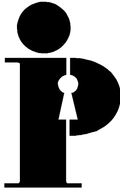

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2951

Appeal PA08-224

University of Ottawa

NATURE OF THE APPEAL:

The University of Ottawa (the University) received the following request under the *Freedom of Information and Protection of Privacy Act* (the *Act*):

> I request all emails from [a named individual (the affected party)] received by the Dean of the Faculty of Science and all emails sent to [the affected party] by the Dean of the Faculty of Science. I also request all emails from [the affected party] received by the Dean of the Faculty of Science and forwarded by the Dean of the Faculty of Science to a third party. The respondent period is from September 1, 2005, to present.

The University located records responsive to the request and issued a decision letter to the requester denying him access to these records pursuant to the exclusion in section 65(6) (labour relations and employment records), the discretionary exemptions in sections 19 (solicitor-client privilege) and 22 (information available to the public), and the mandatory exemption in section 21 (personal privacy) of the *Act*.

The requester (now the appellant) appealed the University's decision.

During mediation, the possible application of sections 49(a) and 49(b) were identified as issues in this appeal. In addition, the University provided the appellant with a revised index of records, and issues regarding the number and description of the responsive records were resolved. The appellant confirmed that he wished to pursue access to all records at issue in this appeal.

Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process where an adjudicator conducts an inquiry under the *Act*. A Notice of Inquiry, identifying the facts and issues in this appeal, was initially sent to the University and the affected party. Representations were received from both of these parties. The Notice of Inquiry was then sent to the appellant, along with the non-confidential portions of the representations of the University and the affected party. The appellant also provided representations in response to the Notice.

This file was then transferred to me to complete the inquiry. I also note that, after all the representations were received, I received an unsolicited letter from a labour organization addressing certain issues in this appeal. I have reviewed this material, and find that it does not affect the outcome of this appeal.

RECORDS:

The records remaining at issue consist of 65 documents. All of these records are emails or email strings between the affected party and the dean. Some of these emails also include attachments.

The records are numbered in reverse chronological order, with Record 1 being the most recent, and Record 65 being the oldest. Records 1 through 45 cover the period of time during which the affected party was employed in some capacity by the University. The earlier records (records 46-65) do not involve the affected party in an employment capacity.

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

General Principles

Section 65(6) of the *Act* 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:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

If section 65(6) applies to the record, and none of the exceptions found in section 65(7) apply, the record is excluded from the scope of the *Act*.

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

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 [Order PO-2157].

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 [*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, ("*Solicitor General*")].

Representations

The University takes the position that the *Act* does not apply to certain records because they fall within the exclusion in section 65(6). The University states that this section applies to a number of the records created during the time in which the affected party was an employee with the University (Records 6, 8, 9, 11, 13, 15-21, 23-27, 30-32, 34-36, 39, 40, 42, 44 and 45) and one record created prior to the affected party's employment (Record 50).

In its general representations on this exclusion, the University states that the records were prepared by employees or their assistants and/or agents of the University, on behalf of the University, and represent advice provided to management regarding labour-relations matters. The University then identifies that these records relate to matters in which the University is acting as an employer, and the terms and conditions of employment or human resources are at issue, and refers to the case of *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 98 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.) in support of its position that the records are, therefore, excluded. In addition, the University identifies that its relationship with its full-time professors is governed by a Collective Agreement, and that all labour-relations matters between the University and the professors are dealt with in accordance with the collective agreement. The University then states:

> At the time of the Appellant's request for information, which is the subject matter of this Appeal, the Appellant was an APUO member and involved with several labour-relations matters, such as grievances, with [the University]. These matters are on-going. The relationship between undergraduate and graduate students who are engaged by [the University] from time to time as teaching assistants, tutors, research assistants is governed by the Collective Agreement between [the University] and The Canadian Union of Public Employees ...
>
> Records 6, 7, 8, 9, 11, 13, 15-21, 23-28, 30-32, 34- 36, 39-40, 42, 44-45 and 50 relate, amongst others, to the administrative process involved in the development of [the University's] strategy in response to the grievances, disciplinary matters or complaints filed in accordance with the Collective Agreement. This includes, but is not limited to, the obtaining of information, the organization of the relevant materials, the clarification of facts from other individuals or events, the confirmation of what actually occurred in relation to the grievance and disciplinary issues, the general administration of the relevant grievance or disciplinary process, the obtaining of background information and supporting documents, and researching relevant issues. Numerous individuals at [the University] are involved with handling a labour-relations matter, including, but not limited to the Dean of the Faculty of Science, University of Ottawa legal counsel, members of the Human Resources department and other individuals.

