information about use of police databases by the Campus Police, at pages 74, 77, 114, 116, 117, 125, and 163, and decided to disclose this information to the appellant. Therefore, the law enforcement exemption in section 14(1) is no longer at issue.

[12] As well, during the inquiry, the university disclosed to the appellant the information on pages 141, 272 and 273 that it had deemed non-responsive to the request. The remaining information deemed by the university to be non-responsive at page 255 is both outside the date range of the request (which was until the date of the request on January 10, 2019) and is not of interest to the appellant.[2] Therefore, this information and the issue of the responsiveness of the information deemed non-responsive by the university are no longer at issue in this appeal.

[13] The appellant provided representations in response to the university's representations. I then sought and received reply and sur-reply representations from the parties.

[14] With his initial and sur-reply representations, the appellant provided copies of documents disclosed to him during the court proceedings he initiated against the complainants. The appellant already has copies of:

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[1] See section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.
[2] The appellant states that he does not object to the withholding of the non-responsive information on page 255.

- Records 1 to 5[3], which are materials describing the interaction between the appellant and the complainants, which were submitted by the complainants to the U of T Campus Police.

- Records 61, 63, 64, and 66 to 68,[4] which are U of T Campus Police occurrence reports.

[15] Therefore, as the appellant already has copies of these records, they are no longer at issue in this appeal.

[16] In this order, I uphold the university's decision to deny access to the information at issue in the records under sections 49(a), in conjunction with section 19, and sections 21(1) and 49(b).

RECORDS:

[17] The records consist of general occurrence reports, memorandum book notes, witness statements, contact information, emails and officers' notes, which have been withheld in part or in full pursuant to sections 21(1) or 49(b), and section 49(a), in conjunction with section 19, as more particularly described in the following Index of Records prepared by the university:

Index of Records

Record #	General Description of Record or Record Categories	Page #	Release Yes/No	Section(s) Applied
10	Email thread of complaint to Graduate Administrator, which is forwarded to University Campus Police	p. 21	Part	49(b), 21
		p. 22-23	No	49(b), 21
11	Email of complainant to Graduate Administrator submitting evidence	p. 24	No	49(b), 21
12	Forwarding of correspondence of the complainants from the Graduate Administrator to Associate Chair	p. 25	Part	49(b), 21
		p. 26-27	No	49(b), 21

[3] Pages 1 to 14 of the records.
[4] Pages 162, 164, 165, and 167 to 170 of the records.

13	Correspondence between Graduate Administrator, Associate Chair, and Complainants	p. 28-30	No	49(b), 21
14	Correspondence with complainants and the Graduate Administrator	p. 31-32	No	49(b), 21
34	Correspondence within Campus Police with records 1, 2, and 3.	p. 71	Part	49(b), 21
		p. 72	No	49(b), 21
36	Forwarding of complaint occurrence report from Campus Police to the Office of Safety and High Risk	p. 74	Part	49(b), 21
37	Correspondence between Campus Police officers discussing response to allegations and Supplementary Occurrence Report and update to Office of Safety and High Risk	p. 77	Part	49(b), 21
38	Forwarding of complainant's email within Campus Police	p. 80	Part	49(b), 21
39	Forwarding of complainant's email within Campus Police	p. 81	Part	49(b), 21
40	Correspondence between Campus Police and the Office of Safety and High Risk discussing an email forwarded from Associate Chair (which itself includes a forwarded email from the appellant)	p. 82	Part	49(b), 21
		p. 85	Part	49(b), 21
41	Ongoing correspondence between Campus Police and the Office of Safety and High Risk discussing an email forwarded from Associate Chair (which itself includes a forwarded email from the	p. 95	Part	49(b), 21

	appellant).			
43	Ongoing correspondence between Campus Police and the Office of Safety and High Risk discussing an email from Associate Chair (which itself includes a forwarded email from the appellant)	p. 104	Part	49(b), 21
		p. 107	Part	49(b), 21
44	Campus Police thread of initial occurrence reporting	p. 114-115	Part	49(b), 21
45	Internal Campus Police case Update	p. 116-117	Part	49(b), 21
46	Update to correspondence between Campus Police and the Office of Safety and High Risk discussing an email from Associate Chair (which itself includes a forwarded email from the appellant) discussing further action	p. 119	Part	49(b), 21
		p. 120	Part	49(b), 21
47	Internal Campus Police email about complainant and Occurrence	p. 124	No	49(b), 21
48	Internal Campus Police email occurrence report and supplemental occurrence report	p. 125	Part	49(b), 21
49	Email chains	p. 129	Part	49(a), 19
		p. 130-132	No	
50	Email chains	p. 133	No	49(a), 19
		p. 134	Part	49(a), 19
51	Email chains	p. 137-138	No	49(a), 19
		p. 139	Part	49(a), 19
52	Conversation between Office	p. 139	Part	49(a), 19

	of High and Sexual Violence Prevention and Response Coordinator	p. 140	Part	49(b), 21
54	Email from Campus Police to Office of Safety and High Risk re: status of file, and supplementary report.	p. 143-144	Part	49(b), 21
		p. 145	Part	
56	Correspondence between Dean at School of Graduate Studies, and Office of Safety and High Risk, discussing briefing from the High Risk group	p. 150-152	Part	49(b), 21
57	Email chains	p. 153	Part	49(a), 19
		p. 154	No	
		p. 155	Part	
58	Email chains	p. 155	Part	49(a), 19
		p. 156-157	Part	49(b), 21
59	Campus Police written notes of Officer	p. 158	Part	49(b), 21
65	Supplementary Occurrence Report 4	p. 166	Part	49(b), 21
70	Supplementary Occurrence Report 9	p. 172	Part	49(b), 21
		p. 173	No	49(b), 21
72	Voluntary Statement 1	p. 177-180	Part	49(b), 21
73	Voluntary Statement 2	p. 181-187	Part	49(b), 21
74	Voluntary Statement 3	p. 188-193	Part	49(b), 21
75	Voluntary Statement 4	p. 194-201	Part	49(b), 21
77	Student crisis response report	p. 206	Part	49(b), 21
97	Campus Police notebook pages	p. 251-252	Part	49(b), 21

		p. 253-254	No	
		p. 256	Part	49(b), 21
100	Office of High Risk and Community Safety email	p. 260-261	Part	49(b), 21
102	Email from Human Resources to Adam Fraser Office of Safety and High Risk)	p. 263-267	Part	49(b), 21
105	Email within Office of Safety and High Risk, Subject: FW: Community Safety Referral	p. 276	Part	49(b), 21
106	Office of Safety and High Risk email	p. 279-281	Part	49(b), 21
107	Record of contact	p. 283-284	No	49(b), 21
108	Record of contact	p. 285	No	49(b), 21

ISSUES:

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

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

C. Does the discretionary exemption at section 49(a) (discretion to refuse access to requester's own personal information), in conjunction with section 19 (solicitor-client privilege), apply to the information at issue?

