Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4334

Appeal PA19-00002

University of Waterloo

December 30, 2022

Summary: The appellant sought access to all university records about him and certain events in which he was involved for a specified time. The university granted the appellant partial access to the records responsive to his request. The university relied on the discretionary exemptions in section 49(b) (personal privacy), and section 49(a) (discretion to refuse requester's own information), read with sections 13(1) (advice or recommendations) and 17(1) (third party information), to deny access to some information and emails.

In this order, the adjudicator upholds the university's decision in part. She orders the university to disclose information and records that do not qualify for exemption under section 49(a) read with section 17(1), and one record that is not exempt under section 49(b) due to the application of the absurd result principle. The adjudicator also orders the university to disclose the appellant's personal information that can reasonably be severed from some records in accordance with the university's severing obligation under section 10(2) of the *Act*. The adjudicator upholds the balance of the university's decision and finds that the university conducted a reasonable search for responsive records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 2(1) (definition of "personal information"), 10(1), 10(2), 13(1), 17(1), 24, 49(a) and 49(b).

Orders and Investigation Reports Considered: PO-3715.

Cases Considered: *Canada* (*Information Commissioner*) *v. Canada* (*Minister of National Defence*), 2011 SCC 25 (CanLII), [2011] 2 SCR 306.

OVERVIEW:

[1] This order resolves an appeal regarding a student's right of access to university records mentioning him, including records relating to an investigation of a complaint made by the student and allegations about the student's conduct.

[2] The appellant submitted an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the University of Waterloo (the university) for all academic and non-academic disciplinary records and email communications about him. The appellant's access request named 27 individuals whose email accounts the appellant wanted searched, and it included a list of terms for the university to use in its search for responsive records. The university located a significant number of records responsive to the request and issued a decision granting the appellant partial access. The university relied on various exemptions to deny the appellant access to some records and information. It also claimed that two exclusions applied to remove other records from the application of the *Act.* The appellant was not satisfied with the university's decision and appealed it to the Office of the Information and Privacy Commissioner of Ontario (the IPC).

[3] The IPC attempted to mediate the appeal. During mediation, the appellant narrowed his access request. In response, the university issued revised access decisions. At the end of mediation, eight records remained at issue. The university confirmed in its final revised decision that it relied on the discretionary exemption in section 49(b) (personal privacy), and the discretionary exemption in section 49(a) (discretion to refuse requester's own information), read with sections 13(1) (advice or recommendations) and 17(1) (third party information) of the *Act*, to withhold the information from the emails and attachments described in the Records section, below.

[4] A mediated resolution was not possible and the appeal was moved to the adjudication stage of the appeal process in which an adjudicator may conduct an inquiry under the *Act.* I conducted an inquiry, obtaining representations from the university and the appellant, which I shared in accordance with *Practice Direction Number 7* of the IPC's *Code of Procedure*. Although I shared only the university's non-confidential representations with the appellant, I have considered the complete representations of the parties in making the determinations that follow.

[5] In this order, I uphold the university's decision in part and I order the university to disclose information and records that do not qualify for exemption under section 49(a) read with section 17(1), and one record that is not exempt under section 49(b) due to the application of the absurd result principle. I also order the university to disclose the appellant's personal information that can reasonably be severed from some records in accordance with the university's severing obligation under section 10(2) of the *Act*. I uphold the balance of the university's decision and the reasonableness of its search for responsive records.

RECORDS:

[6] The eight records at issue in this appeal, summarized below, are all emails (some with attachments) between various university administrators and other individuals.

- Record 45, withheld completely, is four pages composed of a two- page email and a two-page attachment (attachment 8 at pages 36 and 37).
- Records 68 and 69, withheld completely, are both one-page emails.
- Records 71 (two pages) and 75 (three pages), withheld completely, are both email chains and contain one email in common.
- Record 78, partly withheld, is a six-page email chain.
- Record 79, partly withheld, is an eight-page email chain that is a duplicate of Record 78, except that it contains just over one additional page of emails.
- Record 82, partly withheld, is 103 pages composed of a three-page email chain and a 100-page attachment.

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 discretionary personal privacy exemption at section 49(b) apply to the information in records 45, 68, 71, 75, 78, 79 and 82?

C. Does the discretionary exemption at section 49(a), read with section 13(1) (advice or recommendations), apply to the information in records 75, 78, 79 and 82?

D. Does the discretionary exemption at section 49(a), read with section 17(1) (third party information), apply to the information in records 45, 68, 69, 71,75 and the 100-page attachment to record 82?