In its confidential representations, the University then reviews each of the records which it claims fall outside the scope of the *Act* on the basis of the exclusion in section 65(6). After doing so, the University states:

> Accordingly, all of the above-referenced records were prepared by employees or agents on behalf of the University. The records were also maintained by the University which was in control and custody of these records. Furthermore, these Records contain information pertaining to various grievances filed by an individual or disciplinary matters filed against an individual who is subject to the Collective Agreement and/or the CUPE Agreement, which documents relate to labour relations or employment-related matters

The University then provides representations on the application of the exclusionary provisions in sections 65(6)1 and 65(6)3, which I review below.

The appellant does not directly address the issue of the application of the exclusion to the records at issue; however, he argues that the approach to this exclusion taken by this office in previous orders is incorrect. The appellant also argues that if the institution obtained or produced the records through actions which were improper or contrary to collective agreements, international agreements, legal precedents and other rules and contentions, any claimed exemptions or exclusions are made void by the institution's breaches. The appellant provides extensive representations identifying how, in his view, the collection and use of the records by the University violated a number of agreements, precedents, rules and conventions.

The appellant also refers to the fact that, pursuant to the applicable collective agreement, two formal grievances have been filed against the University in regards to the actions of the University in collecting and using material obtained by the affected party.

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

Introduction

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.

In addition to the representations set out above, the University confirms that it has an interest in the matters involving its own workforce and the collective agreements referred to. It states that the records at issue are internal emails prepared and maintained in relation to consultations, discussions and communications, and provides the following information on section 65(6)3:

> The information found in the Records relate to communications between University of Ottawa legal counsel, agents and the Dean of the faculty involved in the labour-relations issue. In particular, [the University] prepared and maintained these records with regard to consultations and communications concerning a disciplinary matter as well as a grievance filed against one of its professors ... The University had [an] interest in this matter involving its workforce [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner), supra*]. For any employer, … disciplinary actions and grievances filed under [a collective agreement] are serious matters which must be solved as efficiently as possible. Grievances as well as any form of tension in the workplace will affect the working environment. This could result in an increased stress level, unpleasant atmosphere, tensed relations between employees, etc. Therefore, the University of Ottawa has a definite interest in these matters.

Requirement 1: Were the records collected, prepared, maintained or used by the University or on its behalf?

The University identifies that the records are email communications between University legal counsel and University staff, including officers and agents, and takes the position that the records were collected, prepared, maintained and used by the University. Based on my review of the emails, it is clear that the records were collected, prepared, maintained and/or used by the University.

Requirement 2: Were the records collected, prepared, maintained and/or used in relation to meetings, consultations, discussions or communications?

In support of its position that the records were collected, prepared, maintained and/or used in relation to meetings, consultations, discussions or communications, the University states the records are emails prepared and maintained in relation to discussions and communications. On my review of these records, I am satisfied that they were prepared, maintained or used in relation to discussions or communications. The records themselves consist of email communications prepared by employees or their assistants and/or agents, and consist of communications between these parties and the dean and/or legal counsel.

Part 3: Were the meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest?

As identified above, the type of records excluded from the *Act* by section 65(3) 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.

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

- a job competition [Orders M-830, PO-2123]
- an employee's dismissal [Order MO-1654-I]

- a grievance under a collective agreement [Orders M-832, PO-1769]
- disciplinary proceedings under the *Police Services Act* [Order MO-1433-F]
- a "voluntary exit program" [Order M-1074]
- a review of "workload and working relationships" [Order PO-2057]
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act* [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.)]

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

- an organizational or operational review [Orders M-941, P-1369]
- litigation in which the institution may be found vicariously liable for the actions of its employee [Orders PO-1722, PO-1905]

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 [*Solicitor General* (cited above)].

