Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4265

Appeal PA17-217-2

Wilfrid Laurier University

June 13, 2022

Summary: The appellant submitted a request to Wilfrid Laurier University (the university) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to personal information, including emails, that referenced or directly referred to her for a specified period. The university located responsive records and disclosed some information to the appellant. It took the position that some of the records were excluded from the *Act* by the labour relations exclusion in section 65(6)3. The university also claimed that other withheld information was exempt under the personal privacy exemptions in section 21(1) and/or 49(b) (personal privacy), and the solicitor-client privilege exemption in section 19. During mediation, the appellant indicated that further responsive records should exist and, therefore the university's search for responsive records was added to the scope of the appeal. In this order, the adjudicator upholds the university's decision and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 2(1) (definition of *personal information*), 19, 21(1), 49(b) and 65(6)3.

Orders and Investigation Reports Considered: Orders PO-3819 and MO-2467.

Cases Considered: *Ontario* (*Ministry of Correctional Services*) *v. Goodis* (2008), CanLII 2603 (ON SCDC).

OVERVIEW:

[1] The appellant, a professor, submitted a request to Wilfrid Laurier University (the

university) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to "personal information, including emails, referencing or directly referring to" her for a specified time period. She named eleven individuals "in reference" to her request.

[2] The university located records responsive to the request and issued a decision granting the appellant partial access to them. The university withheld some records on the basis that they were excluded from the application of the *Act* under section 65(6) (employment or labour relations). It relied on the discretionary exemptions in sections 13(1) (advice or recommendations), 19 (solicitor-client privilege) and 49(b) (personal privacy), and the mandatory exemption in section 21(1) (personal privacy) to withhold some information in the records.

[3] The appellant was not satisfied with the university's decision and appealed it to the Information and Privacy Commissioner of Ontario (IPC). The IPC attempted to mediate the appeal. During mediation, the appellant questioned the reasonableness of the university's search for records. In response, the university provided a five-page explanation of how it conducted its search for records responsive to the request but the appellant was not satisfied with the university's explanation. Accordingly, the university's search for responsive records was added to the scope of the appeal. A mediated resolution of the appeal was not possible and it was moved to the adjudication stage of the appeal process where a written inquiry may be conducted under the *Act*.

[4] The assigned adjudicator decided to conduct an inquiry and sought representations from the university. The university provided representations which were shared with the appellant, who provided representations in response. At this point, I was assigned carriage of the appeal and I provided the appellant's representations to the university who provided further representations in reply. The appellant was provided with the university's reply representations and invited to provide a sur-reply. The appellant indicated that she would not provide sur-reply representations and, instead, referred to her initial representations.

[5] In this order, I uphold the university's decision that certain records are excluded from the *Act* by section 65(6)3. I also uphold the university's claim that the exemptions at section 21(1), 49(b) and 19 apply to the remaining withheld information. Finally, I find that the university's search was reasonable and I dismiss the appeal.

RECORDS:

[6] The records at issue are all emails, some with attachments, of which the

following pages[1] are withheld as noted:

- Page 29 - sections 65(6) and 13(1)
- Pages 59-73 – sections 49(b) and/or 21(1)
- Pages 104, 105 – section 21(1)
- Page 119 - section 19
- Pages 120-126 – section 65(6)
- Pages 132-137 – section 49(b) and/or 21(1)
- Pages 138-140 and 143-148 – section 21(1)

ISSUES:

A. Does the labour relations and employment exclusion at section 65(6) apply to exclude pages 29 and 120-126 of the records from the application of the Act?

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

C. Does either the discretionary exemption at section 49(b) or the mandatory exemption at section 21(1) apply to the withheld information in pages 59-73, 104, 105, 132-140 and 143-148?

D. Does the discretionary exemption at section 19 apply to page 119?

E. Did the university exercise its discretion under sections 19 and 49(b)? If so, should this office uphold the exercise of discretion?

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

DISCUSSION:

Issue A: Does the labour and employment exclusion at section 65(6) apply to exclude pages 29 and 120-126 of the records from the application of the *Act*?

[7] Pages 29 and 120-126 are two email chains amongst university staff concerning university staffing issues. The university takes the position that these records are

[1] The university numbered the pages it located in the search sequentially. Those pages are referenced to identify where the withheld information is located.

excluded from the *Act* under the labour relations and employment exclusion at section 65(6)3.

