QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2018 SKQB 92**

Date: **2018 03 22**
Docket: QBG 979 of 2016
Judicial Centre: Saskatoon

BETWEEN:

[redacted],

APPELLANT
(APPLICANT)

- and -

UNIVERSITY OF SASKATCHEWAN,

RESPONDENT
(RESPONDENT)

Counsel:

Gary L. Bainbridge, Q.C.	for the appellant (applicant)
John R. Beckman Q.C. and Robert J. Affleck	for the respondent

---

JUDGMENT
March 22, 2018

DANYLIUK J.

Introduction

[1] This is a statutory appeal brought by [redacted]. He seeks access to certain documents and records from the University. The University resists and claims exemptions.

[2] In a previous ruling on this matter (2017 SKQB 259), I directed that the University provide further information regarding its claims of privilege.

[3] The directive portion of the previous ruling read as follows:

1. The documents filed by the University of Saskatchewan shall remain under seal until further order and may not be inspected or viewed by any person or party without a specific order of this court.

2. At this time and subject to further order, none of the documents presently on the court file shall be made available to [redacted] or his counsel.

3. The University of Saskatchewan shall provide this court and counsel for [redacted] with a summary of the sealed documents presently on file, which summary shall include the following information and be supplied on the following terms:

    (a) The University shall only supply this summary after counsel for [redacted] provides the University and the court with an undertaking as to confidentiality that is satisfactory to both sides. In the event the parties cannot agree on the nature of the undertaking, that dispute is to be referred back to me.

    (b) The University's summary shall contain a list of the documents to which the University claims privilege; the type or nature of the privilege claimed with respect to each document (including references to *The Local Authority Freedom of Information and Protection of Privacy Act* provisions if required); the date(s) of the documents or communications; and the sender and recipient. The University is not presently required to summarize the contents of any of the documents.

    (c) The University's summary shall also be filed with this court and maintained under seal until further order.

4. Within 45 days of receipt of the summary, both [redacted] and the University of Saskatchewan shall file with this court a further brief or memorandum setting out their further positions regarding the University's claims of exemption of the sealed documents from disclosure. These briefs shall not be exchanged by counsel and shall be filed independently with the court and *in camera*, and both of them shall be sealed and not to be accessed by anyone without a specific order authorizing same. The court's expectation is that the University's brief will be very specific as to the basis, background and context of how privilege attaches to each document, including the type of privilege claimed.

5. After receipt of these briefs the court shall render a decision and, if required, provide further directions.

6. Costs of this application are reserved.

[4] The parties have complied with these directions. I have carefully reviewed and considered all the material filed. I wish to thank counsel for the excellent briefs filed.

Facts

[5] There is no substantial difference between the parties as to the background facts; rather, the parties are at odds as to how to apply and interpret those facts within the particular legal context of this privacy legislation.

[6] At all material times the applicant, [redacted], has been an employee of the University. He is a Librarian, and holds a tenured appointment as faculty effective September 23, 2013.

[7] In April 2015 he applied to the University for disclosure of certain records pursuant to *The Local Authority Freedom of Information and Protection of Privacy Act*, SS 1990-91, c L-27.1 [*LAFOIPA*]. These records spanned March 1, 2014 to April 24, 2015. [redacted]'s request sought the following records:

> All correspondence in electronic form sent or received (including those deleted from her e-mail mailbox) by [redacted] (Dean of the University of Saskatchewan Library) that includes a reference to me by name (i.e. [redacted], or [redacted], and/or [redacted]), and/or a reference to my employment history (including changes to my employment positions held by me with the University of Saskatchewan), and/or a reference to the harassment complaint filed by me"…

[8] An exchange of correspondence followed, the nature of which was to clarify [redacted]'s requests. It appears the parties agreed that a number of records could be excluded:

- emails in which [redacted] was copied (a "cc" or "bc" recipient);

- emails in which [redacted] was a recipient through a group list;
- emails in which [redacted] was the "to" recipient; and
- emails in which [redacted] was the sender.

[9] By letter dated July 24, 2015 the University replied to this request. The nature of the reply was twofold. Some of the requested records were provided to [redacted], comprised of 129 pages of information. Some of the requested records were not provided to [redacted], amounting to 306 pages. The reasons for the University's denial of [redacted]'s request were based on exemptions from disclosure claimed by the University.

[10] The University's exemption claim was manifold:

- some records were withheld or redacted in accordance with s. 8 of *LAFOIPA* so as to prevent unauthorized disclosure of a third party's personal information;
- some records were withheld as duplicates;
- some records were withheld pursuant to ss. 14(1)(d), 16(1)(a) and (b), 21, 28(1), and 30(2) of *LAFOIPA* because they contained:
    - correspondence regarding a third party that was provided to the University that was confidential in nature;
    - advice or recommendations developed by or for the University;
    - consultations or deliberations involving University officers or employees;

- information possibly injurious to the University in the conduct of existing or anticipated legal proceedings;
- information subject to solicitor-client privilege, was prepared by or for the University's legal counsel and/or correspondence between such legal counsel and third parties relating to a matter involving provision of advice or other services by legal counsel;
- information that is evaluative or opinion related material provided in confidence and compiled solely for the purpose of determining an individual's suitability, eligibility or qualifications for employment.