In support of its position that the records fall within the exclusion in section 65(6)3, the University states that the records:

> … relate, amongst others, to the administrative process involved in the development of the University of Ottawa's strategy in response to the grievances, disciplinary matters or complaints filed in accordance with the Collective Agreement. This includes, but is not limited to, the obtaining of information, the organization of the relevant materials, the clarification of facts from other individuals or events, the confirmation of what actually occurred in relation to the grievance and disciplinary issues, the general administration of the relevant grievance or disciplinary process, the obtaining of background information and supporting documents, and researching relevant issues. Numerous individuals at [the University] are involved with handling a labour-relations matter, including, but not limited to the Dean of the Faculty of Science, University of Ottawa legal counsel, members of the Human Resources department and other individuals.

With respect to the issue of whether the University has an interest in the labour-relations or employment-related matters, the University confirms that it has an interest in the matters involving its own workforce and the collective agreements referred to.

Findings

Previous orders of this office, including the decision in "*Solicitor General*," have consistently found that disciplinary actions involving an employee are employment-related matters. In addition, a number of previous orders have established that grievances initiated pursuant to the

procedures contained in the collective agreement are, by their very nature, about labour relations matters (Orders PO-1223, PO-1769).

With respect to the scope of the exclusionary provision, Swinton J. for a unanimous Court, wrote in *Ontario (Ministry of Correctional Services) v. Goodis* (2008) that:

> In *Reynolds v. Ontario (Information and Privacy Commissioner*, [2006] O.J. No. 4356, this Court applied the equivalent to s. 65(6) found in municipal freedom of information legislation to documents compiled by the Honourable Coulter Osborne while inquiring into the conduct of the City of Toronto in selecting a proposal to develop Union Station. The records he compiled in interviewing Ms. Reynolds, a former employee, were excluded from the *Act*, as Mr. Osborne was carrying out a kind of performance review, which was an employment-related exercise that led to her dismissal (at para. 66). At para. 60, Lane J. stated,
>
>> It seems probable that the intention of the amendment was to protect the interests of institutions by removing public rights of access to certain records relating to their relations with their own workforce.

Cautioning that there is no general proposition that all records pertaining to employee conduct are excluded from the *Act*, even if they are in files pertaining to civil litigation or complaints by a third party, Swinton J. also pointed out that "(w)hether or not a particular record is 'employment related' will turn on an examination of the particular document."

I agree with and adopt the analysis set out above for the purpose of making my determinations in this appeal.

In this appeal, with the exception of Record 50, the records for which the exclusion is claimed are email communications between an employee of the University and the dean and, for most of these records, legal counsel. At the time of the request, the appellant was an APUO member, and was involved with several labour-relations matters, such as grievances, with the University. Subsequently, grievances were brought against the University relating directly to the collection and use of the records at issue.

The University has stated that the records relate to the administrative process involved in the development of the University of Ottawa's strategy in response to the grievances, disciplinary matters or complaints filed in accordance with the Collective Agreement. On my review of the records for which the exclusion in section 65(6)3 is claimed, I am satisfied that (with the exception of Record 50), they were prepared and maintained by the University with regard to consultations and communications concerning a disciplinary matter as well as grievances, including a grievance filed against one of its professors. Accordingly, these records relate to the University's relations with its own workforce, and the University has an interest in these records. In these circumstances, I am satisfied that the exclusionary wording in section 65(6)3 applies to the records, and they fall outside the scope of the *Act*.

With respect to the appellant's argument that the exclusionary provision cannot apply because the records were obtained or produced improperly or contrary to various agreements or protocols, in my view the manner in which the University obtained the records does not affect my finding that they are excluded from the scope of the *Act*, in the circumstances of this appeal. It is clear that the University used these records in relation to discussions or communications about labour relations or employment-related matters. Indeed, the manner in which the University collected and used the records appears to itself be an issue in two other grievances. In these circumstances, I find that the questions regarding the manner in which these records were obtained or used does not affect my finding that they are excluded from the scope of the *Act*.

Record 50 is different from the other records for which the exclusion was claimed. As identified above, a number of the records were provided by the affected party to the Dean prior to the affected party's employment with the University. Record 50 is one of these records, and it relates solely to an issue regarding a legal action. In my view, this record does not relate to a labour-relations or employment-related matter, nor has the University provided sufficient evidence to satisfy me that it fits within the exclusionary provision in section 65(6). As a result, I find that this record is not excluded from the scope of the *Act*.