[8] Section 65(6)3 states:

> Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> > 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

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

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

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

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

[13] If section 65(6) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.[5]

[14] The type of records excluded from the *Act* by section 65(6) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.[6]

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[2] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

[3] *Ontario* (*Minister of Health and Long-Term Care*) *v. Ontario* (*Assistant Information and Privacy Commissioner*), [2003] O.J. No. 4123 (C.A.); see also Order PO-2157.

[4] Order PO-2157.

[5] *Ontario* (*Solicitor General*) *v. Ontario* (*Assistant Information and Privacy Commissioner*) (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.

[6] *Ontario* (*Ministry of Correctional Services*) *v. Goodis*, cited above.

[15] The university submits that the records it claims are excluded by section 65(6)3 are documents related to matters in which the university is acting as an employer and address the relationship between an employer and employees. It submits that the terms and conditions of employment or human resources questions are at issue and that, therefore, the records are subject to section 65(6)3 of the *Act*.

[16] In her representations, the appellant does not address this provision.

Section 65(6)3: matters in which the institution has an interest

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

1. the records were collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and
3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

[18] For the following reasons, I find that the records contained at pages 29 and 120–126 are excluded from the *Act* by section 65(6)3.

Part 1: collected, prepared, maintained or used

[19] In addressing the first part of the three-part test, the university submits that the records were created internally, by the university's employees, and address labour relations or employment-related matters involving the appellant.

[20] I have reviewed the records, which consist of two email chains, and find that they involve email communications that originate with or were sent to university employees. I find that the records were collected, maintained and created by the university or on its behalf and the first part of the test has been met.

Part 2: meetings, consultations, discussions or communications

[21] To satisfy part 2 of the section 65(6)3 test, the university must establish that its collection, preparation, maintenance or use of the records was in relation to meetings, consultations, discussions or communications.

[22] The university submits that the second part of the test is met because the records are communications about employment and labour relations matters, which resulted, or stemmed from meetings, consultations or discussions.

[23] After reviewing the records, I find that the university's collection, preparation, maintenance or use of the records was in relation to meetings, consultations,

discussions and communications about the matters discussed in the emails.

Part 3: "about" labour relations or employment-related matters in which the institution has an interest

[24] To satisfy part 3 of the section 65(6)3 test, the university must establish that the meetings, consultations, discussions or communications that took place were about labour relations or employment-related matters in which it has an interest.

[25] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.[7]

[26] The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.[8]

[27] The phrase "labour relations or employment-related matters" has been found to apply in the context of:

- a job competition[9]
- an employee's dismissal[10]
- a grievance under a collective agreement[11]
- disciplinary proceedings under the Police Services Act [12]
- a "voluntary exit program"[13]
- a review of "workload and working relationships"[14]
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act*.[15]

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[7] *Ontario* (*Minister of Health and Long-Term Care*) *v. Ontario* (*Assistant Information and Privacy Commissioner*), [2003] O.J. No. 4123 (C.A.). See also Order PO-2157.
[8] Order PO-2157.
[9] Orders M-830 and PO-2123.
[10] Order MO-1654-I.
[11] Orders M-832 and PO-1769.
[12] Order MO-1433-F.
[13] Order M-1074.
[14] Order PO-2057.

[28] The phrase "labour relations or employment-related matters" has been found *not* to apply in the context of:

- an organizational or operational review[16]
- litigation in which the institution may be found vicariously liable for the actions of its employee.[17]

[29] The phrase "in which the institution has an interest" means more than a "mere curiosity or concern", and refers to matters involving the institution's own workforce.[18]

[30] The records collected, prepared maintained or used by the university are excluded only if [the] meetings, consultations, discussions or communications are about labour relations or "employment-related" matters in which the institution has an interest. Employment-related matters are separate and distinct from matters related to employees' actions.[19]

[31] The university submits that the third part of the test is met because the records relate to its own employees and university employment-related matters. The university refers to Order PO-2057 which it submits supports its position that section 65(6)3 can be applied in the context of review of workload and working relationships.

[32] The university submits that when reviewing the records responsive to the request, it gave serious consideration to the principles and intent of the *Act* to allow individuals to have access to their own personal information. It submits that the exclusion in section 65(6)3 was applied only where it was clear that it applied and where there was a need to restrict access to ensure the confidentiality of labour/employment relations information.

