Access Denied in Ontario: A Critical Examination of the Roles of the University, the Commissioner, the Legislature, and the Courts

by Joseph Hickey

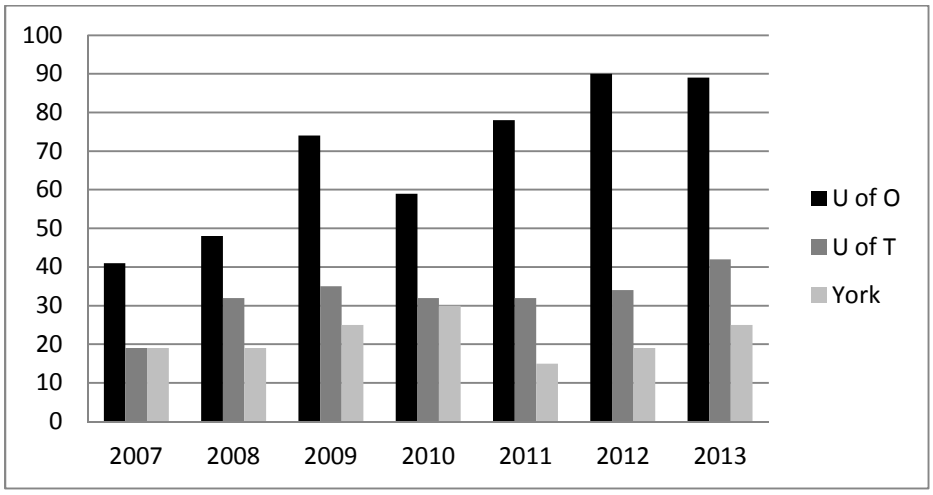
Critical examination and analysis of how institutions respond to freedom of information (FOI) requests is needed in order to optimize the use of FOI law in research, journalism, and activism. As a contribution to this effort, this chapter will look at a public university's track record – in this case the University of Ottawa (U of O) – with respect to providing access to information under Ontario's *Freedom of Information and Protection of Privacy Act (FIPPA)*. I will also consider the roles of Ontario's Information and Privacy Commissioner (IPC), the provincial legislature, and the courts in determining how the *FIPPA* is applied.

First, I present the U of O's behaviour in response to FOI requests using data obtained from statistics reports published annually by Ontario's Information and Privacy Commissioner (IPC) and from publicly available adjudication decisions ("orders") made by the IPC about the university. This is followed by a description of specific examples of tactics used by the university to deny access to information, and the impact this can have on researchers, activists, and others who seeks information from the university. The third section discusses why the U of O maintains bad FOI practices that contravene the purposes of the *FIPPA*. The final section considers what can be done to improve access at the U of O and in other public institutions across the province.

University of Ottawa's Track Record with Respect to FOI

Universities in Ontario were included under the purview of the *FIPPA* and became subject to FOI requests in June 2006. Since that time, the U of O has topped the list of Ontario's postsecondary institutions (colleges and universities) in terms of the number of requests received and the number of appeals of its access decisions. Figure 1 shows the number of FOI requests received per year by the three Ontario universities that received the most requests in total between 2007 and 2013. In each year, the U of O received the most requests, often double the number received by the second-ranked University of Toronto (U of T).[1]

Figure 1: Number of FOI requests received per year by three Ontario universities (IPC 2007-2013).

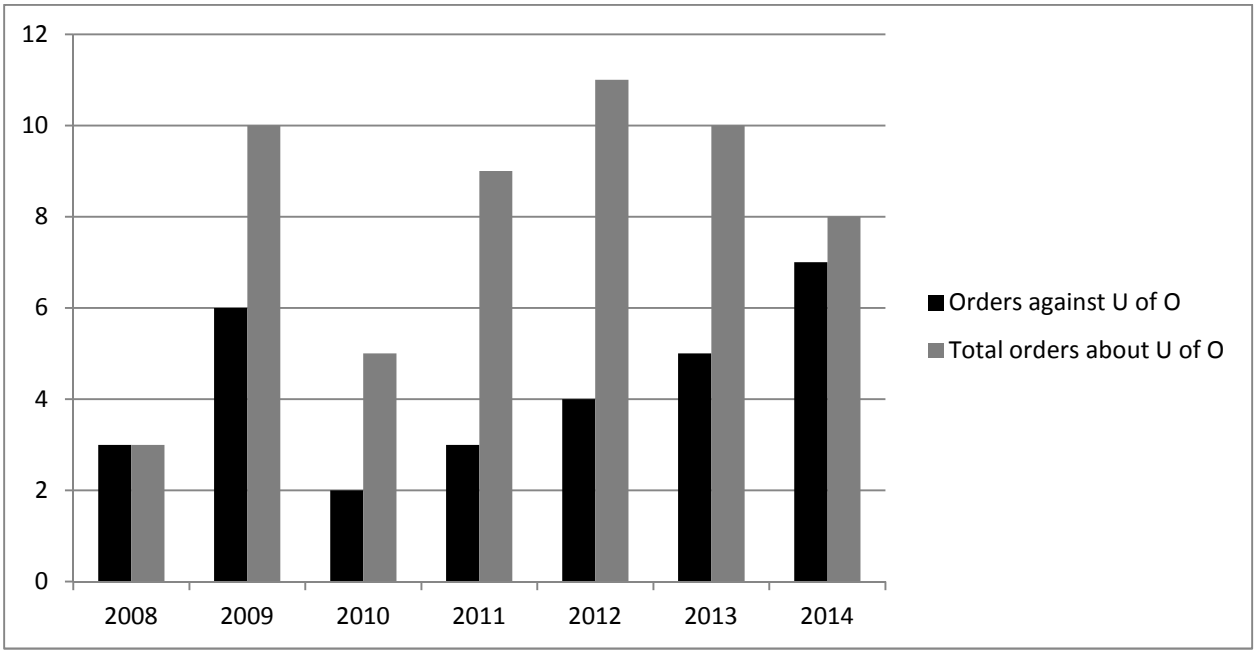


The U of O was also the most appealed postsecondary institution between 2009 and 2013, the years for which the IPC has made data about appeals available. It received the most appeals (of requests for personal information and general records combined) in 2009, 2011, 2012 and 2013, while ranking second in this category to the Ontario Power Authority in 2010.[2] The U

of O is therefore Ontario's most active postsecondary institution with regard to FOI, both in terms of requests received and appeals opened.