In conclusion, I find that Records 6, 7, 8, 9, 11, 13, 15-21, 23-28, 30-32, 34-36, 39, 40, 42, 44 and 45 are excluded from the scope of the *Act*.

I will now review whether the remaining records (Records 1-5, 10, 12, 14, 22, 29, 33, 37, 38, 41, 43 and 46-65) qualify for exemption under the *Act*.

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except where they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225]. 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 [Orders P-1409, R-980015, PO-2225].

In addition, to qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

By relying on sections 49(a) and (b) the University takes the position that certain records contain the personal information of the appellant. The University also identifies that the records contain the personal information of the affected party, and that some records contain the personal information of other identifiable individuals. The University states:

> The records at issue contain information about [the affected party] in a personal capacity. It is reasonable to expect that information of a personal nature about the individual may be identified if the records are disclosed. [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)] Even if the information relates to an individual in a professional, official or business capacity, such information may still qualify as personal information if

> the information reveals something of a personal nature about the individual. [Orders P-1409, R-980015, PO-2225] The personal information contained in the records at issue also relates to individuals other than the appellant and [the affected party].

In its confidential representations, the University describes the status of the affected party. It then states:

> The information in the records contain, for instance, the name of [the affected party], the education and employment history of [the affected party], medical information, financial information, a personal evaluation of [the affected party], the personal email address of [the affected party] and [the affected party's] views or opinions, [the affected party's] own personal concerns about various situations or other matters unrelated to the appellant. Many of the records were communications sent to the University … legal counsel and were explicitly of a private or confidential nature. The records also contain information about [the affected party] that, if disclosed, would reveal other information about this individual which would compromise the personal privacy of this individual.

The appellant does not address the issue of whether the records contain personal information.

Findings

I have carefully reviewed the records remaining at issue. All of the records are emails between the affected party and the dean, and many are also sent to University legal counsel. These emails cover a period of approximately 19 months. As identified above, at a certain point in time the affected party became employed in some capacity by the University. This change in the relationship between the affected party and the University affects my findings on whether or not some of the information qualifies as the affected party's personal information.

The affected party

Emails sent and received prior to the affected party's employment with the University (Records 46-65) do not involve the affected party as an employee of the University. On my review of these records, I find that they contain information that qualifies as the personal information of the affected party. This includes the affected party's name and education (paragraph (b)); personal views and opinions (paragraph (e)); correspondence sent to an institution by the affected party that is implicitly or explicitly of a private or confidential nature (paragraph (f)); and the affected party's name where it appears with other personal information relating to the individual (paragraph (h)). Accordingly, I find that Records 46-65 contain the personal information of the affected party.

Records 1 through 45 cover the period of time during which the affected party was employed in some capacity by the University. Although small portions of some of these records contain the personal information of the affected party (for example, address information, or references to personal vacation and travel plans), the bulk of the information contained in Records 1 through

45 contain information provided to the University by the affected party in the capacity of an employee. Accordingly, much of this information is not the personal information of the affected party. However, with one exception, given my findings under sections 19, 49(a) and 21(1) below, it is not necessary for me to determine which specific portions of these records contain the affected party's personal information.

The one exception is Record 41. On my review of this record, I find that the only personal information about the affected party contained in this record is the affected party's email information. Although the University and the affected party take the position that other portions of this record contain the personal information of the affected party, I find that the remaining portions of this record contain either publically available information, or the views and opinions of the affected party about the appellant which, according to paragraph (g) of the definition of personal information, is the personal information of the appellant.

As a result, I find that, if the affected party's email information (along with certain administrative information not responsive to the request) is severed from Record 41, the only personal information remaining at issue relates exclusively to the appellant. In the circumstances, I will order that this record (with the email information relating to the affected party, and the administrative information, severed) be disclosed to the appellant, as to do so would not result in an unjustified invasion of the personal privacy of another identifiable individual.