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

DISCUSSION:

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

[18] In order to determine 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. That term is 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;

[19] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[5]

Representations

[20] The university states that the records contain detailed information related to allegations of harassment or sexual misconduct against the appellant. The university submits that the records contain the personal information of the appellant, and the personal information of individuals who came forward to file complaints against the

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[5] Order 11.

appellant.

[21] The university states that pages 82, 85, 95, 104, 107, 120, and 145 of the records also contain small amounts of personal information of a staff member, who communicated about their availability for scheduling purposes, and this information reveals something of a personal nature about this staff member.

[22] The university states that the personal information includes:

- the names and contact information of the complainants,
- The complainants' statements to the Campus Police about their experiences with the appellant,
- notes of interviews with the complainants,
- copies of the complainants' communications with the appellant to support their complaints,
- correspondence between the complainants, a specific university department, and the Campus Police regarding the initial complaints, and
- correspondence between and about the complainants after the complaints had been made to ensure that the complainants had access to safety and support resources to ensure that they were able to safely continue their studies at the university.

[23] The university submits that the appellant naturally knows the details of the complaints and the interactions from which they arise, so information pertaining to the complainants would clearly be identifiable for the appellant.

[24] The university states that some of the records contain the personal information of the complainants, and not of the appellant, although they exist in the context of the complaints and matters that relate to the appellant. According to the university, key examples of this type of information include:

- pages 256 [of record 98], which contains the personal information of another individual in an unrelated matter. This personal information of another individual is contained in a responsive record with information about the appellant. For this reason, it was treated as exempt under section 49(b), and
- pages 260 and 261 [record 100], and 283 to 285 [record 107]. The university has applied section 49(b) of FIPPA, supported by section 21(1) to these types of documents, but submits that they may be eligible for exemption under section 21(1) alone, as this is information about the complainants only.

[25] The appellant states that the records contain his personal information, along with that of the complainants. He states that the information relates to his criminal history,

the complainants' views or opinions, and his name where it appears with other personal information about him, in accordance with paragraphs (b), (e), (g) and (h) of the definition of personal information in section 2(1).

Analysis/Findings

[26] 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.[6]

[27] 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.[7]

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

[29] I find that the information at issue on page 256 is information related to an individual not connected with the incidents in the records and that it is not responsive to the request. As the information is clearly unrelated to the appellant or the incidents in question and, therefore, is not responsive to the appellant's request, I will order this information on page 256 withheld.

[30] Pages 82 and 85 (part of record 40), 95 (part of record 41), 104 and 107 (part of record 43), 120 (one of the two severances in record 46), 145 (one of the two severances in record 54) contain small amounts of personal information of a staff member related to their scheduling availability. This information is not about the appellant or the actual complaints in the records about him. I find that this information is not responsive to the request and I will order it withheld.

[31] For records 100 and 107, I find that the information at issue in these records consists only of the personal information of the complainants and not that of the appellant. This personal information includes their names, addresses and phone numbers, as well as information about contacts they made, in accordance with paragraphs (d) and (h) of the definition of personal information in section 2(1).

[32] As records 100 and 107 do not contain the personal information of the appellant, I will consider whether the mandatory personal privacy exemption at section 21(1) applies to the information withheld from these records. Section 21(1), not section

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[6] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[7] Orders P-1409, R-980015, PO-2225 and MO-2344.
[8] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

49(b), applies where a record contains personal information of another individual but not that of the requester.

[33] I find that the remaining information at issue in the records is about the appellant and the complainants. In accordance with paragraphs (d) to (h) of the definition of personal information in section 2(1), this information includes:

- the names and contact information of the complainants,
- the complainants' statements to and interviews with the Campus Police, and
- the complainants' communications with each other, the appellant, a specific university department and the Campus Police.

[34] As these records contain the personal information of the appellant and other individuals, I will consider whether the discretionary personal privacy exemption in section 49(b) applies to the information that has been withheld from these records.

Issue B: Does the mandatory personal privacy exemption at section 21(1) or the discretionary exemption at section 49(b) apply to the information at issue?

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

[36] Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. Since the section 49(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.

[37] In contrast, under section 21(1), where a record contains personal information of another individual but not the requester, the institution is prohibited from disclosing that information unless one of the exceptions in paragraphs (a) to (e) applies, or unless the section 21(1)(f) exception applies.

[38] If any of paragraphs (a) to (e) of section 21(1) or paragraphs (a) to (d) of section 21(4) apply, neither the section 21(1) exemption nor the section 49(b) exemption applies.

[39] In applying either the section 49(b) exemption or the section 21(1)(f) exception to the section 21(1) exemption, sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. In addition, section 21(4) lists situations that would not be an unjustified invasion of personal privacy.

[40] 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(1) or 49(b).

[41] For records claimed to be exempt under section 21(1) (i.e., records that do not contain the requester's personal information), a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if a section 21(4) exception or the "public interest override" at section 23 applies.[9]

[42] If the records are not covered by a presumption in section 21(3), section 21(2) lists various factors that may be relevant in determining whether disclosure of the personal information would be an unjustified invasion of personal privacy and the information will be exempt unless the circumstances favour disclosure.[10]

[43] For records claimed to be exempt under section 49(b) (i.e., records that contain the requester's personal information), this office will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.[11]

The application of section 21(1) and the presumption in section 21(3)(b) to records that do not contain the appellant's personal information

[44] The university relies on the presumption in section 21(3)(b), which reads:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

Representations re section 21(3)(b)

[45] The university submits that section 21(3)(b) applies to the records, as they are records of the Campus Police that were prepared as part of an investigation into a potential violation of law.

[46] The university states that although no criminal charges were ultimately laid against the appellant, the investigation by the Campus Police was necessary in determining whether the behaviour of the appellant amounted to criminal harassment.

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

The university relies on Order PO-3750,[12] in which similar information provided to the Campus Police at the University of Toronto was found to satisfy the requirements of the presumption of section 21(3)(b) in a similar fact situation where a complainant's records were sought by the individual complained about.

[47] The appellant states that he was issued a warning by the Campus Police that if he contacted the complainants he could be charged with criminal harassment. He submits that:

> ...section 21(3)(b) does not apply to records of the Campus Police, which were predominantly personal information of the appellant as he is the person alleged to have committed the said criminal harassment and sexual violence.

Analysis/Findings re section 21(3)(b)

[48] Even if no criminal proceedings were commenced against any individuals, section 21(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.[13] The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[14]

[49] The presumption can apply to a variety of investigations, including those relating to by-law enforcement[15] and violations of environmental laws or occupational health and safety laws.[16]

[50] In Order PO-3750, referred to by the university in its representations, the appellant submitted a request to the university under the *Act* for records relating to a complaint filed against her with the Campus Police. This complaint resulted in a Trespass Order being made against the appellant that was subsequently rescinded. In Order PO-3750, the adjudicator found that the records were created as part of the Campus Police's investigation into a possible violation of law, namely a *Criminal Code* offence, and determined that the presumption against disclosure in section 21(3)(b) applied to the records.