Figure 2 provides an indication of the university's behaviour as an institution subject to the *FIPPA*. For each year since 2008, the total number of orders produced by the IPC pursuant to appeals of the U of O's decisions in response to FOI requests is plotted beside the total number of those orders that went "against" the university.[3] Orders against the university are ones in which the university was ordered by the IPC adjudicator to take action that it would not have taken otherwise. For example, the university was ordered to: release records denied to the requester, provide a decision letter in cases where it had refused to do so, conduct searches for records, reduce fee decisions, and so on. It is important to emphasize that an order against the university typically forces it to take action that it refused to take throughout the entire process leading up to the order's release, from the submission of the FOI request, through the issuing of the university's decision letter, the opening of the appeal, mediation between the requester and the university, and finally following submission of the parties' representations to the adjudicator.

Figure 2: Number of IPC Orders per year involving the U of O



As of July 2014, the total number of orders issued by the IPC following appeals of access decisions by the U of O is 56. "Interim orders" are counted as distinct orders in Figure 2. An assessment of all IPC orders about the university shows that 30 out of the 56 orders (54%) were against the university. Figure 2 also shows the number of orders against the university has been steadily rising since 2010, and their proportion (per year) has been steadily increasing since 2011 (note that orders released in a given year were not necessarily opened by the requester in that year; in fact, the most-probable average time from opening of appeal to release of order is two years, as explained below). As a point of comparison, in the period from January 1 to July 31, 2014, the U of O received as many IPC orders against it (7) as the U of T (the Ontario postsecondary institution with the second-most FOI requests) has ever received against it since universities came under the purview of the *FIPPA* in 2006.

An IPC order against the university is a determination that the university has failed to properly apply the *FIPPA*. The data shown in Figure 2 therefore indicates that the Ontario postsecondary institution that is the subject of the most FOI requests and appeals is consistently misapplying the province's FOI law.

Institutional Strategies to Block or Delay Access

The following examples illustrate some of the ways in which the U of O has improperly acted to block or delay access to information. In each of these examples, the university was formally ordered by an IPC adjudicator to take action contrary to its access decision and its representations to the IPC adjudicator defending its decision.

Misuse of solicitor-client communication privilege exemption

Sections 19 and 49a of the FIPPA allow an institution to withhold from disclosure information that is protected by solicitor-client privilege. This includes records in which the institution seeks or receives legal advice from a lawyer. The university often relies on the solicitor-client communication privilege exemption to withhold information (22 of the 56 IPC orders involving the university cited section 19).

One example is an FOI request that I filed for access to personal information, and which led to interim order PO-2909-I. In this case, the university applied sections 19 and 49a to withhold email records. In one of the undisclosed emails, the Dean of Science opposed allowing my proposed master's of science research about global climate change with a particular professor. In another, the Dean of Graduate and Postdoctoral Studies wrote that a different professor refused to supervise me due to my "activist beliefs," and the Dean of Science communicated that I had

written letters in support of political causes that he did not agree with. The recipients of these emails included vice-presidents of the university, deans, and lawyers (*AcademicFreedom.ca* n.d.).

In its representations to the IPC adjudicator, the university argued that the undisclosed parts of these emails related to "direct communication with lawyers retained by the University for the purpose of informing the lawyers and obtaining legal advice." The representations further stated that disclosure of the emails would "directly impinge upon the solicitor-client privilege and the rationale of ensuring a client may confide in his or her lawyer on a legal matter without reservation" (University of Ottawa 2010). The IPC adjudicator, unlike the appellant in an appeal to the IPC, has the benefit of actually seeing the record at issue. In this case, the adjudicator showed that the university's legal submission was false (IPC 2010):

> Although two lawyers at the law firm were sent this email, the email was also sent to two other University officials and was copied to seven other individuals. *There is no indication in this email that legal advice is being sought or given. Merely sending a copy of a record to a solicitor in and of itself does not automatically result in privilege being attached to it* [emphasis added].

The records were ordered disclosed. The time from filing of the access to information request to receipt of the released document was 1.8 years.

Refusal to process request on the basis of an alleged "lack of clarity"

IPC order PO-3043 followed from an FOI request that I made as a student representative to the U of O Senate to the U of O for all records exchanged between the university president, Allan Rock, and Stéphane Émard-Chabot, the president's chief of staff. In this case, the university refused to do a search for respondent records, closed the file, and returned the filing fee on the grounds that the request was "too broad and [did] not provide sufficient details." The IPC's

adjudicator did not agree, and found the university in violation of its statutory duties, as quoted below (IPC 2012a):

> In this appeal, however, *it is clear that from the very beginning, the university had obligations with respect to responding to the appellant's request that it did not meet.* The process for responding to access requests is set out in considerable detail in the *Act*, as well as in various guidelines established and circulated to institutions, including the university, by this office … As described, there were a number of options available to the university in responding to the appellant's request. However, simply closing his file – based on the seemingly erroneous belief that it required clarification and that the appellant would not provide it – was not one of them. In the circumstances, *I find that the actions taken in response to the appellant's request were not in accordance with the university's statutory obligations under section 26 and 29 of the Act ...* Accordingly, I will be ordering the university to issue an access decision to the appellant in response to his request [emphasis added].

The university's refusal to proceed with the FOI request when it was initially filed caused a delay of four months. The university then applied a three month extension to its 30 day response deadline before finally issuing a decision that allowed access to a minority of the records found in the search. The disclosed records included, for example, discussions between Rock and Émard-Chabot about whether they would allow issues raised by student representatives to be heard at the university Senate, drafts of speeches and op-eds by the president, a planned memorandum of understanding between the Department of Mathematics and the Communications Security Establishment, and an email from Rock to Émard-Chabot in which the former federal minister expressed the following about a university fundraiser (*Student's-Eye View*, April 30, 2012):

> "We need to push uottawa team! Less than 30% towards team goal! What to do? Threats? Bribes? Empty promises (it works during elections!)..."

The many undisclosed records in this file are still under appeal at the time of this writing.

Improperly withholding many records under "economic interests" exemptions

In order PO-3294, the university withheld 70 records under exemptions in the *FIPPA* designed to protect the economic rights of institutions (section 18) and of organizations that provide information to institutions (section 17). The records contained the appellant's personal information about an internship connected to her academic program as a student at the university. Because the purpose of *Act* is to provide access to information about the operation of public institutions, an institution wishing to make use of section 17 or 18 to block access to information must provide "detailed and convincing evidence" about the "reasonable expectation of harm" that would result from disclosure of the information (IPC 2014a, IPC 2008a). In this appeal, the adjudicator found that the university did not provide such evidence and, regarding one of the subsections at issue, found that "[i]n fact, the university has simply reproduced the words of the *Act* and appears to argue that the harms are self-evident." The university was thus ordered to disclose all 70 records to the appellant. In this case, the time span from opening of appeal to release of order was more than one year.