[33] The university submits that university staff must have confidence that their communications about labour relations or employment-related matters will be confidential so that they may fully engage in discussions. It also submits that notwithstanding the application of the exclusion in section 65(6), the university released parts of records subject to section 65(6)3 to the requester when it was possible to sever the record.

[34] Although the appellant does not comment specifically on the application of the section 65(6)3 exclusion in her representations, she does address access to page 29 when she addresses the exemption at section 13(1) (the university withheld this page under section 65(6)3 and section 13(1)). The appellant submits that she believes that

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[15] *Ontario* (*Minister of Health and Long-Term Care*) *v. Ontario* (*Assistant Information and Privacy Commissioner*), [2003] O.J. No. 4123 (C.A.).
[16] Orders M-941 and P-1369.
[17] Orders PO-1722, PO-1905 and *Ontario* (*Ministry of Correctional Services*) *v. Goodis*, cited above.
[18] *Ontario* (*Solicitor General*) *v. Ontario* (*Assistant Information and Privacy Commissioner*), cited above.
[19] *Ontario* (*Ministry of Correctional Services*) *v. Goodis*, cited above.

the record refers to future tenure-track hiring possibilities for the department. The appellant suggests that since she is a tenured member of the department, withholding the record appears arbitrary, discriminatory and in bad faith.

Analysis and finding

[35] After reviewing the records at issue, I find that they relate to the university's own employees and involve employment-related matters in which it has an interest as the employer.

[36] The records at issue are two email chains involving the chair of the department and various other university employees. The subject matter for each chain relates to matters concerning the university's own workforce.

[37] For the third component of section 65(6)3 to be met, the university must "have an interest", as employer, in these labour relations or employment-related matters. The phrase "in which the institution has an interest" means more than a "mere curiosity or concern", and refers to matters involving the institution's own workforce.[20]

[38] Based on my review of the relevant records, I find that they clearly relate to the university's management of its own workforce. Without referring to the actual employment-related matter referenced in the records, I find that the matter being discussed relates to the university's employees and specifically the employment of the appellant herself. I find that the communication in the two records at issue are about employment-related matters in which the university has an interest as employer.

[39] Since I have found that the records at pages 29 and 120 - 126 are excluded from the *Act* by section 65(6)3, I will not consider the university's alternate claim of section 13(1) for page 29 of the record.

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

[40] Under the *Act*, different exemptions may apply depending on whether a record at issue contains or does not contain the personal information of the requester.[21] Where the records contain the requester's own personal information, access to the records is addressed under Part II of the *Act* and the discretionary exemptions at section 49 may apply. Where the records contain the personal information of individuals other than the requester but do not contain the personal information of the requester, access to the records is addressed under Part I of the *Act* and the mandatory exemption at section 21(1) may apply.

[41] To qualify as personal information, the information must be about the individual

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[20] *Ontario* (*Solicitor General*), cited above.
[21] Order M-352.

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.[22] However, 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.[23]

[42] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[24]

[43] In this order, I will consider whether the records at pages 59-73, 104, 105, 132-140 and 143-148 contain personal information. These records are subject to the university's exemption claims under section 49(b) and 21(1).

[44] The university states that the withheld information in the records consist of the personal information of affected parties and the appellant. It submits that it disclosed most of the appellant's personal information to her but, it did not disclose information that is mixed with that of an affected party.

[45] The university submits that the withheld information contains information that qualifies as the personal information of students. It submits that previous orders have found a range of student correspondence with university faculty and officials to be of an explicitly private and confidential nature and containing students' personal information within the meaning of paragraphs (f) and (h) of the definition of personal information in section 2(1).[25] The university submits that this personal information was appropriately severed from the records at issue.

[46] After a review of the records that the university claims contain the personal information of the appellant and affected parties, I find pages 71, 104, 105, 132-140 and 143-148 all contain the personal information of the appellant though most of it has already been disclosed to the appellant (only personal information of the appellant in pages 71 and 139 was not disclosed). The remainder of the withheld information on these pages and on pages 59-70, 72 and 73 (which do not contain any personal information of the appellant) contain information that qualifies as the personal information of affected parties, including student's names and email addresses, student's major research proposals, personal phone number and personal email address of a professor, education level, gender and other personal information that is not employment related. I also find that some of the withheld information are emails about the appellant written by students and constitutes the personal information of the students and the appellant. While most of this information was already disclosed to the appellant, the mixed personal information of the appellant and an affected party at

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[22] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

[23] Orders P-1409, R-980015, PO-2225 and MO-2344.