The appellant

Some of the records remaining at issue refer to the appellant and contain his personal information. However, I find that a number of these records, though they refer to the appellant, do not contain the personal information of the appellant because they simply refer to him in his professional capacity, or include his name simply as a reference to various issues in which he is involved. As a result, I make the following findings:

- Records 10, 12, 14, 29, 50, 51 and 58 contain the personal information of the appellant, as they contain his name along with other personal information relating to him (paragraph (h).
- Records 37, 43, 53 and 55 refer to the appellant, but do not contain his personal information. References to him in these records refer to him in his professional capacity, or include his name simply as a reference to various other issues, including newspaper articles, etc.
- The other records remaining at issue (Records 1-5, 22, 33, 38, 46-49, 52, 54, 56, 57, 59-65) do not refer to the appellant or contain any personal information of the appellant.

Other identifiable individuals

A number of records contain the personal information of other identifiable individuals. Given my findings below on the application of sections 19 and 49(a), it is not necessary for me to review the specific portions of all of these records which contain the personal information of

other identifiable individuals. However, I find that Records 33 and 38 contain the personal information of identifiable individuals other then the appellant.

SECTION 49(a) – DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

While section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution, section 49 provides a number of exceptions to this general right of access.

Under section 49(a), the institution has the discretion to deny an individual access to his or her own personal information where the exemptions in sections 12, 13, 14, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that information.

In this case, the University relies on section 49(a) in conjunction with section 19 to deny access to certain records which it claims qualify for exemption under section 19 and which also contain the personal information of the appellant (Records 10, 12, 14, 28 and 29).

SOLICITOR-CLIENT PRIVILEGE

Of the records which are not excluded from the scope of the *Act*, the University takes the position that Records 1-5, 10, 12, 14, 22, 29, 37, 43 and 50 qualify for exemption under the solicitor-client privilege exemption in section 19 of the *Act*. Section 19 reads as follows:

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

Section 19 contains two branches as described below. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

Branch 1 of the section 19 exemption appears in section 19(a) and encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue. [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

Solicitor-client communication privilege

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

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Orders PO-2441, MO-2166 and MO-1925].

The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

Confidentiality is an essential component of the privilege. Therefore, the University must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

Branch 2: statutory privilege

Branch 2 of section 19 arises from sections 19(b) and (c). Section 19(b) is a statutory exemption that is available in the context of Crown counsel giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

The University's representations

The University submits that certain records are exempt from disclosure, as they are subject to the common law solicitor-client communication privilege in section 19(1). It states:

> The solicitor-client communications privilege pursuant to section 19(1) of the *Act*, which was derived from common law, protects direct communications of a confidential nature between a solicitor and a client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descoteaux v. Mierzwinski* (1982), 141 D.L.R (3d) 590 (S.C.C.)]. This privilege also extends to the protection of a continuum of communications between the solicitor and a client.

> The basis for this rationale is to ensure that a client may confide in his or her lawyer on a legal matter without reservation. [IPC Order P-1551]
>
> Many of the Records at issue represent an exchange of confidential communications between the University of Ottawa legal counsel, officers and/or agents of the University of Ottawa, which communications were prepared for the purpose of obtaining or giving professional legal advice. These communications were of a confidential nature and were produced in the context of labour-relations matters, generally, involving the Appellant or other individuals. More precisely, the purpose of the confidential communications were exchanged with University legal counsel in order to assist the University of Ottawa in preparing for/developing its approach with respect to the disciplinary and/or grievance proceedings that had been initiated ….

The University then provides specific representations for the records for which the solicitor-client privilege is claimed. It states:

> Records 1 through 5 represent an exchange of communications between [the affected party] with the University of Ottawa legal counsel in relation to obtaining information about [identified activities]. …
>
> Records 10, 12 and 14 relate to an exchange of communications between the University of Ottawa legal counsel and [the affected party] … in respect of the legal issues being addressed by the University of Ottawa legal counsel and the parties in dispute in the context of on-going labour-relations matters. …
>
> Records … 29, 43 and 50 contain information provided to University of Ottawa legal counsel … relating to several grievances involving the Appellant as well as providing [identified information] surrounding the events that was potentially having an impact on the legal strategy that University of Ottawa legal counsel was developing on behalf of the University of Ottawa. …
>
> Record … 37 relate[s] to the overall request by University of Ottawa legal counsel to provide additional information in support of the University of Ottawa legal counsel [dealing with identified matters].