[51] As was the case in Order PO-3750, and as the appellant acknowledges, the records were compiled and are identifiable as part of an investigation by the Campus Police into a possible violation of law, that of criminal harassment contrary to section 264 of the *Criminal Code of Canada*. As a result of this investigation, the appellant was issued a warning by the Campus Police to not contact the three complainants. If the

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[12] Order PO-3750 at paragraphs 24-30.
[13] Orders P-242 and MO-2235.
[14] Orders MO-2213, PO-1849 and PO-2608.
[15] Order MO-2147.
[16] Orders PO-1706 and PO-2716.

appellant was to contact the complainants again, he was advised by the Campus Police that he could be charged with criminal harassment.

[52] As the presumption in section 21(3)(b) only requires that there have been an investigation into a possible violation of law, it applies even if no proceedings were commenced. Although no criminal proceedings were commenced against the appellant, I am satisfied that there was an investigation of the appellant's actions by the Campus Police with respect to a possible violation of law.

[53] Accordingly, I find that the presumption at section 21(3)(b) applies to the information at issue in the records, as the records were compiled and are identifiable as part of an investigation into a possible violation of law.

[54] For the records claimed to be exempt under section 21(1) (i.e., records that do not contain the requester's personal information), a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if a section 21(4) exception or the "public interest override" at section 23 applies.[17]

[55] The information that I have found that only section 21(1) applies, as not containing the personal information of the appellant is found at, as identified above:

- records 100 and 107, which contain only the personal information of the complainants.

[56] In this appeal, none of the section 21(4) exceptions or the "public interest override" at section 23 apply. Therefore, I find that the withheld information in these two records is exempt under section 21(1) and I will uphold the university's decision to withhold it.

The application of section 49(b) to records containing the personal information of the appellant and other individuals

[57] The remaining information at issue in the records for which the personal privacy exemption in section 49(b) has been claimed is contained in the following records:

Record #	General Description of Record or Record Categories	Page #	Release Yes/No	Section(s) Applied
10	Email thread of complaint to Graduate Administrator, which is forwarded to University Campus Police	p. 21	Part	49(b), 21
		p. 22-23	No	49(b), 21

[17] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

11	Email of complainant to Graduate Administrator submitting evidence	p. 24	No	49(b), 21
12	Forwarding of correspondence with complainant from the Graduate Administrator to Associate Chair	p. 25	Part	49(b), 21
		p. 26-27	No	49(b), 21
13	Correspondence between Graduate Administrator, Associate Chair, and Complainants	p. 28-30	No	49(b), 21
14	Correspondence with complainants and the Graduate Administrator	p. 31-32	No	49(b), 21
34	Correspondence within Campus Police with records 1, 2, and 3.	p. 71	Part	49(b), 21
		p. 72	No	49(b), 21
36	Forwarding of complaint occurrence report from Campus Police to the Office of Safety and High Risk	p. 74	Part	49(b), 21
37	Correspondence between Campus Police officers discussing response to allegations and Supplementary Occurrence Report and update to Office of Safety and High Risk	p. 77	Part	49(b), 21
38	Forwarding of complainant's email within Campus Police	p. 80	Part	49(b), 21
39	Forwarding of complainant's email within Campus Police	p. 81	Part	49(b), 21
41	Ongoing correspondence between Campus Police and the Office of Safety and High Risk discussing an email forwarded from Associate Chair (which itself includes a forwarded email from the appellant).	p. 95	Part	
44	Campus Police thread of initial	p. 114-115	Part	49(b), 21

	occurrence reporting			
45	Internal Campus Police case Update	p. 116-117	Part	49(b), 21
46	Update to correspondence between Campus Police and the Office of Safety and High Risk discussing an email from Associate Chair (which itself includes a forwarded email from the appellant) discussing further action	p. 119	Part	49(b), 21
		p. 120	Part	49(b), 21
47	Internal Campus Police email about complainant and Occurrence	p. 124	No	49(b), 21
48	Internal Campus Police email occurrence report and supplemental occurrence report	p. 125	Part	49(b), 21
52	Conversation between Office of High Risk and Sexual Violence Prevention and Response Coordinator	p. 140	Part	49(b), 21
54	Email from Campus Police to Office of Safety and High Risk re: status of file, and supplementary report.	p. 143-144	Part	49(b), 21
		p. 145	Part	
56	Correspondence between Dean at School of Graduate Studies, and Office of Safety and High Risk, discussing briefing from the High Risk group	p. 150-152	Part	49(b), 21
59	Campus Police written notes of Officer	p. 158	Part	49(b), 21
65	Supplementary Occurrence Report 4	p. 166	Part	49(b), 21
70	Supplementary Occurrence Report	p. 172	Part	49(b), 21

	9	p. 173	No	49(b), 21
72	Voluntary Statement 1	p. 177-180	Part	49(b), 21
73	Voluntary Statement 2	p. 181-187	Part	49(b), 21
74	Voluntary Statement 3	p. 188-193	Part	49(b), 21
75	Voluntary Statement 4	p. 194-201	Part	49(b), 21
77	Student crisis response report	p. 206	Part	49(b), 21
97	Campus Police notebook pages	p. 251-252	Part	49(b), 21
		p. 253-254	No	
		p. 256	Part	49(b), 21
102	Email from Human Resources to Adam Fraser Office of Safety and High Risk)	p. 263-267	Part	49(b), 21
105	Email within Office of Safety and High Risk, Subject: FW: Community Safety Referral	p. 276	Part	49(b), 21
106	Office of Safety and High Risk Email	p. 279-281	Part	49(b), 21

[58] Other than records 59, 70, 72 to 75, 77, and 97, the records remaining at issue under section 49(b) are emails[18] exchanged between the complainants, the university, and Campus Police about the complaints. The other records are:

- a Campus Police occurrence report at record 70,
- Campus Police handwritten notes at records 59 and 97,
- a supplementary occurrence report at record 65, which consists of an email from a complainant to the Campus Police (that has been reproduced in other records at issue),
- statements of the complainants to the Campus Police at records 72 to 75, and

[18] Many of these emails are duplicated throughout the records at issue, as they were circulated amongst different university staff.

- a university report about the complaints.

[59] Under section 49(b), where a record contains personal information of both the appellant and that of the complainants, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. For these records, this office will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.[19]

[60] As set out above, I found that section 21(3)(b) to apply to the records. With respect to section 49(b), the application of section 21(3)(b) is not determinative as it was for the section 21(1) records. For records claimed to be exempt under section 49(b), I will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.