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

[25] PO-3103-F and PO-3628.

page 139 remains at issue.

[47] Finally, regarding the research proposals at pages 59-73, I find that only one (page 71) contains the appellant's personal information and therefore pages 59-70, 72 and 73 will be analyzed under section 21(1) as these records do not contain the personal information of the appellant. As all of the remaining records contain the appellant's personal information, I will address whether this information is exempt under section 49(b).

[48] I find this information qualifies as personal information under paragraphs (a), (b), (d) and (h) of the definition of that term in section 2(1) of the *Act*.

[49] The parties did not address whether page 119, which the university claimed exempt under section 19 (see discussion below), also contained the personal information of the appellant. Given the appellant's request, I would assume that this record contains at least the name of the appellant and it is therefore possible that it contains her personal information. As the university has claimed that this page is exempt under the solicitor-client privilege exemption at section 19, it has chosen not to provide this page to the IPC and therefore I am unable to review the information it contains. As a result, I am unable to make a finding concerning whether page 119 contains the personal information of the appellant. I will address this issue further below in my consideration of the university's exercise of discretion under Issue E.

Issue C: Does either the discretionary exemption at section 49(b) or the mandatory exemption at section 21(1) apply to the withheld information in pages 59-73, 104, 105, 132-140 and 143-148[26]?

[50] 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 some exemptions from this right.

[51] Under the section 49(b) exemption, if a record contains the personal information of both the requester and another individual, the institution may refuse to disclose the other individual's personal information to the requester if disclosing that information would be an "unjustified invasion" of the other individual's personal privacy.[27]

[52] The section 49(b) exemption is discretionary. This means that the institution can decide to disclose another individual's personal information to a requester even if doing

[26] Although the university identified the pages from 143 to 148 as containing exempted information, after reviewing these pages, the only exemptions are at pages 143, 145 and 148 and therefore, pages 144, 146 and 147 will not be considered.

[27] However, the requester's own personal information, standing alone, cannot be exempt under section 49(b) as its disclosure could not, by definition, be an unjustified invasion of another individual's personal privacy; Order PO-2560.

so would result in an unjustified invasion of other individual's personal privacy.[28]

[53] In contrast, under section 21(1), where a record contains personal information of another individual but *not* the requester, the institution cannot disclose that information unless one of the exceptions in sections 21(1)(a) to (e) applies, or the section 21(1)(f) exception applies, because disclosure would not be an "unjustified invasion" of the other individual's personal privacy.

[54] Sections 21(1) to (4) provide guidance in deciding whether the information is exempt under section 21(1) or 49(b), as the case may be.

[55] As noted, after a review of the withheld information in the records, I find that the records at pages 59-70, 72 and 73 do not contain the appellant's personal information and therefore the university claims that section 21(1) applies to exempt this personal information. For the remainder of the records which contain the appellant's personal information along with that of an affected party, the university claims that section 49(b) applies.

Representations

[56] The university submits that it considered the factors in section 21(2) and presumptions in section 21(3) in determining whether disclosure of the personal information would constitute an unjustified invasion of privacy.

[57] The university submits that where the email related to an individual in their personal capacity or revealed information of a personal nature about an individual, it applied the mandatory exemption in section 21(1). It submits that the presumptions at section 21(3)(d) (employment or educational history) and section 21(3)(g) (personal evaluations) are relevant.

[58] In addition, the university submits that it considered the factors against disclosure in section 21(2) and determined that 21(2)(f) (highly sensitive), 21(2)(h) (supplied in confidence) and 21(2)(i) (unfairly damage reputation) were applicable and that disclosure of the personal information would constitute an unjustified invasion of personal privacy.

[59] The university submits that students have a reasonable expectation that it will not release their personal information except in accordance with the *Act*. It submits that the student emails with university officials has been supplied in confidence and to release the records, or parts thereof, would result in an invasion of personal privacy of these individuals. Accordingly, the university submits that the factor in section 21(2)(h) should apply to this personal information.

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[28] See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's exercise of discretion under section 49(b).