The University then states:

> The Office of the Legal Counsel within the University of Ottawa provides legal advice with respect to numerous situations. At times, the Office of the Legal Counsel requires agents to assist with its work and by engaging such agents, ensures that legal issues can be properly dealt with and in confidence. The dominant purpose of the production of the Records or using the Records or their contents is in order to obtain legal advice or to conduct or aid in the conduct of arbitration. Therefore, the section 19 exemption is an assurance for the University of Ottawa's employees and administrators that their legal issues will be dealt with

> discretion and respect. The solicitor-client privilege is crucial to individuals being able to request and obtain legal [advice] in total confidence. The University of Ottawa is of the opinion that, in order to protect the integrity of the Office of the Legal Counsel, documents providing legal advice, including the continuum of communications between a solicitor and its client and/or the solicitor's agents (in order to keep all the internal parties who need to know informed so that advice may be sought and given as required), are subject to the section 19 exemption and should not be disclosed.
>
> The University of Ottawa submits that it has not taken any action that constitutes a waiver of common law solicitor-client privilege either implicitly or explicitly. The Records have not been disclosed to outsiders by either the University legal counsel or the officers receiving the advice nor has the University of Ottawa, knowing of the existence of the privilege, voluntarily evinced an intention to waive the privilege. The proceedings under the Collective Agreement and CUPE Agreement are currently on-going.

The appellant does not directly address the issue of the application of the solicitor-client privilege exemption to the records at issue, but argues that if the institution obtained or produced the records through actions which were improper or contrary to collective agreements, international agreements, legal precedents and other rules and contentions, any claimed exemptions are made void by the institution's breaches. The appellant provides extensive representations identifying how, in his view, the collection and use of the records by the University violated a number of agreements, precedents, rules and conventions.

Findings

I have carefully examined the records remaining at issue for which the section 19 claim is made. With the exception of Record 50, all of these records were sent to or copied to University legal counsel. The University has stated that the records represent an exchange of confidential communications between University legal counsel and officers and/or agents of the University. The University also states that the confidential communications were exchanged with University legal counsel in order to assist the University in preparing for/developing its approach with respect to the disciplinary and/or grievance proceedings involving the appellant, or under another collective agreement in respect of other individuals.

I am satisfied that the records which were sent to legal counsel (either as the primary recipient or copied to her) qualify for exemption under section 19 of the *Act*. Based on my review of the records and the University's representations, I am satisfied that these records constitute confidential communications between a solicitor and her client (University staff or agents), made for the purpose of obtaining or giving professional legal advice. Accordingly, I find that they qualify for exemption under the solicitor-client communication privilege in Branch 1 of the *Act*.

With respect to the appellant's argument that the exemptions cannot apply because the records were obtained or produced improperly or contrary to various agreements or protocols, in my view the manner in which the University obtained the records does not affect my finding that the

records qualify for exemption under section 19 in the circumstances of this appeal. Although there may be unique circumstances where an exemption is found not to apply due to the actions of the institution, I find that this is not the case in this appeal. The records consist of communications between University legal counsel and University officers, staff or agents, made for the purpose of obtaining or giving professional legal advice. In the circumstances, I am satisfied that the appellant's views on the manner in which these records were obtained or used does not affect my finding that they qualify for exemption under the *Act*.

Record 50 is an email that does not involve University legal counsel. This email was sent to the dean by the affected party prior to her employment with the University, and contains some very general information. Although the email refers to a legal matter, it does so in the most general of terms and again, and in the absence of more detailed representations regarding the application of the solicitor-client privilege to this record, I am not satisfied that it qualifies for exemption under section 19 of the *Act*.

Accordingly, I find that Record 50 does not qualify for exemption under section 19 of the *Act*, but that Records 1-5, 10, 12, 14, 22, 29, 37 and 43 do qualify under that section.

Subject to my review of the exercise of discretion below, I find that Records 1-5, 22, 37 and 43, which do not contain the personal information of the appellant, are exempt under section 19. Records 10, 12, 14 and 29, which contain the personal information of the appellant, qualify for exemption under section 49(a) in conjunction with section 19.