[61] The list of factors under section 21(2) in the *Act* is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2).[20]

[62] In previous orders, considerations that have also been found relevant in determining whether the disclosure would be an unjustified invasion of personal privacy include:

- inherent fairness issues;[21]
- ensuring public confidence in an institution;[22]
- personal information about a deceased person;[23] and
- benefit to unknown heirs.[24]

[63] In this appeal, the university submits that the factors at sections 21(2)(e), (f), (h), and (i) apply and weigh against disclosure, and that the factor at 21(2)(d) applies but also does not weigh in favour of disclosure in the circumstances.

[64] The appellant submits that all these factors weigh in favour of disclosure of the

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[19] Order MO-2954.
[20] Order P-99.
[21] Orders M-82, PO-1731, PO-1750, PO-1767 and P-1014.
[22] Orders M-129, P-237, P-1014 and PO-2657.
[23] Orders M-50, PO-1717, PO-1923, PO-1936 and PO-2012-R.
[24] Orders P-1493, PO-1717 and PO-2012-R.

information at issue to him. He did not raise the application of any additional factors in his representations.

[65] The factors relied upon by the parties read:

> 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,
>
> > (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
> >
> > (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
> >
> > (f) the personal information is highly sensitive;
> >
> > (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
> >
> > (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

[66] I will now consider whether the factors in section 21(2) argued by the parties apply.

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

[67] The university submits that section 21(2)(d) does not weigh in favour of disclosure of information, as the appellant has had full recourse to robust and fair processes at the university, there has been no abrogation of his rights, and disclosure would not be relevant to a fair determination of his rights. It states that no criminal charges resulted from the allegations against him, and although there was a "termination" of his lab privileges, it was carefully considered before being retracted, and it was confirmed for him that it would not be on his academic record.

[68] The university further states that records were released to the appellant confirming that any future admissions decisions would be based on standard academic criteria, and that the allegations against him, which are the subject of this request, would not be a factor.

[69] The university states that there is no existing or contemplated proceeding that has not been completed. It also states that the exempted personal information is not required to prepare for any proceeding, nor to ensure an impartial hearing.

[70] The appellant submits that disclosure of the records at issue is necessary for the fair determination of rights of both himself and the complainants, as the plaintiff and the defendants respectively, in an ongoing civil litigation proceeding.

[71] The appellant states that he was not given full recourse to robust and fair processes at the university. He states he was issued the warning based on the one-sided story from the complainants where material facts, especially their prior threatening messages to harass him by making false accusations, had likely been omitted. He states that he was issued the warning and the termination letter without any chance to tell his side of the story. He states that:

> ...the complainants, while having admitted to have made the complaint of harassment against the appellant, denied making any sexual violence complaint against the plaintiff. He states that disclosure would allow him to exercise his rights to examine the merit of his case, and also allow the complainants to examine the records on whether they did make such "sexual violence" complaints against the plaintiff.

[72] The appellant states that he has demonstrated a strong "prima facie case" against the complainants. He refers to records previously disclosed to him that revealed information about the complaints made against him by the complainants. Based on the information previously disclosed to him, the appellant states that he was able to "bust" the complainants' defence against him in their statement of defence. He states that, despite a strong "prima facie case" against the complainants, the full merit of the case cannot be determined without discovery (disclosure) of the withheld records.

[73] In reply, the university repeats that no criminal charges were laid against the appellant. It submits that the personal information of the appellant withheld in this matter is not relevant to a fair determination of rights affecting him. The university also submits that, in any event, the appellant does not specify the rights affecting him to which section 21(2)(d) may apply.

[74] The university further submits that additional disclosure is not necessary because the appellant has been given access to ample information that was sufficient to initiate legal proceedings. It adds that those legal proceedings provide discovery and disclosure mechanisms that appropriately go well beyond those under *FIPPA*. The university also argues that it is not the purpose of *FIPPA* to provide disclosure for court or other proceedings. It states that court mechanisms for discovery and production of evidence exist to assist all parties in ensuring that information material to the questions before the court are brought before it.

[75] In sur-reply, the appellant submits that a criminal case investigation is considered litigation or prosecution that could have affected his rights, even though no criminal charges were laid. The appellant refers to recent discovery and disclosure of documents in the litigation that, in his opinion, reveal that not only torts but also serious crimes may have been committed against him. He further alleges that the fair determination of rights factor not only applies to him and the complainants, but to society because the alleged crimes are offences to the society.

[76] The appellant states that the court mechanism for discovery and production of evidence is intended to cover disclosure of the private records prevalent in litigation

matters, while *FIPPA* holds public institutions such as the university to even higher standards of transparency. He states that there is a possibility of further legal action being instituted by him in the future.

Analysis/Findings re section 21(2)(d)

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

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

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

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

4. the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.[25]

[78] Based on my review of the parties' representations, I find that the personal information that the appellant is seeking is not required in order to prepare for a legal proceeding or to ensure an impartial hearing.

[79] There have been no criminal proceedings brought or being brought against the appellant, therefore, he does not require disclosure of the records for a criminal hearing.

[80] Although, the appellant has initiated civil proceedings against the complainants, he has received disclosure of records through those proceedings, as indicated above. This disclosure has allowed him, in his own words, to "bust" the complainants' defence against him in his civil litigation proceeding.

[81] I find that the appellant has received, and is also able to get, disclosure of the information at issue in the records in his civil litigation proceeding, as evidenced by his representations.

[82] From the records that the appellant already has copies of, and the court records provided by the appellant with his representations, I find that the appellant is fully aware of the complaints made against him by the complainants. The appellant's representations included the following documents filed in the court proceedings he

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

initiated against the complainants:

- his Statement of Claim, the Statement of Defence filed by the complainants, and his Reply to the Statement of Defence;
- his Reply to the Demand for Particulars;
- his Notice of Motion for leave to amend the Statement of Claim, as filed with the Court, to allow for the inclusion of pleadings relating to the torts of malicious prosecution and intentional interference with economic relations;
- his 54-page affidavit in support of his motion for security for costs; and,
- his Notice of Motion seeking an order requiring the U of T Campus Police to provide him with unredacted copies of all statements, records and documentation, of any nature, and in any form whatsoever, relating to the complaints filed against him by the complainants.

[83] All of these court documents contain extensive details about the appellant's interaction with the complainants and the complaints made to the university about the appellant.

[84] I have also considered that:

- the appellant has received significant disclosure of information at issue from the records through the access and the litigation processes, and
- the appellant has indicated that he is able to get disclosure of the remaining information at issue through the litigation process.

[85] I find that the factor in section 21(2)(d) does not weigh in favour of disclosure. The personal information at issue in the records is not relevant to a fair determination of the appellant's rights; it is not required in order to allow the appellant to prepare for the civil proceeding he has initiated against the complainants or to ensure an impartial hearing in those proceedings.