[60] The appellant does not address the presumptions in section 21(3) or the factors favouring disclosure in section 21(2). She submits that the records at pages 59-73 are "MRP committees" according to the index of records. She submits that as she is a member of the same academic department and contributes to the undergraduate and graduate programs, there is no legal reason to withhold this information.

[61] The appellant also submits that the records on pages 138-140 relate to her position within the department as a professor. She submits that according to the index these records relate to an "independent study" and that from the released information, two individuals in the department were discussing how to prevent a graduate student from completing an independent study with the appellant. The appellant submits that the decision to withhold this information was made in bad faith and that the university is not interested in creating a supportive, accessible and equitable workplace for all employees.

[62] In reply representations, the university submits that the fact that an individual is a member of a department does not mean they are granted access to all records related to the department's operations. It submits that it considered the appellant's right of access to her own personal information against the right of other individuals for protection of their privacy and disclosed extensive records to the appellant.

Analysis and finding

The section 21(3) presumptions

[63] The university has claimed that sections 21(3)(d) and (g) apply to the withheld personal information. These sections state:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> > (d) relates to employment or educational history;
> >
> > (g) consists of personal recommendations or evaluations, character references or personnel evaluations; or

[64] The university submits that the presumption at section 21(3)(d) applies to records but does not provide specific representations addressing this presumption.

[65] Past orders of the IPC have addressed the application of the presumption against disclosure in section 21(3)(d) and have determined that, to qualify as "employment or educational history," the information must contain some significant part of the history of the person's employment or education. What is or is not significant must be determined

based on the facts of each case.[29]

[66] More specifically, past orders have considered records held by institutions that contain information about students. In Order PO-3819, for example, the adjudicator found that the records before her qualified as students' educational history because they included information about, among other things, the students' course enrolment and academic performance. In Order MO-2467, the adjudicator found that attendance registers of students attending a particular school within a particular timeframe qualified as educational history falling within the section 14(3)(d) (the municipal equivalent of section 21(3)(d)) presumption because they included the students' grade, as well as their marks and attendance records.

[67] Having reviewed the records that the university has claimed exempt under section 21(1) and 49(b), I agree that the presumption at section 21(3)(d) applies to the withheld information at pages 59-70, 72 and 73 which are identified as MRP proposals and do not contain the personal information of the appellant. I also find that this presumption applies to the withheld information at pages 71, 132, 134, 137, 139 and 140 which contains the mixed personal information of the appellant and an affected party. In my view, some of the withheld information in all of these pages qualifies as the personal information of an affected party because they contain detail of their academic past as well as future proposed study. I find that disclosure of the withheld personal information in these records would reveal the employment or educational history of an affected party and that their disclosure would be a presumed unjustified invasion of personal privacy under section 21(3)(d).

[68] Since I have found that the presumption at section 21(3)(d) applies to the records at pages 59-70, 72 and 73, and since this personal information does not include the personal information of the appellant, I find that disclosure of this information is a presumed unjustified invasion of an affected party's personal privacy and therefore it is exempt under section 21(1)

[69] The remaining records contain the personal information of an affected party and the appellant (although in most cases the appellant's actual personal information has been disclosed to her).

[70] The university also submits that the presumption at section 21(3)(g) applies to records without identifying the specific records but does not provide specific reasons. After my review of the personal information, it is apparent that this presumption does not apply to any of the remaining personal information at pages 71, 104, 105, 132-140, 143, 145 and 148, which contain personal information that is not covered by the section 21(3)(d) presumption, because this information does not contain personal recommendations or evaluations, character references or personnel evaluations.

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

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

The section 21(2) factors

[72] 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.[30] Some of the factors listed in section 21(2), if present, weigh in favour of disclosure, while others weigh in favour of non-disclosure. 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).[31]

[73] The university identified the factors in sections 21(2)(f), (h) and (i) that might apply to favour non-disclosure of the personal information. The appellant does not refer to any of the listed factors in her representations; however, she suggests that because the records at issue relate to her, she should "in fairness" be granted access to the withheld information. As such, I find that the appellant has raised the unlisted factor of "fairness" in support of disclosure of the withheld information.

[74] Sections 21(2)(f), (h) and (i) state:

> (2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> > (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.