Improperly withholding an official's opinion about treatment of a student

Order PO-3312 relates to an FOI request that I made for personal information while I was a student at the university. The adjudicator ordered the university to disclose additional information from 20 records that were found in the university's search. The adjudicator overturned exemptions claimed by the university to deny access based on "personal information" (sections 21(1), 49(a-b)), "unjustified invasion of personal privacy" (sections 21 and 49b), "solicitor-client communication privilege" (sections 19 and 49a), and whether or not the records were "responsive" (i.e. whether they "reasonably relate") to the request.

For one particular record, the adjudicator found that the university was wrong to deny access to part of an email in which the university's Vice-President of Governance Nathalie Des Rosiers wrote to the president and other vice-presidents that "certainly [Mr. Hickey] thinks he has been mistreated by the university in many ways. I am not certain that we are completely without fault in his case." The adjudicator found that Ms. Des Rosiers's opinion was expressed in a "professional, not a personal capacity" and that "[a]s a result, the disclosure of her professional opinion cannot constitute an unjustified invasion of her personal privacy." For another record, the adjudicator found that the university was wrong to deny access to part of an email in which Dean of Graduate and Postdoctoral Studies, Gary Slater, called the External Commissioner of the U of O Graduate Students' Association a "liar" and said that he was "seriously thinking about boycotting him." Recipients of that email included the Dean of Science, university vice-presidents, and the university's Legal Counsel. The time span from the filing of this request to the receipt of the documents ordered disclosed was 4.3 years.

Other examples

Some other examples include cases in which the university:

- Denied a request for personal medical information on the basis that the request was frivolous or vexatious and was made in bad faith. The university was ordered to provide access by the IPC adjudicator (IPC 2014b);
- Denied information that was "clearly within the appellant's knowledge." The university was ordered to disclose the information on the basis of application of the "absurd result principle" (IPC 2014c);[4]

• Claimed that records were excluded from the *FIPPA* because they related to research conducted by the institution. The adjudicator decided that the records did not relate to "specific, identifiable research projects," and all records were ordered disclosed (IPC 2013a);

• Was ordered to do a new search for records (IPC 2013b, IPC 2009);

• Was ordered to refund an appellant fees that were charged improperly (IPC 2012b).

In addition to the examples referred to above, there are many other requests and appeals in which the university decided to change its position in favour of the requester/appellant, such that requests or appeals were settled at some point in the process before adjudication was completed. These cases are difficult to track since there is no formal documentation (order) published on the IPC's website. This practice of the university results in significant delays in access, and may increase the rate of abandoned appeals.

Effect of the University's Practices on the Public's Right to Access Information

The university's record regarding access requests and appeals is troubling in light of the purposes of the *FIPPA*, which include (*FIPPA* s.1(a)(i-ii)):

> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
> (i) information should be available to the public, [and]
> (ii) necessary exemptions from the right of access should be limited and specific[...]

Lengthy delays in accessing personal information and general records result from the long appeal process as well as the university's habit of taking many cases months or years into that process before finally allowing access. From the appeals that did result in an IPC order, a calculation of the most-probable average time from the opening of an appeal to the issuing of the order can be done as follows.The order is dated on the day it is released, and contains a file

number in the format PAYY-NNN, where the digits "YY" stands for the year the appeal was opened. Assuming the appeal was opened on the most-probable date of July 1 of the year "YY," the most-probable duration of the appeal can be calculated for each order. The average of this most-probable duration over the 56 orders involving the U of O gives a most-probable average time of two years from opening of appeal to issuing of order. It is important to note that this calculation does not include the time span from the date the request is filed at the university to the date on which the appeal is opened at the IPC. This can be a period of many months, depending on how the request is handled by the university and how quickly the appeal is opened at the IPC.

The university's Access to Information and Privacy Office (AIPO) often extends its deadlines to submit representations on appeal files, as well as its deadlines to respond to access requests. In 2013, for example, less than half of the university's responses to FOI requests were completed within the normal 30 day deadline, and 21% took over 90 days to complete (IPC 2014d). Under section 27 of the *FIPPA*, the AIPO is only allowed to apply an extension to the 30 day response deadline in cases where the number of records is large and meeting the time limit would "unreasonably interfere with the operations of the institution," or where consultations need to be made with individuals from outside of the institution that would take additional time.

It is not necessarily in the university's interest to reduce extensive delays to public access to information, because the sensitivity, political significance, and public interest of information about the university's operations typically decreases over time. Increased delays therefore serve the university administration, and do not seem to go against its interests except for the corporate citizenship interest of abiding by the spirit and letter of the *Act*. Such virtue is not encouraged (or

imposed), however, because the university does not appear to face a threat of sanctions for not providing proper service under the *Act*, as discussed below.

Explaining the University's Behaviour

The U of O's *FIPPA* record is dismal and it appears it is becoming worse, according to the data portrayed in Figure 2 and the magnitude (e.g., as measured in numbers of records ordered released) of the most recent orders against the university. The university's actions outlined in the preceding examples are difficult to interpret as anything other than a tactic to dissuade public access by delaying. This section discusses some of the factors that may influence the university's *FIPPA* practices.

Absence of IPC review

The primary reason that the university maintains these practices is because Ontario's Information and Privacy Commissioner allows it to do so. In other words, there are effectively no negative consequences for disregarding the *Act* that would counter the institution's desire to evade transparency. The IPC is mandated to "independently review the decisions and practices of government organizations concerning access and privacy" (IPC n.d.). It can do this by summoning officials to testify under oath regarding their practices, visiting the institution on-site to secure and examine documents, and recommending charges under offences set out in the *Act* (*FIPPA* ss. 52(4-8), 61(1)). However, an interview conducted with the IPC shows that, although it has conducted investigation reports into the practices of institutions such as Government of Ontario Ministries (IPC 2013c), the Liquor Control Board of Ontario (IPC 2013d), and the

Toronto Transit Commission (IPC 2008b), no university has ever been subject to an investigation by the Commissioner (IPC 2014e).

Furthermore, the IPC has never asked the Attorney General to lay charges under section 61(1) for any institution that falls under the *Act*, although it has "made suggestions to the Attorney General's office to examine cases further" (IPC 2014e). In one of the few publicly available orders that refers to the offences section, the adjudicator responded to an appellant's submission that charges should be laid against the Ontario Municipal Board by directing the appellant to lay a charge before a Justice of the Peace as an individual if he so desired (IPC 1998a). This is the only IPC order on CanLII[5] (as of this writing) that addresses the issue of charges against a specific party under the offences section: the other two orders refer to the offences section as i) part of a theoretical consideration about the requirement for requesters to identify themselves to institutions (IPC 1998b); and ii) as a means of demonstrating that the legislature gave the Commissioner adequate powers to conduct inquiries (IPC 2001).