E. Did the university exercise its discretion under sections 49(a) and 49(b) appropriately?

F. Did the university conduct a reasonable search for responsive records and does it have custody or control of additional responsive records?

DISCUSSION:

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

[7] In order to determine which sections of the *Act* may apply to the records at issue, I must first decide whether the records contain "personal information," and, if so, to whom the personal information relates. Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual." Information is "about" an "identifiable individual" when it refers to the individual in a personal capacity, revealing something of a personal nature about them, and it is reasonably to expect that the individual can be identified from the information alone or combined with other information.

[8] Section 2(1) lists examples of personal information, including the following, which are relevant in this appeal:

> "personal information" means recorded information about an identifiable individual, including,
>
> > (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,
> >
> > (e) the personal opinions or views of the individual except if they relate to another individual,
> >
> > (h) the individual's name if 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.

[9] The records all concern the appellant, and they relate to an investigation involving the appellant of a volunteer organization of the undergraduate student federation (the student federation). There is no dispute, and I find, that all of the records at issue contain personal information about the appellant. The personal information includes the appellant's name and other information where it appears with other personal information relating to him, which qualifies as personal information under paragraph (h) of the definition of that term in section 2(1) of the *Act.* The records also contain information relating to the appellant's education or employment history, which qualifies as personal information under paragraph (b) of the definition, and the appellant's personal opinions or views (paragraph (e) of the definition).

[10] Record 69 contains the personal information of only the appellant. The remaining records at issue, records 45, 68, 71, 75, 78, 79 and 82, also contain personal information belonging to other individuals (the affected parties), including

their names and other personal information relating to them, within the meaning of paragraph (h) of the definition.

[11] Having found that all of the records contain the appellant's personal information and all but one of the records also contain the personal information of the affected parties, I will consider whether the withheld information is exempt under the discretionary exemptions in sections 49(a) and 49(b) of the *Act.*

B. Does the discretionary personal privacy exemption at section 49(b) apply to the information in records 45, 68, 71, 75, 78, 79 and 82?

[12] Section 49 of the *Act* provides a number of exemptions from individuals' general right of access, under section 47(1), to their own personal information held by an institution. The university relies on section 49(b) to withhold some information from records 45, 68, 71, 75, 78, 79 and 82.

[13] 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. The section 49(b) exemption is discretionary, meaning that the institution can decide to disclose another individual's personal information to a requester even if doing so would result in an unjustified invasion of the other individual's personal privacy. If disclosing another individual's personal information would not be an unjustified invasion of personal privacy, then the information is not exempt under section 49(b).

[14] Sections 21(1) to (4) provide guidance in deciding whether disclosure would be an unjustified invasion of the other individual's personal privacy. The parties do not rely on sections 21(1) or 21(4) in their representations, and I find that these sections are not relevant in this appeal.

[15] Accordingly, I will consider sections 21(2) and 21(3) in deciding whether disclosure of the information at issue would be an unjustified invasion of personal privacy under section 49(b). As noted in the Notice of Inquiry I provided to the parties, in deciding whether disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 49(b), I must consider and weigh the factors and presumptions in sections 21(2) and 21(3) and balance the interests of the parties.[1]

[16] The university asserts that the presumption in section 21(3)(b) applies to records 45, 68, 71, 75, 78 and 79. Section 21(3)(b) presumes that a disclosure of personal information, which was compiled and is identifiable as part of an investigation

[1] Order MO-2954.

into a possible violation of law, constitutes an unjustified invasion of personal privacy.[2] Previous IPC orders confirm that the section 21(3)(b) presumption requires only that there be an investigation into a possible violation of law.[3] Although the university claims that the presumption applies because the investigation involved police, it does not provide sufficient information to support its claim, such as, identifying the law or legislative provision that was investigated as possibly having been violated, or explaining how the records were compiled and are identifiable as part of such an investigation. The university's representations do not establish that the presumption applies to the records, as claimed, and I find that the presumption does not apply.

[17] The university also claims that the factors in sections 21(2)(e), (f), (h) and (i) – that weigh in favour of protecting the privacy of affected parties and against disclosure to the appellant – apply to records 45, 68, 71, 75, 78, 79 and 82. These factors read:

> (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,
>
> > (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.