Unlisted factor that weighs in favour of disclosure

[75] As noted, the appellant has raised the unlisted factor that "in fairness" she should be granted access to the withheld information. Based on my review of the withheld personal information in the records that remains at issue, I find that this factor should be given little or no weight. I find that disclosure of the withheld information on pages 71, 104, 105, 132-140, 143, 145 and 148 would not address the "fairness" factor identified by the appellant. Moreover, I find the withheld personal information does not relate to the matter as suggested by the appellant in her representations.

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[30] Order P-239.
[31] Order P-99.

Factors that weigh in favour of non-disclosure

[76] In its representations, the university submits that sections 21(2)(f), (h) and (i) apply in the circumstances of this appeal.

[77] In my review of the remaining personal information in dispute, I do not find that the factors at section 21(2)(f) and (i) apply. I am not convinced that disclosure of the personal information would cause the affected party significant personal distress and further, I am not convinced that disclosure would unfairly damage the reputation of any person referred to in the record. However, I agree that section 21(2)(h) is relevant in this appeal because the information would have been provided to the institution in confidence. Based on the nature of the information, I agree that the individual who supplied their personal information would have supplied it with the understanding that the university would not disclose their information. As a result, I give this factor significant weight.

[78] I have found that the presumption in section 21(3)(d) and the factor in section 21(2)(h) are relevant to my determination of whether disclosure of the personal information in the records at issue would be an unjustified invasion of personal privacy. Before I make a finding on section 49(b), I will consider whether the personal information would still be exempt given the absurd result principle.

Absurd result

[79] I also considered whether the absurd result principle applies in the circumstances of this appeal. According to the principle, whether or not the factors or circumstances in section 21(2) or the presumptions in section 21(3) apply, where the appellant originally supplied the information, or the appellant is otherwise aware of it, the information may be found not exempt under section 21(1), because to find otherwise would be absurd and inconsistent with the purpose of the exemption. One of the grounds upon which the absurd result principle has been applied in previous orders is where the information is clearly within the appellant's knowledge.

[80] The parties did not address this principle in their representations, and after my review of the records, it is apparent that the absurd principle does not apply in this appeal.

Conclusion

[81] In conclusion, I have found that the presumption at section 21(3)(d) applies to some of the withheld personal information. I also find that the factor at section 21(2)(h) applies and weighs significantly in favour of non-disclosure of the remaining withheld personal information. I also found that the unlisted factor "fairness" does not apply to support disclosure of the withheld information. As a result, I find that the withheld information in the records at issue qualify for exemption as their disclosure would constitute an unjustified invasion of personal privacy under section 49(b).

Issue D: Does the discretionary exemption at section 19 apply to page 119?

[82] Page 19 of the records is a communication between the university's legal counsel and university employees. The university claims that the section 19 exemption applies to it. If the record does not contain the appellant's personal information, the appropriate exemption to consider is section 19 standing alone. If the record contains the appellant's personal information, the appropriate exemption to consider is section 49(a), read with section 19.

[83] As I noted above, 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 some exemptions from this right.

[84] Section 49(a) of the *Act* 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, 15.1, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

[85] The discretionary nature of section 49(a) ("may" refuse to disclose) recognizes the special nature of requests for one's own personal information and the desire of the Legislature to give institutions the power to grant requesters access to their own personal information.[32]

[86] If the institution refuses to give an individual access to their own personal information under section 49(a), the institution must show that it considered whether a record should be released to the requester because the record contains their personal information. I address this under Issue E below.

[87] In this case, the university relies on section 19. However, if the record contains the personal information of the appellant, the appropriate exemption to consider is section 49(a) read with section 19.

[88] Section 19 exempts certain records from disclosure, either because they are subject to solicitor-client privilege or because they were prepared by or for legal counsel for an institution. It states:

> A head may refuse to disclose a record,
>
> > (a) that is subject to solicitor-client privilege,

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[32] Order M-352.

> (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.

[89] Section 19 contains three different exemptions, which the IPC has referred in previous decisions as making up two "branches."

[90] The first branch, found in section 19(a), ("subject to solicitor-client privilege") is based on common law. The second branch, found in sections 19(b) and (c), ("prepared by or for Crown counsel" or "prepared by or for counsel employed or retained by an educational institution or hospital") contains statutory privileges created by the *Act*.

[91] The institution must establish that at least one branch applies.

[92] At common law, solicitor-client privilege encompasses two types of privilege:

- solicitor-client communication privilege; and
- litigation privilege.