[11] [redacted] was not content with this response. On July 30, 2015 he sought a review of the University's decision to withhold those records. That review was sought pursuant to s. 38 of *LAFOIPA*, and was conducted by the Office of the Information and Privacy Commissioner of Saskatchewan. By mid-August that Office indicated that it would conduct such a review.

[12] The review was conducted by Ronald Kruzeniski Q.C., the Information and Privacy Commissioner. He conducted an *in camera* review of all requested documents. He also received written submissions from the parties. After due consideration, the Commissioner released his decision.

[13] Mr. Kruzeniski Q.C. documented his findings in a report dated May 24, 2016. He found [redacted]'s request was made in good faith and for a legitimate purpose. He found the University did not respond to the request within the legislative time frame, and suggested that the University improve its processes so that it could

respond in a timely manner.

[14] Regarding the University's exemption claims, Mr. Kruzeniski Q.C. determined that some of those claims were valid and some were not. He found that the claim under s. 14(1)(d) was not valid. He found the claim under s. 16(1)(a) and (b) partially valid. He found the claim under s. 28(1) partially valid. He found the claim under s. 30(2) partially valid. He then listed (in Appendix A to his report) the records which he found were not properly exempted by the University and recommended the University release those records to [redacted].

[15] Under the legislation Mr. Kruzeniski's recommendations and findings did not bind the University. The University had 30 days to decide whether it would agree with, and follow, those recommendations and findings. It communicated its determination in writing on June 22, 2016.

[16] The University accepted Mr. Kruzeniski's recommendation regarding reviewing its internal processes to ensure timely responses to such requests for information. However, the University refused to release the documents recommended by Mr. Kruzeniski.

[17] It must be noted that under s. 45 of *LAFOIPA*, the University was not bound to accept any or all of the Commissioner's findings or recommendations and was not bound to release the documents (in whole or in part) that the Commissioner said should be released to [redacted].

[18] [redacted] brought this appeal to the court under s. 46(1) of *LAFOIPA*.

[19] From the material filed, it appears this dispute between [redacted] and the University is not an isolated one. There have been complaints, grievances and

labour proceedings. Some of these proceedings are pending, awaiting a hearing or a disposition from a tribunal.

Issues

[20] The issues in this application all relate to whether any documents should be released to [redacted] or his counsel. Within that broad issue are several issues of further particularity, which I have set out in the order the University (as claimant to the exemptions) has used in its material:

1. What general principles are applicable to this appeal?
2. Does s. 28(1) *LAFOIPA* have any application to the relevant records?
3. Does s. 14(1)(d) *LAFOIPA* have any application to the relevant records?
4. Does s. 16(1)(a) *LAFOIPA* have any application to the relevant records?
5. Does s. 16(1)(b) *LAFOIPA* have any application to the relevant records?
6. Does s. 30(2) *LAFOIPA* have any application to the relevant records?
7. What order should be made regarding release of any of these records?
8. What order should be made as to costs?

Analysis

1. What general principles are applicable this appeal?

[21] My ruling on this issue is contained in my previous fiat. As stated therein this appeal is not a review on the record; it is a *de novo* proceeding, taken pursuant to ss. 46 and 47 *LAFOIPA.*

[22] I determined that under *LAFOIPA* there is, essentially, a two-step process involved in an appeal to this court. First, under s. 47(1)(b) this court decides whether to review the disputed records *in camera*. If not, the matter would presumably be at an end. If so, in the second step of the process the court goes on to review the records in light of the parties' submissions and the applicable law, then determine whether any records ought to be released to the applicant pursuant to s. 47(5), or make any other appropriate order. The court may also declare records exempt from disclosure (s. 47(6)).

[23] Because this is a *de novo* appeal and because the Commissioner's findings are non-binding, on this appeal there is no duty of substantial deference to the Commissioner's decision. Members of this court are entitled and obligated, to look at this matter afresh.

[24] The parties agree as to the onus under *LAFOIPA*, in particular s. 51 thereof. The onus of demonstrating that any document should not be disclosed is on the party in possession of those records, in this case the University. Unless the University can demonstrate a reason not to produce a record it is to be produced to [redacted]. Pursuant to s. 5 *LAFOIPA* he "shall be permitted access to records" unless the University satisfies its onus.

[25] It is also important to bear in mind the overarching purpose of statutes such as *LAFOIPA* when interpreting those statutes and deciding whether a record should be produced to the person seeking same, or whether some exception or exemption applies. These statutes are geared to ensuring citizens have the right to access information and documents possessed by a controlling authority (usually government or, as here, a body holding delegated authority from the government). Those authorities are subject to the legislation to ensure transparency and accountability to persons affected by the operations of those authorities.