[86] As well, although the appellant submits that in the future he may bring other proceedings against other individuals or organizations, I find this submission to be mere speculation. The appellant has not satisfied me that he requires the withheld personal information for a reasonably contemplated proceeding in which this information has some bearing on or is significant to the determination of his rights.

[87] In conclusion, I find that the factor in section 21(2)(d) does not weigh in favour of disclosure to the appellant.

Section 21(2)(e) pecuniary or other harm

[88] The university submits that the complainants whose personal information is

contained in the records could be exposed improperly and unfairly to harm if their information were disclosed to the appellant. It states that appellant is clearly adverse in interest to the complainants and the complainants have had a negative relationship with him. For this reason, the university submits that the factor in section 21(2)(e) applies and weighs significantly against disclosure.

[89] The appellant submits that this factor weighs in favour of disclosure because he, not the complainants, has been harassed.

Analysis/Findings re section 21(2)(e)

[90] In order for this factor to apply, the evidence must demonstrate that the damage or harm envisioned by the clause is present or foreseeable, and that this damage or harm would be "unfair" to the individual involved. In this case, the information at issue relates to the complainants.

[91] The appellant has an adverse relationship with the complainants, as demonstrated by the litigation he has initiated against them. In their statement of defence, the complainants have detailed allegations of incidents of harassment by the appellant against them. In the records disclosed to the appellant by the university, there is an email to the appellant from the Campus Police advising him to:

> ...refrain from contacting directly or indirectly [the complainants] going forward. Should any further communication occur in contravention to this warning, you may be subject to a criminal harassment charge, contrary to sec. 264 of the *Criminal Code of Canada*.

[92] I have reviewed the appellant's representations and the evidence of the acrimonious relationship between the appellant and the complainants.

[93] I find that the factor in section 21(2)(e) applies. This factor favours privacy protection of the complainants. In the circumstances of this appeal, I find that the complainants, to whom the personal information at issue relates, will be exposed to unfair pecuniary or other harm should the information at issue be disclosed to the appellant.

Section 21(2)(f) highly sensitive

[94] The university submits that the personal information at issue is highly sensitive, as it relates to allegations of sexual harassment, and contains statements, interview notes, and detailed accounts of the experiences of the complainants.

[95] The university states that disclosure of this information could reasonably be expected to cause significant distress to the complainants and that this is of particular concern in light of the appellant's expressed views about the complainants, and the possible uses of the information against them that would be enabled by its disclosure.

[96] The appellant states that in his litigation against the complainants, the

information at issue is compellable under the *Rules of Civil Procedure*, and the complainants would face cost penalties for resisting discovery. He submits that such a cost order may impose duress upon the complainants including potential financial hardship and a subsequent risk of being noted in default if they fail to pay the order of costs.

[97] In reply, the university states that the appellant appears to misunderstand section 21(2)(f), which is a factor that weighs against disclosure where the records are highly sensitive. In support of this factor applying, the university points out that the appellant's own representations acknowledge that these records "relate to allegations of not only harassment, but also sexual harassment, sexual violence and sexual misconducts."

[98] In sur-reply, the appellant denies that disclosure could reasonably be expected to cause significant distress to the complainants. He also maintains that his use of the disclosed information would be in accordance with the *Rules of Civil Procedure* (the *Rules*).

Analysis/Findings re section 21(2)(f)

[99] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.[26]

[100] I agree with the university that disclosure to the appellant of the withheld personal information in the records, which pertain to allegations of harassment by the appellant, could reasonably be expected to cause significant personal distress to the complainants. Based on the appellant's representations, I accept that disclosure of the personal information at issue in the records could reasonably be expected to allow the appellant to use it to pursue them beyond the civil litigation proceedings already in existence.

[101] Therefore, I find that there is a reasonable expectation of significant personal distress to the complainants if the information at issue is disclosed to the appellant. Accordingly, I find that the factor in section 21(2)(f) applies and weighs against disclosure.

Section 21(2)(h) supplied in confidence

[102] The university submits that the complainants' personal information in the records, especially the information supplied to the Campus Police, was supplied in confidence by the complainants. The university states:

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

> It cannot be overstated that confidentiality for complainants and witnesses in policing/campus police work, sexual harassment and sexual violence situations is essential for the integrity of these processes and for the safety and ability of complainants and witnesses to be direct, frank, and complete in their provision of information...
>
> [The] essential nature of these processes and their value to the university and to society cannot be overstated and that disclosure of complainant or witness information, including particularly information that they provide in an investigation, their statements, comments, and interviews, would cause serious harm to the integrity and efficacy of these processes and would have a chilling effect for other and future potential complainants and witnesses.

[103] In his representations, the appellant does not address this factor directly.

Analysis/Findings re section 21(2)(h)

[104] The factor in section 21(2)(h) 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. Thus, section 21(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.[27]

[105] The complaints in this appeal relate to complaints of harassment by the appellant against the complainants.

[106] Based on my review of the information at issue, from the statements of the complainants to the university, it is clear to me that the personal information in the records was supplied by the complainants to the Campus Police in confidence. Therefore, I find that the factor in section 21(2)(h) applies and weighs against disclosure of this information to the appellant.

Section 21(2)(i) unfair damage to reputation

[107] The university submits that disclosure of detailed personal information of the complainants could reasonably be expected to result in its use to unfairly damage their reputation, particularly given the contentious situation between them and the appellant.

[108] The university states that the appellant has had full disclosure of all allegations contained in the records because he was given ample disclosure in the processes to which his request relates.

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[27] Order PO-1670.

[109] The appellant disputes that he was provided with full disclosure of all of the allegations against him, because the details have been redacted from the records. He states, for instance, he cannot respond to an allegation that says "sexual violence, especially considering there has never been sexual relationship with the complainants.

[110] In reply, the university submits that the appellant's representations evidence this contentious relationship, adversarial interest, and interest in continued pursuit of his case against them.

[111] In sur-reply, the appellant states that:

> ...further withholding of the records [is] adversarial to the complainants because it would leave the appellant with no choice but to seek court and Crown Prosecutor intervention for the rightful, inevitable disclosure, at the expense of cost order and premature criminal charges against the complainants. On top of these, further withholding of the records by the university is illegal for obstructing justice and harbouring evidence, where civil and criminal liabilities may be pursued against the university itself and related staffs.

Analysis/Findings re section 21(2)(i)

[112] The applicability of the factor relating to reputational damage in section 21(2)(i) is not dependent on whether the damage or harm envisioned by the clauses is present or foreseeable, but whether this damage or harm would be "unfair" to the individual involved.[28]

[113] I agree with the university that disclosure of the personal information at issue in the records could reasonably be expected to result in its use to unfairly damage the complainants' reputations. I have made this finding based on the contentious situation between the complainants and the appellant and the appellant's threats of pursuing criminal charges against them if he does not get disclosure of the information.

[114] Therefore, I find that the factor in section 21(2)(i) applies to the information at issue and weighs against its disclosure.