A 2010 ruling of the Supreme Court of Canada shows that the IPC has not always made diligent use of the powers available to it under the *FIPPA*. In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, the court ordered the Commissioner to reconsider his order upholding a ministry's decision to withhold records about a controversial police investigation, because the Commissioner failed to consider whether the ministry properly exercised its discretion when it denied access to the records. The Commissioner had a mechanism under the *Act* that he could have used to promote access, but he did not use it. In the words of the court:

> [w]ithout pronouncing on the propriety of the Minister's decision, we would remit the s. 14 claim under the law enforcement exemption to the Commissioner for reconsideration. The absence of reasons and the failure of the Minister to order disclosure of any part of the voluminous documents sought at the very least raise concerns that should have been

> investigated by the Commissioner. We are satisfied that had the Commissioner conducted an appropriate review of the Minister's decision, he might well have reached a different conclusion as to whether the Minister's discretion under s. 14 was properly exercised (SCC 2010).

However, there is evidence that the IPC on occasion issues strong direction to institutions in a non-public manner. For example, a 2008 letter obtained through access to information shows the IPC's legal counsel reprimanding the U of O for its failure to comply with an IPC order. The letter states that the university's failure to comply with the order was a "serious matter" and that its conduct was "serving to delay and frustrate the process of the *Act* and the Commissioner, an officer of the Legislative Assembly for Ontario." The letter also reminds the university of the offences section of the *Act* and demands compliance with the IPC's order within three days (IPC 2008c). Targeted FOI requests by researchers for communications between IPC legal counsel and institutions could reveal details about the interaction between the IPC and the institutions under its mandate that are not otherwise observable in the publicly available orders, press releases, and annual reports, and could help to improve public understanding about the behaviour of institutions that deal with FOI requests.

Universities, to use Ontario Ombudsman André Marin's term, are at the low end of the "spectrum of harm" that can be inflicted on the citizens they serve, compared to other institutions, such as hospitals and the Children's Aid Society (Marin 2013). The fact that there is less at stake for the "clients" of universities compared to other institutions may reduce the incentive or social pressure on the IPC to investigate or sanction universities regarding their practices under the *FIPPA*. Nevertheless, the data represented in Figure 2 and the tone and character of the decisions against the U of O demonstrate the need for the IPC to take proactive, public steps to address the university's practices regarding access to information.

Degree of independence of Freedom of Information Coordinator and use of external law firms

The Freedom of Information Coordinator (FOIC) is the officer responsible for processing FOI requests at the responding institution. At the U of O, the FOIC is an employee of the university under the direction of the vice-president of governance. The degree to which the FOIC is independent of the institution's head – the president, in the case of a university – is a factor to consider when examining how the institution responds to FOI requests.

An example of an area of concern are cases in which FOI requests are made for records held in the office of the university president. Although the IPC jurisprudence sets out that a search for records must be conducted by an employee who has knowledge about the subject of the search (IPC 2007), searches for records in the U of O president's office have been conducted by employees who lack such knowledge – for example, by an information-technology staff member rather than by the president's chief of staff or legal counsel with knowledge of the case at hand (or by the president himself).[6] The result is that the FOIC receives records produced by limited or inadequate searches, such that potentially respondent records may not be brought into the request and therefore would not be subject to a disclosure decision by the FOIC or to scrutiny by the IPC.

A related concern is the use by an institution of external legal firms to represent the institution in its submissions to the IPC in response to an appeal. For example, the U of O hired external counsel to produce its representations opposing access to a requester, while using the same law firm to oppose the same requester's (a dismissed professor) labour arbitration seeking reinstatement as an employee of the university (*U of O Watch* December 5, 2011). Many of the records sought through the access request related to the administration's treatment of, strategy, and opinion about the professor and his firing. In such cases there is a reasonable concern about

whether the university can objectively apply the *FIPPA* and argue its position regarding the access to information request using the same law firm it has hired to oppose the individual in another, related proceeding.

Other potential factors

Some other potential reasons for the university's FOI practices are listed below:

- The President of the U of O since 2008 has been Allan Rock, a lawyer and former federal minister under Jean Chrétien. Rock held three different ministerial portfolios during his decade in government. Cabinet ministers and high-ranking lawyers are experts when it comes to knowing the boundaries of what is acceptable conduct under the demands of a statute, and knowing how to push those boundaries. Could the fact that the university president (the institution's "head" under the *FIPPA*) is a former cabinet minister and high-ranking lawyer (rather than, say, a career academic) be a factor influencing the boldness of the university's practice in denying FOI requests?
- University community members have, in principle at least, more influence within the institution than employees or clients in other kinds of institutions. For example, students and professors hold positions on the highest governance committees at universities, such as university senates and boards of governors. The potential for information obtained through FOI requests to be used politically by students, professors, and other non-administrators at the highest level of the institution's governance may add incentive for the administration to block or delay access to information.
- Many appellants of access requests are self-represented. For example, in 2013, 80 percent of appeals opened in the province were by self-represented individuals (IPC 2014d). It is

likely that institutions respond differently to requests/appeals submitted by requesters/appellants with different statuses. A self-represented student filing an FOI request to a university may receive a different response than would a large media organization with legal representation.

What Can be Done to Improve Access to Information in Ontario?

The IPC must start using its teeth

As mentioned above, the Commissioner has the power to summon officials, secure documents, ask the Attorney General to press charges under the *FIPPA*, and make recommendations that would direct the university to ameliorate its practices, and it can do all of these things publicly.

According to the offences section of the *FIPPA*, no person is permitted to "wilfully obstruct the Commissioner in the performance of his or her functions under [the] *Act*," or "wilfully make a false statement to, mislead or attempt to mislead the Commissioner in the performance of his or her functions under [the] *Act*," and anyone who contravenes these rules is "guilty of an offence and on conviction is liable to a fine not exceeding $5000" (*FIPPA* s.61(1-2)). Previously in this chapter, representations by the university were quoted which, when contrasted with the IPC adjudicator's order, showed that the university had submitted a false statement to the IPC that a record at issue was sent for the purpose of "obtaining legal advice." In a subsequent example, an appeal was referred to in which the university had claimed "economic interests" exemptions on 70 records, all of which were overturned, in part because the university did not provide any supporting evidence. It is legitimate to ask at what point the university's submissions and actions become obstructive or misleading to the Commissioner in the performance of his or her functions, such that an offence is warranted under section 61(1) of the

FIPPA. Furthermore, a pattern of apparent obstruction emerges, which supports any specific charge of obstruction. A pattern of minor incidences can constitute evidence of a systemic problem, which the IPC could stem by making a specific charge.