[18] In its non-confidential representations that I shared with the appellant, the university argues that, due to the investigative context in which the records were created, the appellant's involvement in the investigation, and the nature of the withheld information, disclosure of the affected parties' information in the records would be an unjustified invasion of personal privacy of the affected parties. The university asserts that the affected parties' withheld personal information in the records is highly sensitive within the meaning of section 21(2)(f), and its disclosure would cause the affected parties significant personal distress and would unfairly expose them to harm as contemplated by section 21(2)(e). It adds that the affected parties' withheld personal information was supplied in confidence to the university with the expectation that it would be treated confidentially, engaging the factor in section 21(2)(h). Finally, the university asserts that disclosure may unfairly damage the affected parties' reputation, engaging the factor in section 21(2)(i). As noted above, the university also provides

---

[2] Section 21(3)(b) contains the following exception to the presumption: "except to the extent that the disclosure is necessary to prosecute the violation or to continue the investigation."
[3] Orders P-242 and MO-2235.

confidential representations, which, although I did not share them with the appellant, I reviewed and considered.

[19] The appellant does not directly address the factors relied on by the university or the university's representations on this issue. The appellant also does not argue which of the section 21(2) factors that weigh in favour of disclosure may apply, or, if any unlisted factors weigh in favour of disclosure.[4]

[20] Having reviewed the parties' complete representations and the withheld information in the records, I am satisfied that the factor in section 21(2)(f) applies and weighs in favour of not disclosing the affected parties' with held personal information to the appellant. I am also satisfied that, considering the investigative context in which the records were created, the application of this one factor, when balanced with the interests of the parties as required under section 49(b), is sufficient to establish that disclosure of the withheld affected parties' personal information would be an unjustified invasion of their personal privacy. The appellant has been granted access to most of his personal information in records 78, 79 and 82, and his right of access must yield to the privacy interests of the affected parties under the section 49(b) exemption, which protects against unjustified invasions of personal privacy.

[21] In reaching this conclusion, I considered whether the appellant's representations establish the application of any other section 21(2) factor or any unlisted factor that may weigh in favour of disclosure, but I find that they do not.

[22] I find that disclosure of the affected parties' withheld personal information in records 45 (including attachment 8), 68, 71, 75, 78, 79 and 82 (excluding the 100-page attachment) would be an unjustified invasion of their personal privacy and I uphold the university's decision to deny the appellant access to that personal information under section 49(b) of the *Act*. Under Issue E below, I consider the university's exercise of discretion in deciding to rely on this discretionary exemption.

[23] However, I also note that records 45 (excluding attachment 8), 68, 71 and 75 include personal information of the appellant that has been withheld under section 49(b), among other sections. I find that some of the appellant's personal information can reasonably be severed without disclosing information that I have found exempt under section 49(b). Because the university has claimed other exemptions to withhold this personal information of the appellant, I will consider the possible application of those exemptions to this information, below, before deciding whether it can be severed in accordance with section 10(2)[5] of the *Act* and whether it must be disclosed to the

---

[4] Other considerations, besides those listed in sections 21(2)(a) to (j) must be considered under section 21(2) if they are relevant. These unlisted factors may include inherent fairness issues and ensuring public confidence in an institution.

[5] Section 10(2) reads:

> If an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 12 to 22 and the head of the institution

appellant.

[24] I come to a different conclusion regarding the 100-page attachment to record 82, which, the university acknowledges in its representations, is a complaint authored by the appellant. Previous IPC orders[6] have found that an institution may not be able to rely on the section 49(b) exemption in cases where the requester originally supplied the information in the record, since withholding the information might be absurd and inconsistent with the purpose of the exemption. This is the case with the 100-page attachment to record 82. Despite the university's arguments to the contrary, I am satisfied that withholding this attachment from the appellant under section 49(b) would be absurd and inconsistent with the purpose of the section 49(b) exemption. As the author of the 100-page attachment, the appellant is aware of all of the information in it. I find that the 100-page attachment to record 82 does not qualify for exemption under section 49(b) due to the application of the absurd result principle. The university also claims that this attachment is exempt under section 49(a) read with section 17(1). As a result, I consider whether this attachment is exempt under section 49(a) at Issue D, below.

C. Does the discretionary exemption at section 49(a), read with section 13(1) (advice or recommendations), apply to the information in records 75, 78, 79 and 82?

[25] The university has also withheld information in records 75, 78, 79 and 82[7] under the discretionary exemption in section 49(a) of the *Act*, read with section 13(1). As such, and because I have found that these records contain the appellant's personal information, I must determine whether the withheld information is exempt under section 49(a), read with section 13(1).

[26] 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.