[93] The rationale for the common law solicitor-client communication privilege is to ensure that a client may freely confide in their lawyer on a legal matter. This privilege protects direct communications of a confidential nature between lawyer and client, or their agents or employees, made for the purpose of obtaining or giving legal advice. The privilege covers not only the legal advice itself and the request for advice, but also communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given.

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

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

Representations

[96] The university submits that the record it claims is subject to solicitor-client privilege is a communication between its counsel and employees, and contains information relating to legal advice sought or provided within the definition of solicitor-client communication privilege under common law.

[97] It refers to the Supreme Court of Canada in *Alberta* (*Information and Privacy Commissioner*) *v. University of Calgary* where it held that:

> solicitor-client privilege is fundamental to the proper functioning of our legal system and a cornerstone of access to justice. Without the assurance of confidentiality, people cannot be expected to speak honestly and candidly with their lawyers, which compromises the quality of the legal advice they receive. It is in the public interest to protect solicitor-client privilege.[33]

[98] Further, the university observes that solicitor-client privilege belongs to the client, not to the lawyer. It also submits that there was no express or implied waiver of privilege.

[99] In her representations, the appellant refers to the title of the record, according to the index provided as "request for help." She submits that the exemption at section 19 does not apply because the record originates from the same department where she is an employee. She also submits that if the record was sent to the general counsel of the university, then it is not subject to solicitor-client privilege because the university's general counsel does not provide legal advice to faculty members on a one-to-one basis, but to the university as an institution.

[100] Since the university did not provide the IPC with a copy of the record it withheld under section 19, it provided an affidavit sworn by its general counsel. This affidavit included confidential portions describing the withheld record. Non-confidential portions of the affidavit were shared with the appellant who was invited to reply. The appellant did not provide further submissions.

[101] In her affidavit, the general counsel states that she provides legal advice and information to her client, the university, and all university departments and employees. She indicates that this advice may relate to a range of legal issues, including advice on human rights and employment matters. She attests that the communication in page 119 consists of legal advice between legal counsel and university employees acting in the scope of their employment while engaged in university business.

Analysis and finding

[102] Based on my review of the evidence provided by the university, and for the reasons set out below, I find that section 19 applies to exempt page 119.

[103] Although the university has not provided the IPC with a copy of the record that was withheld based on solicitor-client privilege, it has provided an affidavit sworn by its legal counsel who was directly involved in the matter.

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[33] [2016] 2 SCR 555, 2016 sec 53 (CanLII).

[104] As set out above, 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.[34] I find that the information in the record claimed to be subject to section 19, falls within the scope of the exemption because disclosure of this information would reveal confidential communications provided in the context of a solicitor-client relationship or reveal the substance of the confidential communication or legal opinion provided.

[105] In considering the confidential portions of the affidavit of the university's legal counsel which describe the record, I find that the withheld information qualifies for exemption under Branch 1, solicitor-client communication privilege and is exempt under section 19. As set out in the affidavit provided by the university, the communication consists of legal advice between legal counsel and university employees acting in the scope of their employment while engaged in university business. I accept the evidence provided by the university's legal counsel that she reviewed and confirmed that the record falls within the category of solicitor-client communication privilege as it would fall within the continuum of communications between solicitor and client in relation to a specified circumstance.

[106] Also, there is no evidence the university has waived this privilege. As a result, I find that there has not been a waiver of solicitor-client privilege in relation to the record at issue and I find that section 19 applies, subject to my finding on the university's exercise of discretion below.

[107] As stated above, it is not clear whether or not this record also contains the personal information of the appellant as this was not addressed by the parties. I address this under Issue E below.

Issue E: Did the university exercise its discretion under section 19 and 49(b)? if so should the IPC uphold the exercise of discretion?

[108] The section 19, 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.

[109] 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.

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

[110] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations. The IPC may not, however, substitute its own discretion for that of the institution.

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

- 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

[112] The university submits that it took into consideration the appellant's right to access her own personal information, and balanced that right with the need to protect the affected parties' right to privacy, and for the institution to maintain the confidentiality over certain information needed to conduct the business of the university. The university submits that it has, in good faith, released as many of the records, or portions of the records, that it believes it is possible to disclose while

balancing these competing needs.

[113] The appellant did not specifically address the university's exercise of discretion in her representations. The appellant submits that the university's decision to withhold these records indicates that it is more interested in supporting arbitrary, discriminatory decisions, made in bad faith, over creating a supportive, accessible and equitable workplace for all employees.