Also, the IPC has developed criteria for determining if a requester/appellant is acting in a vexatious or frivolous manner. Application of these criteria may involve an analysis of the requester's "pattern of conduct" in making requests and/or whether or not the request is made in "bad faith" (IPC 2014b, IPC 2014f). Unfortunately, however, the IPC does not have an analogous evaluation to determine if institutions act vexatiously or frivolously in managing requests and responding to appeals (IPC 2014e). The IPC should adopt the realistic perspective that it is possible for institutions to act in ways that are purposefully designed to improperly deny or delay access. Punitive justice in the form of public identification of "pariah" institutions, when justified based in analysis of the institution's conduct, would be a progressive use of the IPC's oversight powers aligned with its responsibility to promote transparency in Ontario's public institutions.

At the very least, an investigation by the Commissioner into the U of O's practices regarding access to information is necessary. Such an investigation, in addition to its potential to reveal more details about the university's conduct, will exert public pressure on the university to alter its bad practices and send a strong message to all universities in Ontario that they must take seriously their transparency obligations under the *FIPPA*.

Repeal of exclusion of "labour relations" documents from the purview of the Act

In 1995, the Ontario Conservative government of Mike Harris amended the *FIPPA* so that much information related to labour relations would be excluded from *FIPPA*'s jurisdiction. Therefore,

information related to meetings, consultations, discussions, and communications about employment matters at an institution are simply excluded from the *Act* and cannot be accessed, even by employees of an institution seeking personal information about themselves (IPC 2005). Further, information excluded under this section (65(6)) is not subject to many of the terms of the *FIPPA* that would otherwise apply, including, for example, the "public interest override" that allows for the release of information when there is a compelling public interest to disclose it, even if the information could be considered exempt under other portions of the *Act*, such as the personal privacy exemption.

This section of the *FIPPA* appears to be unique in Canadian freedom of information legislation – as far as the IPC is aware, no other province's legislation contains such an exclusion (IPC 2014e) – and Ontario institutions make extensive use of it. For example, section 65(6) was at issue in 17 of the 56 appeals of access decisions made by the U of O that led to orders by IPC adjudicators.

The courts have unduly reinforced the legislature's protection of employers. In 1999, an IPC order decided that a public employer was not allowed to exclude labour relations records that were no longer current from the scope of the *Act*. In the Assistant Commissioner's opinion, the labour relations exclusion could only apply when the institution had a current legal interest in the records at issue; since the records were about a former employee and there were no employment-related matters pending, the records were not excluded. The respondent (the Ministry of the Solicitor General and Correctional Services) brought the IPC order to judicial review, and although the Assistant Commissioner's order was upheld by the Ontario Divisional Court, the Court of Appeal for Ontario overturned the order and excluded the records (IPC 2003). The appeal court examined the *Act*'s subsection that states that the *Act* does not apply to

"[m]eetings, consultations, discussions or communications about labour relations or employment-related matters *in which the institution has an interest*" [emphasis added] (*FIPPA* s.65(6)(3)) and interpreted this subsection to mean that "[o]nce effectively excluded from the operation of the Act, the records remain excluded" (ONCA 2001). In other words, the appeal court decided to interpret "an interest" as "any interest the institution may have had in the past," instead of "a current interest in the present time of the access request," where an "interest" must be a significant labour-relations-related interest.

This is a regressive and harmful precedent that gives freedom to public employers to hide information about employees, former employees, and unions without needing to provide a current valid reason. It is also in direct opposition to the principles on which the *Act* is based: that information should be public and that exemptions should be limited. The Assistant Commissioner rightly based his decision on these principles. The Supreme Court of Canada denied the IPC leave to appeal, thus locking in and reinforcing a broad power for public employers to exclude labour relations information from the scope of the *FIPPA*.

A province-wide movement is needed to repeal section 65(6) from the *FIPPA*. Public sector unions, in particular, have much to gain from removing this access barrier because it would allow them to better position themselves in their struggle for social and workplace justice. Unions should therefore be leading the movement to repeal this pernicious legislation that has remained in place for nearly 20 years. Unfortunately, the IPC has no current plans to address this issue (IPC 2014e).

Conclusion

This chapter has presented a fourfold criticism of the implementation of Ontario's FOI legislation: 1) An examination of the University of Ottawa's FOI record demonstrates that an institution can be persistently and boldly misbehaved in relation to its *FIPPA* obligations, causing long and improper delays, contrary to the purposes of the *Act*. 2) The IPC's reluctance to review and sanction an institution allows the institution to maintain bad practices. 3) The Ontario legislature has created and maintains statute law that removes a whole class of important records from scope of the *Act*. 4) The courts have upheld and reinforced this faulty legislation via regressive interpretations of the statute for providing access. All of these factors contribute to a status quo in which timely access to information is frequently denied to researchers, activists, and other members of the public. Significant changes in institutional conduct, IPC oversight, and community activism are needed to bring Ontario and its institutions up to a standard of transparency required not just for research but for all other political efforts in a democratic society.

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——. s.52(4-8) and s.61(1).

——.s.61(1-2).

——.s.65(6)(3).

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——. 2012a. Order PO-3043, Appeal PA11-501, University of Ottawa. January 25. Toronto, Ontario.

——. 2012b. Order PO-3139, Appeal PA08-159-2, University of Ottawa. November 27. Toronto, Ontario.

——. 2013a. Order PO-3243, Appeal PA12-297-2, University of Ottawa. August 27. Toronto, Ontario.

——. 2013b. Order PO-3216, Appeal PA12-159, University of Ottawa. June 14. Toronto, Ontario.

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——. 2014b. Order PO-3325, Appeal PA12-537, University of Ottawa. March 25. Toronto, Ontario.

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[1] In terms of full-time student enrolment (graduate and undergraduate), the University of Toronto is the largest university in Canada (75,800 students in 2013), followed by York University (44,900 students in 2013); the University of Ottawa is the third largest university in Ontario and fourth largest in Canada by this measure (35,700 students in 2013) (AUCC n.d.).

[2] The IPC's "provincial agency" category does not include government ministries, hospitals, or municipal bodies including police services.

[3] Data assessed from all IPC orders published at http://ipc.on.ca involving University of Ottawa, up to July 31, 2014. There were no IPC orders involving the University of Ottawa before 2008.