[27] Section 13(1) of the *Act* exempts certain records containing advice or recommendations given to an institution. This exemption aims to preserve an effective and neutral public service by ensuring that people employed or retained by institutions

---

> is not of the opinion that the request is frivolous or vexatious, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

[6] Orders M-444 and MO-1323.

[7] This withheld information is different from the personal information of the affected parties in these records that I have already addressed in my consideration of section 49(b) above.

are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.[8] Sections 13(2) and 13(3) set out exceptions to the exemption in section 13(1), however, they are not relevant in this appeal. Section 13(1) reads:

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

[28] The university submits that the information in records 75, 78, 79 and 82 that it withheld under section 49(a) read with section 13(1) is exempt and does not fall within any of the exceptions at sections 13(2) and 13(3). It explains that these records are emails between its employees from its Human Rights and Conflict Management Office, which delivers professional services, including mediation, consultation, conflict resolution and advice and recommendations to its campus community on a confidential basis. The university submits that these records are communications seeking recommendations and advice regarding, variously, certain university policies and courses of action involving the appellant's complaint and an incident in which he was involved. The university also provides confidential representations on the application of this exemption. The appellant does not directly address this issue in his representations.

[29] Having reviewed the information withheld by the university under section 49(a) read with section 13(1) and considered the university's complete representations, I am satisfied that the withheld information qualifies as advice or recommendations within the meaning of section 13(1). The withheld information all relates to the university's consideration and handling of the appellant's complaint and related investigation. Some of the withheld information is advice about the suggested course of action for the university, and some withheld information constitutes recommendations about policies and alternative courses of action. I conclude that disclosure of the information withheld by the university under section 49(a) read with section 13(1) would reveal the advice or recommendations itself or would permit the drawing of accurate inferences about the nature of the actual advice or recommendations. I find that this withheld information is exempt from disclosure under section 13(1). Under Issue E below, I consider the university's exercise of discretion in deciding to rely on this discretionary exemption.

D. Does the discretionary exemption at section 49(a), read with section 17(1) (third party information), apply to the information in records 45, 68, 69, 71, 75 and the 100-page attachment to record 82?

[30] The university has denied access to records 45, 68, 69, 71, 75 and the 100-page attachment to record 82 under section 49(a), read with the third party information exemption at section 17(1). Record 69 is an email about the student federation's

[8] *John Doe v. Ontario* (*Finance*), 2014 SCC 36, at para. 43.

investigation of the appellant's complaint. As noted above, records 45, 68, 69, 71 and 75 are emails and the attachment to record 82 is the complaint authored by the appellant.

[31] The purpose of section 17(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,[9] where specific harms can reasonably be expected to result from its disclosure.[10] Section 17(1) reads:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
>
> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[32] For section 17(1) to apply, the university must satisfy each part of the following three-part test:

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

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

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

[33] The university argues that the withheld information is exempt under section 49(a) read with section 17(1) because it is confidential information belonging to the

---

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

student federation. I disagree and, in my view, it is not even arguable that this exemption applies here. The university's representations do not establish or fully argue that any part of the three-part test for the application of section 17(1) is met; they simply assume that, because the subject matter referred to in the records relates to the student federation and some of the emails include student federation representatives, these records qualify as confidential informational assets of the student federation. The university also asserts that the information in record 69 fits within the labour relations information and that I should seek representations directly from the third party about the application of section 17(1). The university's representations do not identify the confidential information it suggests was provided to it by the student federation or the specific harms that can reasonably be expected to result from its disclosure.

[34] Having reviewed the records, I observe that they do not reveal any information that is a trade secret or scientific, technical, commercial, financial or labour relations information, as required to establish the first part of the three-part test for the application of section 17(1). Accordingly, I find that the withheld information in records 45, 68, 69, 71, 75 and the attachment to record 82 is not protected under section 17(1) of the *Act* and, therefore, the section 49(a) exemption, read with section 17(1), does not apply. The university has not claimed any other exemption to withhold record 69. As a result, I will order the university to disclose record 69 to the appellant. I will also order the university to disclose to the appellant all of the attachment to record 82, and all of his personal information in records 45, 68, 71, 75, excluding that which I have found exempt under Issues B and C above, in accordance with the severing requirement at section 10(2) of the *Act.*

E. Did the university exercise its discretion under sections 49(a) and 49(b) appropriately?

[35] The section 49(a) and 49(b) exemptions are discretionary (the institution "may" refuse to disclose), meaning that the university can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so. In addition, the IPC 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; or
- it fails to take into account relevant considerations.