Finding

[114] I have considered the circumstances surrounding this appeal and the university's representations and I am satisfied that it has properly exercised it discretion with respect to the records it withheld under sections 19 and 49(b). The university considered the purposes of the *Act* and has given due regard to the nature and sensitivity of the information in the specific circumstances of this appeal. Accordingly, I find that the university took relevant factors into account and I uphold its exercise of discretion in this appeal.

[115] As I stated above, it is unclear to me whether page 119 contains the personal information of the appellant. If it does, then section 49(a) would apply. The discretionary nature of section 49(a) 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 own personal information.

[116] I am satisfied in the circumstances that the university considered the fact that many of the records contain the appellant's personal information. If record 119 contains the appellant's personal information, I am satisfied, given the university efforts to sever and disclose other personal information to the appellant, that it considered this in respect of record 119 too. I am also satisfied that it did not exercise its discretion in bad faith or for an improper purpose. The university considered the purposes of the *Act* and has given due regard to the nature and sensitivity of the information in the specific circumstances of this appeal. Accordingly, I find that the university took relevant factors into account and I uphold its exercise of discretion in this appeal.

Issue F: Did the university conduct a reasonable search for records?

[117] 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.[35] 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.

[118] 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

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[35] Orders P-85, P-221 and PO-1954-I.

show that it has made a reasonable effort to identify and locate responsive records.[36] To be responsive, a record must be "reasonably related" to the request.[37]

[119] 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.[38] 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.[39]

[120] 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.[40]

Representations

[121] The university provided an affidavit sworn by its coordinator of records management and privacy office (the coordinator), who was the university employee responsible for coordinating the search. The coordinator submits that after reviewing the request she considered the scope clear and that a reasonable search for all responsive records could be completed.

[122] The coordinator notes that she contacted the eleven employees who were specifically named in the request to notify them and ask to search for responsive records. The co-ordinator provided her letter that she sent to the specified employees along with the instructions she provided on how to perform a search.

[123] The coordinator submits that staff and faculty who completed a search provided confirmation by completing the search form provided to them or through an email that confirmed that they had completed a search for responsive records in accordance with the coordinator’s request. The coordinator affirms that from her review of these communications, university staff and faculty understood their responsibilities and made reasonable efforts to complete a search for responsive records.

[124] The coordinator submits that the records provided by faculty and staff were consistent with what she expected following her initial review of a responsive sample of records when determining the fee estimate. The coordinator submits that given the nature of an employee's position, she expected that some employees would have no responsive records as they would have had no interactions with the appellant in the course of their job during the responsive time period.

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[36] Orders P-624 and PO-2559.
[37] Order PO-2554.
[38] Orders M-909, PO-2469 and PO-2592.
[39] Order MO-2185.
[40] Order MO-2246.

[125] The coordinator submits that all records were reviewed and consideration was given as to whether it was possible that any responsive records were not provided. For example, she submits that email communications were reviewed to consider if attachments were missing. The coordinator submits that based on the search that was completed, and feedback received from the numerous employees who searched for records, the university is not aware of any responsive records found during the search that were not in its possession.

[126] The coordinator affirms that based on the instructions provided and the range of records located through the search, she believes a reasonable search was completed to locate responsive records within the university's custody or control.

[127] The appellant did not address the university's search in her representations and did not provide the basis for her belief that additional responsive records should exist.

Finding

[128] I find that the university has provided sufficient evidence to show that it made a reasonable effort to identify and locate responsive records. The university's searches were coordinated by an experienced employee, the coordinator of records management and privacy office. The searches were conducted by staff members who had detailed instructions as to the searches to be conducted. Given that records were located and the coordinator reviewed the responsive records identified in order to determine if records were missed, I am satisfied that the university's search for responsive records was reasonable in the circumstances. As noted, the university is not required to prove with absolute certainty that further records do not exist.

[129] Although the appellant will rarely be in a position to indicate precisely which records the institution has not identified, the appellant still must provide a reasonable basis for concluding that such records exist. As the appellant did not address this issue in her representations, it is my view that she has not provided a reasonable basis for me to conclude that further responsive records exist. As a result, I find that the university's search was reasonable.

ORDER:

The appeal is dismissed.

Original Signed by: June 13, 2022

Alec Fadel
Adjudicator