[4] Applies when withholding information would be "absurd and inconsistent" with the purpose of the personal privacy exemption (s. 49(b)) of the *Act*, because the information was originally supplied by the requester or is within the requester's knowledge (IPC 2014c).

[5] CanLII.org is the electronic database of judicial and tribunal rulings provided by the Canadian Legal Information Institute.

[6] Appeal representations in an ongoing file, privately provided to author.

(IPC 2008c)

+S-124
+S-127

67

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

August 12, 2008

VIA FACSIMILE to 613-562-5178

PERSONAL & CONFIDENTIAL

Pamela A. Harrod
University Secretary
University of Ottawa
550 Cumberland Street
Ottawa, ON
K1N 6N5

Dear Pamela A. Harrod:

RE: Order PO-2698 dated July 22, 2008
Appeal PA08-159 / Institution File Number: AS-127
Freedom of Information and Protection of Privacy Act (the ***Act***)

The IPC Tribunal Services Department has referred to me the matter of your failure to comply with the Order referenced above.

The background facts of this case are as follows:

On April 21, 2008, the University of Ottawa (the University) received two requests for access to the following:

Request 1:

> ...all records about me that have been sent by or received by the President of the University since November 30, 2006.

Request 2:

> ...all records about me that have been produced or sent by or received by the Dean of the Faculty of Science since November 30, 2006.

On May 22, 2008, the University sent the requester two identical letters indicating that he had already requested the records outlined in the requests on October 31, 2006. The University stated in this letter that:

Legal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services juridiques
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
www.ipc.on.ca

> Since we already provided you with a fee estimate with respect to your previous request (University's file number), we will not be providing you with another distinct response to these four latest requests.

On June 11, 2008, two appeals were received by this office from the requester (now the appellant) indicating that the May 22, 2008 correspondence did not constitute a proper access decision as required under the *Act* for a number of reasons.

Appeal PA08-156 was opened in relation to Request 1 and PA08-159 was opened in relation to Request 2.

The University was contacted to discuss its claim that the records had already been requested. The University maintained that the two requests were encompassed in another request that the appellant made in October, 2006, currently under appeal with this office.

Further inquiries were made and it was confirmed that the dates as noted in the requests would be the responsive dates with respect to the two appeals.

Two decisions were received from the University by this office on July 21, 2008. Upon review of the decisions it became apparent that the decisions were not final access decisions, but interim decisions with fee estimates. The appellant also contacted this office on July 19, 2008, to communicate that although the two decisions stated that partial access to the requested records was granted, when he attempted to pick up the records outlined in the index for each of the two decisions, the University was not ready to disclose them to him.

Accordingly, Order PO-2698 was issued to the University with the following provisions:

> 1. I order the University to issue a final access decision to the appellant regarding access to the records in accordance with the *Act* without recourse to any time extensions, no later than **July 28, 2008**.
>
> 2. In order to verify compliance with Provision 1 of this Order, I order the University to provide me with a copy of the decision letter referred to in Provision 1 no later than **July 28, 2008**. This should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 2 Bloor Street East, Suite 1400, Toronto, Ontario, M4W 1A8.

The appellant notified this office on July 28, 2008, that the University had not complied with the order. Communications with the University indicated that both decisions would be completed by August 8, 2008. The appellant was satisfied to receive the decisions on August 8, 2008.

The appellant contacted this office on August 9, 2008, to inform that neither decision was completed on August 8, 2008, when he attempted to collect them. Communications with the

University on August 11, 2008, indicated that a decision for PA08-156 was prepared; however, the decision for PA08-159 would not be available until August 15, 2008.

As of today's date, the University has failed to comply with the order, and has not provided this office with a firm date by which it will do so, despite this office's request.

The University's failure to comply with the order is a serious matter. The University's conduct is serving to delay and frustrate the processes of the *Act* and the Commissioner, an officer of the Legislative Assembly for Ontario. You should be aware that under section 61(1) of the *Act* it is an offence to:

> (d) wilfully obstruct the Commissioner in the performance of his or her functions;

or

> (f) wilfully fail to comply with an order of the Commissioner

The University has now been aware of the order provisions for 21 days, and has now been in non-compliance with the order for 15 days. This situation is unacceptable.

I trust that University will comply with order no later than the close of business on **Friday, August 15, 2008**, and that it will not be necessary for us to take further legal steps to enforce the order.

Should you wish to discuss this matter, I can be reached on my direct line at (416) 326-3920.

Yours truly,

John Swaigen
Legal Counsel

(IPC 2014 e)

Joseph Hickey - OCLA

From: Trell Huether [Trell.Huether@ipc.on.ca]
Sent: August 27, 2014 4:02 PM
To: 'joseph.hickey@ocla.ca'
Subject: RE: Questions for the IPC

Hi Joseph,

Please see answers to your questions below. Please let me know if you have any follow-up questions,

Trell

IPC special investigations

- Has any university ever been investigated for access concerns?
- If so, who, when and why?
- What was the result of the investigation?

A. No Ontario university or college has been investigated by the IPC for concerns regarding access to information.

The IPC has only conducted a small number of special investigations in its history and each of these investigations were the result of rare and exceptional circumstances. These investigations include:

- Deleting Accountability: Record Management Practices of Political Staff - A Special Investigation Report
- Elections Ontario's Unprecedented Privacy Breach: A Special Investigation Report
- Excessive Background Checks Conducted on Prospective Jurors: A Special Investigation Report

- **Labour Relations Disclosure – Section 65**
  - Section 65 allows for exemptions and excludes records. In the past, the IPC has asked for this section to be changed. Any update on this change?

A. The IPC stands by its past recommendations that changes should be made to the labour relations and employment records exclusion in section 65. We have repeatedly recommended that the government of Ontario restore the public's access and privacy rights regarding these records, by repealing sections 65(6) and (7) (and their equivalent in the municipal access and privacy legislation). To date, the government has not acted on our recommendations.

The IPC has discussed our position in several annual reports including:
1998 Page 10 Section: *Exclusions*
2000 Page 33, *Judicial Reviews*
2001 Page 35, *Judicial Reviews*
2002 Page 40, *Judicial Reviews*, Section 3
2003 Page 6, *Employment Information of Public Servants*
2004 Page 5, Employment Information of Public Servants

- What would need to happen for this to change?

A. The Ontario government would have to make a decision to reexamine the legislation and propose changes. We have had no indications that this will happen.

- Has the IPC prepared a legal challenge about this?

A. No.

- Are there any future plans to address this issue?