INVASION OF PRIVACY

I have found that Records 1-7, 8-32, 34-37, 39-40 and 42-45 either qualify for exemption under sections 19 and/or 49(a), or are excluded from the scope of the *Act* pursuant to section 65(6). I have also found that a severed copy of Record 41 ought to be disclosed. I will now determine whether the remaining records (Records 33, 38 and 46-65) qualify for exemption under the personal privacy exemptions in sections 21(1) and/or 49(b).

As I indicated above, I found that some of the records contain only the personal information of the affected party and/or individuals other than the appellant. For these records, I will determine whether the mandatory exemption at section 21(1) applies to exempt them from disclosure. For the remaining records that do contain the appellant's personal information, my assessment of this issue will be conducted under the discretionary exemption at section 49(b) of the *Act*.

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

Under section 49(b), where a record relates to the requester but disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution may refuse to disclose that information to the requester.

Section 49(b) is a discretionary exemption. Even if the requirements of section 49(b) are met, the institution must nevertheless consider whether to disclose the information to the requester. In this case, section 49(b) requires the Ministry to exercise its discretion in this regard by balancing the appellant's right of access to their own personal information against other individuals' right to the protection of their privacy.

Under section 21, where a record contains personal information only of an individual other than the requester, the institution must refuse to disclose that information unless disclosure would not constitute an "unjustified invasion of personal privacy."

In both these situations, sections 21(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met.

Sections 21(1)(a) through (e) provide exceptions to the personal privacy exemption; if any of these exceptions apply, the information cannot be exempt from disclosure under section 21 or 49(b).

Section 21(2) provides some criteria for determining whether the personal privacy exemption applies. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) lists the types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has ruled that once a presumption against disclosure has been established under section 21(3), it cannot be rebutted by either one or a combination of the factors set out in section 21(2). A section 21(3) presumption can be overcome, however, if the personal information at issue is caught by section 21(4) or if the "compelling public interest" override at section 23 applies (*John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767).

If none of the presumptions in section 21(3) applies, the institution must consider the factors listed in section 21(2), as well as all other relevant circumstances.

Representations

The University provides representations on the application of sections 49(b) and 21(1) to the records. The University states:

> All the Records contain the personal email address of [the affected party]. In addition, Records [33 and 51 and 53], for example, contain a mixture of the personal views of [the affected party], personal information about the activities of other individuals other than the appellant, or personal information about [the affected party] provided by another individual.
>
> Records 48 and 49 relate solely to private information regarding [the affected party] or another in respect of matters unrelated to the appellant. Many records

> were communications sent to the University of Ottawa from [the affected party] that were explicitly of a private or confidential nature.

The University also states that Records 46 through 65 contain the personal information of the affected party. The University states:

> Records … 46, 47, 52 - 54 and 56 - 65 inclusive, for example, identify the personal email address of [the affected party] and describe either the employment or educational history of [the affected party], medical information or a financial activity concerning [the affected party] (paragraphs 21 (3) (a), (d) and (e)). In addition, Records … 62, 63 and 64 relate to the educational or employment history of other individuals. There is no personal information of the appellant contained in these records. Therefore, there is a presumed unjustified invasion of personal privacy that cannot be rebutted by one or more factors or circumstances under section 21(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. This is not a case where a compelling public interest in the record clearly outweighs the purpose of the exemption.

The affected party has provided representations in support of the view that many of the records contain personal information. The affected party reviews a number of the records in detail, and provides representations on how this information contains the affected party's personal information, as well as how disclosure would constitute an unjustified invasion of privacy.

The appellant's representations focus on the activities of the affected party as they relate to the matters involving the appellant. In that regard, the appellant does not provide representations relating to responsive records that do not relate to him.

Findings

Records 33 and 38

As identified above, Records 33 and 38 relate to the period of time when the affected party was employed by the University. I have also found that these records do not contain the personal information of the appellant, but that they do contain the personal information of individuals other than the appellant and the affected party.

Having found that these records contain the personal information of identifiable individuals, and in the absence of any factors favouring disclosure, I find that these records qualify for exemption under the mandatory exemption in section 21(1) of the *Act*.

Records 46-65

As identified above, Records 46-65 relate to the period of time when the affected party was not an employee of the University. Many of these emails relate to matters involving her personal involvement in various activities. All of these records contain the personal information of the

affected party, and some of these records also contain the personal information of other identifiable individuals.