Conclusion re section 49(b)

[115] The records at issue in this section are claimed to be exempt under the discretionary personal privacy exemption in section 49(b) because they contain both the appellant's and the complainants' personal information. Under section 49(b), the IPC will consider and weigh the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties in determining whether the disclosure of the

[28] Order P-256.

personal information in the records would be an unjustified invasion of personal privacy.[29]

[116] In this appeal, the personal information at issue is that of the complainants and was provided by them to the U of T Campus Police in confidence.

[117] I have found that the presumption against disclosure for personal information gathered during an investigation into a possible violation of law in section 21(3)(b) applies.

[118] As well, based on my review of the records at issue and the parties' representations, I have found that the factors in sections 21(2)(e), (f), (h) and (i) apply and weigh against disclosure of the remaining personal information at issue in the records. I have also found that the factor for the fair determination of rights in section 21(2)(d), which can weigh in favour of disclosure if established, does not apply in the circumstances of this appeal.

[119] Based on my review of the parties' representations and the personal information at issue, I find, on balance, that disclosure of the personal information in the records would be an unjustified invasion of personal privacy of the complainants. Subject to my review of the absurd result principle and the university's exercise of discretion, the personal information at issue is exempt under section 49(b).

Absurd result

[120] Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may not be exempt under sections 49(b), because to withhold the information would be absurd and inconsistent with the purpose of the exemption.[30]

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

- the requester sought access to his or her own witness statement[31]
- the requester was present when the information was provided to the institution[32]
- the information is clearly within the requester's knowledge[33]

[122] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the

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[29] Order MO-2954.
[30] Orders M-444 and MO-1323.
[31] Orders M-444 and M-451.
[32] Orders M-444 and P-1414.
[33] Orders MO-1196, PO-1679 and MO-1755.

requester or is within the requester's knowledge.[34]

Representations

[123] The appellant submits that parts of the withheld records should be released to him because he supplied the information originally, or he is otherwise aware of it. He states:

> In the present matter, the withheld records contain information within the appellant's knowledge. For example, the complainant[s] have been identified as [names], on the warnings and released records, further confirmed by their admission during the exchanges of the ongoing legal proceeding. The exact complainants, and the information provided to the university, any communication to or from the appellant, are largely known to the appellant as compiled in the records of the legal proceedings, such as Statement of Claim, Reply to Demand for Particulars, Statement of Defence and Reply to Statement of Defence.
>
> ... In addition, some of the withheld information [was] known by the appellant prior to the complaint, such as the information of the complainants during interactions prior to the complaint, communications prior to the complaint, and contact information of the complainants. It is the submission of the appellant that the information [is] not exempt because to withhold [it] would be absurd and inconsistent with the purpose of the exemption.

[124] In reply, the university states that the names of the complainants were disclosed to the appellant in records related to the warning from the Campus Police because it was clear that this information had already been disclosed to the appellant.

[125] The university disagrees that the appellant should be granted access to copies of previous communications he has had with the complainants that have been submitted to the university to support their claims. It states that the selection of specific passages of such communications in the context of a complainant making a confidential complaint, is wholly unique and personal to the complainants, comprises and is part of the complaint itself, which is confidential to the complainant. The university adds that this is information of a personal nature about the complainants and it is not known to the appellant.

[126] In sur-reply, the appellant refers to the disclosure he has received in his litigation against the complainants as a justification that the complainants' privacy rights are no longer relevant.

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[34] Orders M-757, MO-1323 and MO-1378.

Analysis/Findings

[127] As noted above, other than records 59, 70, 72 to 75, 77, and 97, remaining at issue are emails exchanged between the complainants, the university, and Campus Police about the complainants' complaints, regarding which section 49(b) has been claimed. These other Campus Police records are:

- an occurrence report (record 70),
- handwritten notes (records 59 and 97),
- a supplementary occurrence report (record 65), including an email from a complainant to the Campus Police (reproduced in other records at issue),
- the complainants' statements to the Campus Police (records 72 to 75), and
- information from the graduate administrator about the complainants (record 77).

[128] I agree with the university that disclosure of the remaining records or portions of them would be an unjustified invasion of the personal privacy of the complainants, and I find that the absurd result principle does not apply to these records for the following reasons.

[129] Through the disclosure of information, the appellant has received from his access request and through his civil litigation proceedings against the complainants, the appellant is aware of much of the information at issue in these records, including the names of the complainants and the details of the complaints made against him. However, I find that disclosure of the remaining information at issue would be inconsistent with the purpose of the section 49(b) exemption, which is to protect the personal privacy of other individuals.

[130] In this case, the relations between the appellant and the complainants are very adversarial, as evidenced by the appellant's representations, the litigation documents he provided with his representations, and the actual content of the complaint records themselves. As well, in my view, the appellant has made it clear that any further disclosure of records and information could reasonably be expected to be used by him to cause distress to the complainants. My conclusion in this regard supports a finding that disclosure would be inconsistent with the purpose of section 49(b). Therefore, I find that the absurd result principle does not apply in this appeal.

[131] Accordingly, I find that the records at issue are exempt under section 49(b), subject to my review of the university's exercise of discretion.

[132] I will now consider whether the records claimed by the university to be exempt under section 49(a), in conjunction with section 19, are privileged records and, therefore, exempt on that basis.

Issue C: Does the discretionary exemption at section 49(a) (discretion to refuse access to requester's own personal information), in conjunction with section 19 (solicitor-client privilege), apply to the information at issue?

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

[134] 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.

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

[136] 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

[137] In this appeal, the university relies on section 49(a), in conjunction with section 19 to deny access to some records, or portions of records, as set out in the table prepared by the university, below. 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.

Record #	**General Description of Record or Record Categories**	**Page #**	**Release Yes/No**
48	Internal Campus Police email occurrence	p. 129	Part

[35] Order M-352.

	report and supplemental occurrence report	p. 130-132	No
50	Email chains	p. 133	No
		p. 134	Part
51	Email chains	p. 137-138	No
		p. 139	Part
52	Conversation between Office of High Risk and Sexual Violence Prevention and Response Coordinator	p. 139	Part
57	Email chains	p. 153	Part
		p. 154	No
		p. 155	Part
58	Email chains	p. 155	Part

[138] 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.

Representations

[139] In the non-confidential portions of its representations,[36] the university submits that all of the identified records are subject to the common law legal advice, solicitor-client communication privilege under branch 1 of section 19, as they are:

- communications between legal counsel and various university employees, or
- communications from university employees to legal counsel to seek legal advice, or
- confidential legal advice and additional work product to be sent to legal counsel for further legal advice.

[36] The university provided both confidential and non-confidential representations on this issue. I have considered the entirety of the university's representations in making my determination in this appeal, although I am only referring to the non-confidential representations in this order.

[140] The university submits that disclosure of the withheld portions would reveal the substance of legal advice given or being sought in each of the three contexts set out above.