[36] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.[11] The IPC cannot, however, substitute its own discretion for that of the institution.[12] Relevant considerations in the

[11] Order MO-1573.
[12] Section 54(2).

exercise of discretion in this appeal are 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, and
- the privacy of individuals should be protected.

[37] Also relevant in this appeal are the following considerations:

- the wording of the exemption and the interests it seeks to protect,
- whether the requester is seeking his 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,
- 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, and
- the historic practice of the institution with respect to similar information.

[38] In its representations, the university acknowledges its obligation under the *Act* to disclose as much information as possible to the appellant subject to judicious severance of information that is exempt. It submits that it carefully reviewed the records at issue and disclosed as much information as possible, without unjustifiably invading the personal privacy of the affected parties. The university states that it considered the nature of the exemptions it applied, the importance of protecting the personal privacy of the affected parties, and the nature of the relationship between the appellant and the affected parties. Regarding the latter, the university notes that in his own access request, the appellant used the words "danger, safety, harass, stalk, nuisance, and/or trouble in relation to [himself]" which supports its exercise of discretion to withhold the affected parties' personal information under section 49(b) and certain advice and recommendations under section 49(a) read with section 13(1) regarding the investigation and handling of the appellant's complaint and the allegations about his conduct. Finally, the university states it considered whether the appellant had a sympathetic or compelling need to for the withheld information and decided he did not. The appellant does not directly address this issue or the university's representations.

[39] Having considered the university's representations, I am satisfied that it

exercised its discretion under sections 49(a) and 49(b) in denying access to the withheld information that I have found exempt under those sections. I am satisfied that the university did not exercise its discretion in bad faith or for an improper purpose. Accordingly, I uphold the university's exercise of discretion under sections 49(a) and 49(b).

F. Did the university conduct a reasonable search for responsive records and does it have custody or control of additional responsive records?

[40] In his representations, the appellant challenges the reasonableness of the university's search for responsive records and claims that additional responsive records exist beyond those found by the university. In doing so, the appellant raises the issue of whether the university conducted a reasonable search for records as required by section 24 of the *Act*.[13]

[41] IPC orders have defined a reasonable search as one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.[14] The university must provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records.[15] The *Act* does not require the university to prove with certainty that further records do not exist. In determining whether the university has conducted a reasonable search for responsive records, I will consider whether the appellant has provided a reasonable basis for concluding that additional records exist.

[42] In his representations, the appellant asserts that additional responsive records exist; specifically, he argues that the university should have additional emails from a number of individuals he listed in his access request who are affiliated with the student federation. The appellant further submits that such records are in the university's custody or control because they are saved on the university's servers. He also argues that some responsive records may be located in university email accounts of individuals affiliated with the student federation because, although the student federation has its own email accounts, some of its representatives use their university emails when conducting student federation business. He adds that, despite the university's claim that the student federation is a distinct legal entity, the university shared his personal information with the student federation and seemed to act in an advisory capacity to the student federation in matters of disciplinary measures taken against him. The appellant names specific university administrators who, he alleges, maintained a "cheerful dialogue" with the student federation "regarding [his] disciplinary measures."

[43] Regarding its search, the university explains the steps it took to locate records responsive to the appellant's request: it provides details of the email its Privacy Officer sent to 11 named individuals (all university employees) and details of the process she

[13] Orders P-85, P-221 and PO-1954-I.
[14] Orders M-909, PO-2469 and PO-2592.
[15] Orders P-624 and PO-2559.

followed to review the responsive records that were located and to compile an index of records. The university submits that its search for responsive records was reasonable and that there is no basis to conclude that additional records responsive to the appellant's request exist in its custody or control. The university also notes that the responsive records it located include emails that the university employees named in the appellant's request received from and sent to the student federation; they also include emails between the named university employees in which email of the student federation was forwarded or included as an attachment.

[44] In response to the appellant's assertions that it has custody or control of the student federation's emails, the university explains that the student federation is an incorporated entity that exists separately from the university and has been in operation since 1967. The university states that this type of entity is also commonly known to exist separately from other Ontario universities and has been recognized as such in Order PO- 3894. The university adds that, as can be seen from the student federation's website, it is not the university, it is not branded as the university and the university has no control, statutory or otherwise, over it. The university notes that the student federation describes itself as "the official collective voice and legal representative of undergraduate students." The university submits that it could not reasonably expect to receive any responsive records from the student federation upon asking, and therefore, it did not ask.