Although the records contain the personal information of the affected party (including her email address, and information about her activities and schedule) many of the records also contain what I would characterize as rather innocuous information (for example, her availability for a meeting, comments on certain issues and matters, etc.).

I have found above that three of the records (Records 50, 51 and 58) also contain the personal information of the appellant, as they contain his name along with other personal information relating to him.

On my review of Records 46-49, 52-57 and 59-65, I am satisfied that they contain the personal information of the affected party. In the absence of representations supporting the disclosure of these records, or any factors favouring disclosure, I find that these records qualify for exemption under the mandatory exemption in section 21(1) of the *Act*.

With respect to the three records which also contain the personal information of the appellant, I have reviewed these records in detail. Record 50 contains a reference to the appellant in relation to a matter which is publicly known. The references to the appellant in the other two records (51 and 58) are general references to matters and issues that the appellant is involved in, but these references also contain the personal information of the affected party, including the affected party's views and opinions. In my view, the information relating to the appellant is intertwined with the personal information of the affected party, and I find that it is not possible to sever the information contained in these three records. In the absence of any factors favouring disclosure of the information to the appellant, I am satisfied that the information contained in Records 50, 51 and 58 qualifies for exemption under section 49(b) of the *Act*.

University's Exercise of Discretion

Where appropriate, institutions have the discretion under the *Act* to disclose information even if it qualifies for exemption under any of the *Act*'s discretionary exemptions. Because sections 19 and 49(a) and (b) are discretionary exemptions, I must also review the University's exercise of discretion in deciding to deny access to the records.

The University's representations identify the considerations it took into account in deciding to exercise its discretion not to disclose the records remaining at issue. The University states:

> The University of Ottawa exercised its discretion under sections 49(a) and (b) taking into account relevant considerations and the principles of [the *Act*] and … this exercise of discretion should be upheld.

With respect to the records withheld under sections 19 and 49(a), the University states:

> Historically, the University of Ottawa does not disclose solicitor-client communications as such communications are regarded as privileged. This increases public confidence in the operation of the University of Ottawa.
>
> The solicitor-client communication privilege exemption represents an assurance for University of Ottawa administrators and employees that their legal issues will be dealt with discretion and respect. The solicitor-client communication privilege is crucial to individuals being able to request and obtain legal advice in total confidence. Public confidence in the operation of the University of Ottawa will be undermined if the Records at issue are disclosed.

With respect to the records withheld under section 49(b), the University states:

> … It is important that personal information of other individuals, for which disclosure will constitute an unjustified invasion of personal privacy in accordance with [the *Act*], remain non-disclosed. The privacy of individuals needs to be protected. This is not a case where personal information should be made available to the public. …

The University also provides additional representations on the exercise of its discretion, and the factors it considered.

On my review of the positions of the parties and the records remaining at issue, and given the nature of the information in the records I have found to be exempt, as well as other factors referred to by the University and all of the circumstances of this appeal, I am satisfied that the University properly exercised its discretion in refusing to disclose the records under sections 19 and 49. Accordingly, I uphold the University's decision to deny access to the records which I have found qualify for exemption under those sections.

ORDER:

1. I order the University to disclose a copy of the non-highlighted portion of Record 41 to the appellant by sending the appellant a copy of the information by **March 16, 2011** but not before **March 11, 2011**. I have provided the University with a highlighted copy of Record 41, indicating those portions which should be disclosed, and highlighting the portions that should not be disclosed.

2. I uphold the University's decision that Records 6, 7, 8, 9, 11, 13, 15-21, 23-28, 30-32, 34-36, 39, 40, 42, 44 and 45 are excluded from the scope of the *Act*.

3. I uphold the University's decision that Records 1-5, 10, 12, 14, 22, 29, 37 and 43 qualify for exemption under sections 19 and/or 49(a) of the *Act*.

4. I uphold the University's decision that Records 33, 38 and 46-65 qualify for exemption under sections 21(1) and/or 49(b) of the *Act*.

5. In order to verify compliance with the terms of Order provision 1, I reserve the right to require the University to provide me with a copy of the material which it discloses to the appellant.

Original signed by: February 9, 2011
Frank DeVries
Adjudicator