[141] The university submits that all of these records are part of a "continuum of communications" that is subject to the common law solicitor-client privilege under branch 1.

[142] The university also submits that the records are subject to branch 2 legal advice privilege on the basis that they were prepared by or for counsel employed or retained by the university (an educational institution) for use in giving legal advice.

[143] The university further submits that it has at no time waived or lost privilege with respect to these records, as they have been kept confidential between legal counsel, on the one hand, and the faculty and staff who were seeking legal advice and/or providing information for counsel in the seeking of the advice on the other. These records were not shared with others, nor at any time made public.

[144] In support of its representations, the university provided affidavits from two of its legal counsel regarding the application of section 19 to the records at issue. In their affidavits, these legal counsel submit:

> As is typical in providing legal advice, on this matter there was discussion between lawyers and the client, and there was back and forth as information was gathered, draft communications were reviewed, and legal advice was conveyed and discussed. All of the records referred to below are part of the continuum of the provision of legal advice...
>
> The emails in these strings concern a confidential matter, replete with highly sensitive student personal information which can only be communicated within the university on a need-to-know basis and concerning which the university, prudently, sought and received legal advice.

[145] The appellant did not directly respond to the university's representations, instead insisting he should be given disclosure of the records at issue, just as he should be able to get them in his court proceedings.

Analysis/Findings

[146] 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.[37] The rationale for this

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

privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[38] 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.[39]

[147] 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.[40] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[41]

[148] 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.

[149] The records at issue are all emails. I am satisfied that these emails contain communications relating to confidential legal advice, which was sought from or being given by the university's internal legal counsel to the university's staff. I find that these emails are all part of the continuum of communication between the university's staff and its legal counsel for the purpose of giving or obtaining legal advice. Based on my review of the parties' representations, I also find that the privilege in this information has not been lost or waived.

[150] I do not agree with the appellant's argument that the *Rules of Civil Procedure* that govern the legal proceedings he has brought against the complainants should require the university to disclose the information at issue under *FIPPA*. Civil proceedings in the courts and appeals under the *Act* are two separate proceedings.[42]

[151] The relationship between access under the *Act* and civil litigation is dealt with in section 64(1), which provides that:

> This Act does not impose any limitation on the information otherwise available by law to a party to litigation.

[152] The *Rules* govern civil proceedings in the Superior Court of Justice and set out procedures to be followed by litigants. They do not govern proceedings before the IPC. Section 64(1) operates in such a way as to not restrict discovery or production mechanisms available to parties in litigation. It does not, however, create a substantive

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[38] Orders PO-2441, MO-2166 and MO-1925.
[39] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[40] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[41] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).
[42] See Orders PO-1688 and PO-2490.

right of access parallel or adjunct to litigation. A similar question was considered in Order M-852, in which the adjudicator wrote:

> Section 51(1)[43] does not create a substantive right of access. The right of access created under [*MFIPPA*] is found in section 4 and 36, and is subject to the exemptions found in the [*MFIPPA*]. Section 51 ensures that the [*MFIPPA*] and its exemptions do not operate in a way which would deny access to information through other legal rules or principles, including the rules of natural justice…. [*MFIPPA*] can and should operate as an independent piece of legislation.

[153] In Order MO-3900, the adjudicator cited Order M-852 and discussed the difference between litigation proceedings and access proceedings under *MFIPPA*. She stated:

> Because access rights under *MFIPPA* are arguably more restrictive than discovery rights in litigation, section 51(1) operates to ensure that *MFIPPA* does not impose any limitations on the information otherwise available to litigants. Questions of whether or not access to information should be granted under *MFIPPA* are subject to specific exemptions and different considerations than questions of relevance in a matter in litigation. Section 51(1) does not limit a litigant's discovery rights during litigation, so that a document that might be exempt under *MFIPPA* can still be producible in litigation.
>
> In my view, section 51(1), by its very enactment and by its language (information "otherwise available" to a party to litigation) specifically contemplates that discovery rights in litigation are separate from access rights under *MFIPPA*. It would, in my view, be too broad an interpretation of express authorization to find that *MFIPPA* authorizes this office to order disclosure of any information that might be producible in a civil litigation because a court may determine that it is relevant to the findings of fact or issues in that particular litigation. In my view, therefore, the *Rules* cannot be characterized as legislation that expressly authorizes the disclosure of the record at issue in this appeal for the purpose of the exception in section 14(1)(d).[44]

[154] I adopt these findings and also find that that discovery rights in litigation are

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[43] Of the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*), The equivalent to section 64(1) of *FIPPA*.

[44] Section 14(1)(d) of *MFIPPA* is the equivalent to section 21(1)(d) of *FIPPA*. This section reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> under an Act of Ontario or Canada that expressly authorizes the disclosure.

separate from access rights under *FIPPA*. I find that the commencement of litigation by the appellant against the complainants is not relevant to the determination of whether the records are solicitor-client privileged under section 19 of *FIPPA*. Rather, what I find relevant in the circumstances is whether the records at issue contain direct communications of a confidential nature between a the university's legal counsel and the university's staff made for the purpose of obtaining or giving professional legal advice. In this appeal, I find that the records at issue contain such direct communications of a confidential nature between a solicitor and client.

[155] Therefore, I find that both the common law and statutory solicitor-client communication privileges in branches 1 and 2 are established in this appeal in respect of the information at issue for which section 49(a) with section 19 have been claimed. The records at issue contain confidential solicitor-client communications and are privileged. As I stated above, the privilege in the records at issue has not been waived or lost.

[156] Therefore, the information at issue for which section 49(a), in conjunction with section 19, has been claimed is exempt under those sections, subject to my review of the university's exercise of discretion.

Issue D: Did the university exercise its discretion under sections 49(a) and 49(b)? If so, should this office uphold the exercise of discretion?

[157] The sections 49(a) and 49(b) 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.

[158] 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.

[159] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[45] This office may not, however, substitute its own discretion for that of the institution.[46]

[160] Relevant considerations may include those listed below. However, not all those

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[45] Order MO-1573.
[46] Section 54(2).

listed will necessarily be relevant, and additional unlisted considerations may be relevant:[47]

- 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
- 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

[161] The university states that, in exercising its discretion in this matter, it considered the purposes of *FIPPA*, including the principles that:

- individuals should have a right of access to their own personal information
- exemptions from the right of access should be limited and specific, and
- the privacy of individuals should be protected

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[47] Orders P-344 and MO-1573.