[45] In response to the appellant's argument that the university's servers contain the email accounts of representatives of the student federation who were students and who may have used their university email accounts to communicate about the incidents detailed in his access request, the university relies on Order PO-3715. It argues that, as confirmed in Order PO-3715, the email accounts of university students are not in its custody or control for the purpose of section 10(1) of the *Act* as these are records over which it has bare possession only since the university provides email accounts to students with the presumption of privacy for their use.

[46] The appellant does not provide a reply to the university's representations about the student federation's status as a distinct entity. Nor does the appellant respond to the university's representations explaining why it does not have custody or control of the student federation's records, including emails of individuals who were students and used their university student email accounts during the events in question involving the appellant. The university also addresses the two-part test articulated by the Supreme Court of Canada[16] for institutional control of a record that is not in its possession. *National Defence* found that in order for control to be established, answers to both of the following questions must be yes (the university's responses follow the questions):

(1) Do the contents of the document relate to a departmental matter?

[16] *Canada* (*Information Commissioner*) *v. Canada* (*Minister of National Defence*), 2011 SCC 25 (CanLII), [2011] 2 SCR 306. (*National Defence*) I included the *National Defence* test in the Notice of Inquiry.

> No, the contents of student emails or emails of the student federation do not relate to a university matter. The records of the 16 named individuals from the student federation relate to a matter between the appellant and the student federation.

(2) Could the government institution reasonably expect to obtain a copy of the document upon request?

> No, the university could not reasonable expect to obtain a copy of the documents upon request.

[47] Having reviewed the records at issue and considered the parties' complete representations, I am satisfied that the university conducted a reasonable search for responsive records in its custody or control and that it does not have custody or control of the student federation's emails or the emails of students affiliated with the student federation who were involved in the incidents in question. The details provided by the university about the search it conducted establish that an experienced employee knowledgeable in the subject matter of the request made a reasonable effort to locate records that are reasonably related to the request.

[48] I disagree with the appellant's assertion that the university has custody or control of the student federation's emails. I agree with the university that it has no authority over the student federation's emails. The student federation is a separate entity from the university and it is not an institution under the *Act*. While the university may have bare possession of student emails, I agree with and adopt the approach taken in Order PO- 3715 that student email accounts are not in a university's custody or under its control for the purpose of section 10(1) of the *Act*.[17] I find that any records in the email accounts of student federation representatives are not in the university's custody or under its control for the purpose of section 10(1) of the *Act*. Furthermore, based on the evidence before me, I find that the university's search for records responsive to the request was reasonable according to section 24 of the *Act*. I dismiss this aspect of the appeal.

Summary of findings and severing under section 10(2)

[49] In summary, I have upheld the university's claim of section 49(b) to withhold the affected parties' personal information in records 45 (including attachment 8), 68, 71, 75, 78, 79 and 82 (excluding the 100-page attachment, which I have found is not exempt (Issue B). I have upheld the university's claim that the information in records 75, 78, 79 and 82, that it withheld under section 49(a) read with section 13(1), is exempt from disclosure (Issue C). I have also upheld the university's exercise of discretion under sections 49(a) and 49(b) (Issue E) and the reasonableness of its search for responsive records (Issue F).

---

[17] See paragraphs 171 to 188 of Order PO-3715 for the complete analysis and application of this approach.

[50] I have not upheld the university's claim of section 49(a) read with section 17(1) to the withheld information in records 45, 68, 69, 71, 75 and the 100-page attachment to record 82. I have also found that some of the appellant's personal information in records 45, 68, 71 and 75, excluding that which I found exempt under Issues B and C above, should be severed and disclosed in accordance with the requirement at section 10(2) of the *Act*. In the order provisions below, I will order the university to disclose the appellant's personal information that can reasonably be severed from some records in accordance with the university's severing obligation under section 10(2) of the *Act*.

ORDER:

1. I order the university to disclose the following records and information to the appellant by February 6, 2023, but not before February 1, 2023:

   • Record 69

   • the 100-page attachment to record 82

   • the appellant's personal information in records 45, 68, 71 and 75 that can reasonably be severed from exempt information in accordance with section 10(2) of the *Act*. For clarity, I include (with the university's copy of this order) a copy of these records highlighting the appellant's personal information that the university is to disclose.

2. I uphold the balance of the university's decision and the reasonableness of its search for responsive records.

Original Signed By: December 30, 2022

Stella Ball
Adjudicator