A. Not at the present time.

- The Commissioner sent a letter to MPPs about this topic on Oct. 30, 1995 according to transcripts. Would it be possible to obtain a copy of this letter?

A. Given the age of this letter, it has now gone to archivist and is not in the IPC's possession. The letter expressed concerns with the legislation as proposed and eventually passed by the government. These concerns were addressed repeatedly in our annual reports.

- Do any other province's access laws have this type of exemptions?
- If so, could you elaborate on which provinces have these types of exemptions and the differences between Ontario's laws and the laws of other provinces.

A. To our knowledge, Ontario is the only province with this type of exclusion.

- **Institutions Delaying Access Requests**

- Has the IPC developed a tracking criteria to monitor institutions which may be slow or have patterns of delaying FOI requests?
- Various legal documents demonstrate that the IPC has tracked Requestors and Appellants who make excessive or frivolous requests.
- Is there a criteria set out to define institutions in the same manner?

A. The IPC tracks both the response rate and compliance rate of every reporting institution. These complete figures are published yearly in the Statistical Adjunct to the Annual Report. From time to time, the IPC has publicly identified institutions in our Annual Report which have systemic delays in compliance and response. An example of this can be found in our 2001 Annual Report on page 22 (see appendix for original text). In the report, the IPC highlighted serious problems with the Ministry of the Environment's 30-day compliance rates. When an institution is identified, the IPC will meet with its leaders to discuss our concerns, offer guidance and help to develop a plan for reporting improvements. (In this case, the Ministry of the Environment had an abysmal 13.6 per cent 30-day compliance rate in 2001. The Ministry has improved it compliance rate enormously over the years and had a 86.5 per cent 30-day compliance rate in 2013). Overall compliance by all provincial institutions has also improved from a 30-day compliance rate of 55.6 per cent in 2001 to 85.5 per cent in 2013.

- **Offenses under 61 (subsection 1)**
  - Has the IPC ever requested that the Attorney General lay charges under this section?
  - If so, when and what was the result?

A. The IPC has not requested the Attorney General to lay charges for an offense under this section. On rare occasions, the IPC has made suggestions to the Attorney General's office to examine cases further. To date, these suggestions have not resulted in charges being brought forward.

Trell Huether
Media Relations Specialist
Office of the Information & Privacy Commissioner of Ontario, Canada
2 Bloor Street East, 14th Floor
Toronto, Ontario M4W 1A8
Phone: 416 326 3939
Cell: 416 873 9746
Fax: 416 325 9195

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(University of Ottawa 2010)

uOttawa

Université d'Ottawa
Services juridiques

University of Ottawa
Legal Services

January 26, 2010

By Fax and Courier

Information and Privacy Commissioner of Ontario
Tribunal Services Department
2 Bloor Street East, Suite 1400
Toronto, Ontario M4W 1A8

Attention: Ms. Diane Smith, Adjudicator

Re: Appeal PA08-375
University of Ottawa File No. AS-175
Supplemental Notice of Inquiry

Dear Ms. Smith,

Further to your letter of January 5, 2010, the University submits the following representations in response to the Supplementary Notice of Inquiry dated January 5, 2010 in respect of the above-noted Appeal.

The Records at Issue

2. As requested, enclosed is a copy of Records 2, 3, and 11 and identified on each copy are the exemptions claimed.

   Record 2 (severed – page 1)
   Record 3 (severed – page 3)
   Record 11 (severed – page 1 and top of page 2)

3. The University denied access to Records 2, 3 and 11 under section 49(a) and in doing so it considered whether the records should be released to the requester/appellant. Considering that Records 2, 3, and 11 were, in each case, sent to the law firm retained by the University about numerous grievances filed by a University professor and related to ongoing labour relations disputes with the professor, the University's position is that each of these records are subject to the solicitor and client privilege exemption provided in section 19. With respect to Record 11, the University submits that the Record was also denied under section 49(b). Consequently, in addition to

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550 Cumberland (302)
Ottawa ON K1N 6N5 Canada
www.uOttawa.ca

the solicitor and client privilege exemption, section 21 and the provisions on personal privacy apply to Record 11.

RECORD 2

Solicitor and Client Privilege (s. 19)

4. Section 19 of the Act states that a head may refuse to disclose a record that is subject to solicitor-client privilege for use in giving legal advice or in contemplation of or for use in litigation. The University submits that the undisclosed portion of Record 2 satisfies both branches of the privilege: the common law solicitor-client privilege (branch 1) and the litigation privilege (branch 2).

Common law (branch 1)

5. In order for Record 2 to be subject to the common law solicitor-client privilege (branch 1), the record must meet either criteria A or B as described below:

Criteria A:
- (i) there is a written or oral communication, and
- (ii) the communication must be of a confidential nature, and
- (iii) the communication must be between a client (or his agent) and a legal advisor, and
- (iv) the communication must be directly related to seeking, formulating or giving legal advice;

OR

Criteria B: the record was created or obtained for existing or contemplated litigation

Litigation (branch 2)

6. In order for Record 2 to be the subject of the litigation privilege (branch 2), two criteria must be satisfied:

Criteria A: the record must have been prepared by or for counsel employed or retained by the University;

AND

Criteria B: the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation [Order 210].

7. The undisclosed portion of Record 2 satisfies both branches of the privilege as it consists of:

a) written communication,
b) intended to be confidential as indicated in the subject line (and the other recipients are University staff members),
c) sent by the University (the client)
d) to lawyers from the law firm of Emond Harnden LLP retained by the University (Lynn Harnden and André Champagne)

e) for the purpose of keeping the University lawyers informed on an existing and ongoing labour relations matters (involving professor [redacted]) and for seeking legal advice.

8. The purpose of the undisclosed portion of Record 2 is also to seek legal advice in connection with allegations raised by the requester/appellant. The disclosed portion of Record 2 shows that the requester/appellant makes allegations of unfairness and discrimination in the handling of the requester/appellant's application to a master's program at the University.

9. The *Descôteaux* case is cited in the Supplemental Notice of Inquiry and the University further relies upon it to state that the undisclosed portion of Record 2 falls within the description of the privilege put forward by the Supreme Court of Canada *Descôteaux* as follows:

> "... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship ..."[*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 at 618....]"

10. The University also submits that the undisclosed portion of Record 2 falls within the "continuum of communications" as described in the *Balable* case and as cited in the Supplemental Notice of Inquiry. It further relies on the *Balable* case to submit that the undisclosed portion of Record 2 relates to the existing and ongoing labour relations matters with professor Rancourt and the confidential provision of information that is relevant to various stages of the labour relations matter.