[162] Additionally, the university says that it considered all factors relevant to its exercise of discretion, including:

- the wording (intent and meaning) of the exemptions at sections 49(a) and 49(b) and the important interests that the university should protect,
- whether the appellant is seeking his or her own personal information, and
- the relationship between the appellant and affected persons

[163] The university also submits that, in applying the section 49(b) exemption, it carefully considered the importance to the appellant of the matters to which the records relate, including his clear and concerted efforts to deal with the issues with university faculty and staff. It states:

> Clearly, these are issues of significance to the appellant, and every effort was made to not apply the exemption to any information that could reasonably be given to him.
>
> [T]he university carefully considered the possible value of additional disclosure for the appellant in his matters with the university, and is of the view that additional disclosure would not materially affect his rights or recourse, whereas it would affect the rights or interests of others, or such other interests as are protected by *FIPPA*.
>
> [For section 49(b)], the university considered the privacy interests of the other individuals whose personal information is in the records, particularly given the nature of the allegations that some records contain and in this context, the potential for those other individuals to suffer negative repercussions, and of course for a "chilling effect" for other individuals who might be victims of harassment or sexual violence, or whose information and assistance would be of value in resolving such matters...
>
> In its application of section 49(a), based on the solicitor-client exemption at section 19...the university also considered the purpose of the exemption, which is the protection of the confidential nature of the solicitor-client relationship. This confidentiality is essential to enable clients to communicate freely with their legal advisors without fear that their communications will be shared...
>
> Since the appellant is seeking access to information that pertains to him, the university carefully considered the need for its faculty and officials to obtain legal advice confidentially and candidly to determine how to best to proceed with respect to the serious matters respecting the appellant in the contexts of High Risk, Sexual Harassment/Sexual Violence, and employment...

> Given the seriousness of the matters at issue and their significant impact on various individuals, it is the submission of the university that it has a responsibility to avail itself of solicitor client privilege to ensure that its actions embody the best legal approaches and results possible for its communities, including the various individuals whose personal information is contained in the records and the appellant. These are the sorts of issues for which institutions should seek legal advice to best arrive at correct and prudent approaches, and that advice should be candidly and safely sought, with the protection of solicitor client privilege.
>
> The university also considered the considerable information disclosed to the appellant in the processes to which the request refers, and it is the submission of the university that disclosure of exempt material in the record[s] would provide minimal new information to the appellant, the value of which would not outweigh the value of solicitor-client privilege, or of its application to these records.

[164] The appellant submits that the university has improperly exercised its discretion. He states that the university unnecessarily withheld information that is key to the merit of his ongoing court case, which resulted in obstruction of the discovery process, and led to issues for both the appellant and the complainants.

[165] The appellant states that in applying the section 49(b) exemption, the university omitted the importance of the matters to not only for him, but also the complainants as parties to the ongoing legal proceeding.

[166] The appellant submits that, in its application of section 49(a) based on the solicitor-client exemption at section 19, the university neglected the importance of the purpose of *FIPPA* that information should be available to the public, especially the appellant and the complainants as parties to the ongoing legal proceeding. He states that:

> Since the appellant is seeking access to information that not only pertains to him, but [is] also critical to a fair trial especially for the complainants as the defendants, the university abused the need for its faculty and officials to obtain legal advice confidentially and candidly to determine how best to proceed with respect to the serious matters respecting [the appellant] initially and presently the complainants (for being sued) in the contexts of High Risk, Sexual Harassment/Sexual Violence, employment as well as presently the Ontario Superior Court of Justice.
>
> In these contexts, [not] only the appellant, but the complainants are clearly entitled to avail themselves of the information for fair trial. Contrary to the University claims of public interest, the information even though claimed privileged by the university, is still compellable under the *Rules of Civil Procedure* which would result in cost orders against the

> complainants and potentially further financial hardships and mental duress.

Analysis/Findings

[167] I find that the university exercised its discretion under sections 49(a) and 49(b) in a proper manner, taking into account relevant considerations and not taking into account irrelevant considerations.

[168] I am satisfied that the university considered the purposes of the sections 49(a) and 49(b) exemptions, as well as those of the *Act*.

[169] In exercising its discretion, the university considered that the litigation proceeding the appellant has brought against the complainants is a separate and distinct proceeding from the adjudication of his *FIPPA* request.

[170] The university also considered that, although the appellant maybe entitled to disclosure of certain records in the discovery stage of the litigation proceeding, this does not automatically entitle him to disclosure of the information at issue in this appeal.

[171] As well, the university has considered that disclosure of the information at issue is not necessary for the fair determination of the appellant's rights in the litigation proceedings.

[172] In determining that the university exercised its discretion in a proper manner, I have considered the findings of the adjudicator in Order PO-3448. In that order, in addition to section 49(a), in conjunction with section 19 and section 49(b) (as in this appeal), the adjudicator also reviewed the application of sections 13(1) (advice or recommendations) and 18(1) (economic and other interests). In upholding the Ministry of Municipal Affairs and Housing's (the ministry's) exercise of discretion to records that included emails, the adjudicator found that:

> ...access to documents under the *Rules of Civil Procedure* is a separate mechanism from the regime under the *Act*, with its own set of rules around disclosure, I find that the ministry took into account relevant factors in weighing both for and against the disclosure of the information at issue and did not take into account irrelevant considerations. In my view, the ministry's representations reveal that they considered the appellant's position and circumstances and balanced it against: the importance of solicitor-client privilege; the ability of staff to provide free and frank advice to decision makers; the economic interests of the ministry; and the protection of individuals' personal privacy in exercising its discretion not to disclose the information at issue. I am also mindful that the ministry has disclosed most of the responsive records to the appellant, either in whole or in part, and has severed only that information which I have found to be exempt from disclosure under the *Act*.

[173] In this appeal, I have similarly concluded that access to documents under the *Rules of Civil Procedure* is a separate mechanism from access to records under the *Act*.

[174] Consistent with the findings in Order PO-3448, I find that the university considered the appellant's position and circumstances and balanced them against the importance of solicitor-client privilege (section 49(a) with section 19) and the protection of the complainants' personal privacy related to their complaints of harassment by the appellant (section 49(b)).

[175] I am also mindful that the appellant already has, through *FIPPA* access or court processes, received disclosure of the substance of the information remaining at issue in the records.

[176] Therefore, as the litigation proceeding is a separate proceeding from the appellant's access request, I do not accept the appellant's argument that the university did not exercise its discretion properly because it did not disclose records to him that he submits maybe useful to him in his civil litigation proceedings.

[177] I also do not accept the appellant's argument that he should receive disclosure of the complainant's personal information as it will be helpful to the complainants that he is pursuing vigorously in civil litigation proceedings. The complainants are not requesting disclosure of the information at issue in the records, the appellant is.

[178] I find that the university has exercised its discretion in a proper manner in its disclosure of records to the appellant under sections 49(a), in conjunction with section 19, and 49(b).

[179] Accordingly, I uphold the university's exercise of discretion and find that the information at issue in the records is exempt under section 49(a), in conjunction with section 19, and section 49(b).

ORDER:

I uphold the university's decision to deny access to the information at issue in the records.

Original signed by: September 20, 2021
Diane Smith
Adjudicator