> "... In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the 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. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P-1409].

No Waiver

11. The University submits that it has not taken any action that constitutes a waiver of the solicitor-client privilege. The undisclosed portion of Record 2 has not been disclosed to

a party outside of the University and the University does not intend to waive voluntarily the privilege.

Exercise of Discretion

12. The University submits that it exercised its discretion based on the principles set out in the *Freedom of Information and Protection of Privacy Act.* In examining Record 2, it was determined that partial access could be given to the record and that the undisclosed portion relates to a direct communication with lawyers retained by the University for the purpose of informing the lawyers and obtaining legal advice. The University's position is that there are no substantial ramifications or prejudice to the requester/appellant if the undisclosed portion of the Record remains severed. Whereas if the undisclosed portion is released to the requester/appellant, such disclosure would directly impinge upon the solicitor-client privilege and the rationale of ensuring a client may confide in his or her lawyer on a legal matter without reservation (Order P-1551). Consequently, the University did take into account all relevant factors in the exercise of its discretion.

Severances

13. The University has considered whether there is any undisclosed information which should be disclosed pursuant to section 10(2). The University submits that, given the nature of the exemption claimed, it cannot disclose any of the undisclosed portion of the Record.

RECORD 3

Solicitor and Client Privilege (s. 19)

14. The University submits that undisclosed portion of Record 3 satisfies both branches of the privilege exemption as it consists of:

    a) written communication,
    b) intended to be confidential as indicated in the subject line (and the other recipients are University staff members),
    c) sent by the University (the client),
    d) to lawyers from the law firm of Emond Harnden LLP retained by the University (Lynn Harnden and André Champagne),
    e) for the purpose of keeping the University lawyers informed on an existing and ongoing labour relations matters (involving professor [redacted] and for seeking legal advice.

15. The purpose of the undisclosed portion of Record 3 are part of the continuum of communications and sent to the lawyers hired by the University as part of the legal advice being sought.

16. The University reiterates its submissions made above in respect of Record 2 and states that both branches of the privilege have been met.

No Waiver, Exercise of Discretion and Severances

17. The University reiterates its submissions on waiver, exercise of discretion and severances made above in respect of Record 2. The undisclosed portion of Record 3 has not been sent to anyone outside of the University and there has been no waiver of the privilege. The University also submits that, in the case of Record 3, it has properly exercised its discretion. The University has considered whether there is any undisclosed information which should be disclosed pursuant to section 10(2). The University submits that, given the nature of the exemption claimed, it cannot disclose any of the undisclosed portion of the Record.

RECORD 11

Solicitor and Client Privilege (s. 19)

18. The undisclosed portion of Record 11 appearing at the bottom of page 1 and at the top of page 2 is the same as the undisclosed portion of Record 2. In that regard, the University reiterates its submissions made for Record 2.

19. With respect to the undisclosed portion of Record 11 appearing at the top of page 1, that portion consists of,

    a) written communication,
    b) intended to be confidential as indicated in the subject line (and the other recipients are University staff members),
    c) sent by the University (the client)
    d) to lawyers from the law firm of Emond Harnden LLP retained by the University (Lynn Harnden and André Champagne)
    e) for the purpose of keeping the University lawyers informed on an existing and ongoing labour relations matters (involving professor [redacted] and for seeking legal advice.

20. The purpose of the communication was to keep the University lawyers informed in connection with the same labour relations matter referred to in Records 2 and 3. The University is providing information to its lawyers as part of the legal strategy or course of action involving a University professor [redacted]

21. The purpose of the undisclosed portion of Record 3 are part of the continuum of communications sent to the lawyers hired by the University and is part of the legal advice being sought.

22. Consequently, the University reiterates its submissions made above in respect of Record 2 and states that both branches of the privilege have been met.

No Waiver, Exercise of Discretion and Severances

23. The University reiterates its submissions on waiver, exercise of discretion and severances made above in respect of Record 2. The undisclosed portion of Record 11 has not been sent to anyone outside of the University and there has been no waiver of the privilege. The University also submits that, in the case of Record 11, it has properly exercised its discretion. The University has considered whether there is any undisclosed

information which should be disclosed pursuant to section 10(2). The University submits that, given the nature of the exemption claimed, it cannot disclose any of the undisclosed portions of the Record

Personal Privacy (s. 21)

24. While the University submits that the solicitor and client privilege is the exemption that applies to the entire undisclosed portion, the University also submits that section 21 applies to part of the undisclosed portion of Record 11.

25. The undisclosed portion of Record 11 contains personal information of other identifiable individuals other than the requester/appellant as defined at s 2(1), specifically, it contains,

a) the name of two University professors [redacted];
b) together with the personal view of one of those individuals [redacted] that is of a confidential nature; and
c) information relating to the employment history of the other individual [redacted]

26. If the undisclosed portion was disclosed and even if severed, it is reasonable to expect that the individual to whom the information relates would be identified.

27. Having established that the information is personal information of an identifiable individual, the University submits that it must refuse to disclose the personal information unless one of the exceptions to the exemption at section 21 (1) (a) to (f) apply. In this case, the University submits that while none of the paragraphs (a) to (e) of section 21 (1) apply, paragraph (f) of s. 21 (1) is of consideration in the circumstances. Section 21 (1) (f) provides that a head shall refuse to disclose personal information except if the disclosure does not constitute an unjustified invasion of personal privacy.

28. The University submits that s. 21(1) (f) does not apply and that the disclosure of that information in the circumstances would constitute an invasion of privacy for the following reasons:

a) there is a presumed invasion of privacy under section 21(3); and
b) factors listed in s 21(2), specifically 21 (2) (h) and other relevant circumstances apply.

29. The University submits that the presumption at section 21(3) (d) applies in the circumstances as the information relates to the employment history of a University professor [redacted]

30. Section 21 (2) applies to the information relating to a professor [redacted] A University professor has the discretion to agree or not to the supervision of a graduate student and the undisclosed portion of Record 11 consists of information that was supplied in confidence by a professor [redacted] The University submits that this falls under 21 (2) (h). The factor provided in 21

(2) (f) weighs in favour of privacy protection (Order PO-2265). In the alternative, the University submits that if it does not fall under 21 (2), it is a valid consideration in determining whether an unjustified invasion of personal privacy exists.

31. If the University's representations on s. 21 are not accepted, the University submits that in any event, the entire undisclosed portion of Record 11 falls under the exemption of solicitor and client privilege.

Should you require anything further, please do not hesitate to contact me.

Yours truly,

Kathryn Prud'homme

Kathryn Prud'homme
Legal Counsel

Encls.