[26] *LAFOIPA* is, of course, to be interpreted in a manner consonant with the principled approach to statutory interpretation set out in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para 21 which contains a quote from page 87 of Elmer Driedger, *Construction of Statutes*, 2d ed (Toronto: Butterworths, 1983):

> [21] Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[27] The purpose of freedom of information legislation has been judicially considered. For example, see *Merck Frosst Canada Ltd. v Canada (Health),* 2012 SCC 3, [2012] 1 SCR 23, Justice Cromwell begins the majority decision as follows:

> [1] **Broad rights of access to government information serve important public purposes. They help to ensure accountability and ultimately, it is hoped, to strengthen democracy. "Sunlight", as Louis Brandeis put it so well, "is said to be the best of disinfectants"** ("What Publicity Can Do", *Harper's Weekly*, December 20, 1913, 10, at p. 10).
>
> [2] **Providing access to government information, however, also engages other public and private interests.** Government, for example, collects information from third parties for regulatory purposes, information which may include trade secrets and other confidential commercial matters. Such information may be valuable to competitors and disclosing it may cause financial or other harm to the third party who had to provide it. Routine disclosure of such

> information might even ultimately discourage research and innovation**. Thus, too single-minded a commitment to access to this sort of government information risks ignoring these interests and has the potential to inflict a lot of collateral damage. There must, therefore, be a balance between granting access to information and protecting these other interests in relation to some types of third party information.**
>
> [3] The need for this balance is well illustrated by these appeals. They arise out of requests for information which had been provided to government by a manufacturer as part of the new drug approval process. In order to get approval to market new drugs, innovator pharmaceutical companies, such as the appellant Merck Frosst Canada Ltd. ("Merck"), are required to disclose a great deal of information to the government regulator, the respondent Health Canada, including a lot of material that they, with good reason, do not want to fall into their competitors' hands. But competitors, like everyone else in Canada, are entitled to the disclosure of government information under the *Access to Information Act*, R.S.C. 1985, c. A-1 ("Act" or "*ATI*").
>
> [4] **The Act strikes a careful balance between the sometimes competing objectives of encouraging disclosure and protecting third party interests.** While the Act requires government institutions to make broad disclosure of information, it also provides exemptions from disclosure for certain types of third party information, such as trade secrets or information the disclosure of which could cause economic harm to a third party. It also provides third parties with procedural protections. These appeals concern how the balance struck by the legislation between disclosure and protection of third parties should be reflected in the interpretation and administration of that legislation.

And later, at paras. 21 to 23:

> [21] **The purpose of the Act is to provide a right of access to information in records under the control of a government institution. The Act has three guiding principles: first, that government information should be available to the public; second, that necessary exceptions to the right of access should be limited and specific; and third, that decisions on the disclosure of government information should be reviewed independently of government** (s. 2(1)).
>
> [22] In *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at para. 61, La Forest J. (dissenting, but not on this point) underlined that **the overarching purpose of the Act is to facilitate democracy and that it does this in two related ways: by helping to ensure that citizens have the information required to participate**

> **meaningfully in the democratic process and that politicians and officials may be held meaningfully to account to the public.** This purpose was reiterated by the Court very recently, in the context of Ontario's access to information legislation, in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815. The Court noted, at para. 1, that **access to information legislation "can increase transparency in government, contribute to an informed public, and enhance an open and democratic society". Thus, access to information legislation is intended to facilitate one of the foundations of our society, democracy. The legislation must be given a broad and purposive interpretation,** and due account must be taken of s. 4(1), that the Act is to apply notwithstanding the provision of any other Act of Parliament: *Canada Post Corp. v. Canada (Minister of Public Works)*, [1995] 2 F.C. 110, at p. 128; *Canada (Privacy Commissioner) v. Canada (Labour Relations Board)*, [1996] 3 F.C. 609, at para. 49, aff'd (2000), 25 Admin. L.R. (3d) 305 (F.C.A.).
>
> [23] **Nonetheless, when the information at stake is third party, confidential commercial and related information, the important goal of broad disclosure must be balanced with the legitimate private interests of third parties and the public interest in promoting innovation and development. The Act strikes this balance between the demands of openness and commercial confidentiality in two main ways.** First, it affords substantive protection of the information by specifying that certain categories of third party information are exempt from disclosure. Second, it provides procedural protection. The third party whose information is being sought has the opportunity, before disclosure, to persuade the institution that exemptions to disclosure apply and to seek judicial review of the institution's decision to release information which the third party thinks falls within the protected sphere. These appeals raise significant issues about the interpretation of the substantive protections as well as about how the procedural protections should operate.
>
> [Emphasis added]

[28] The commentary as to the purpose behind this type of legislation has been adopted in Saskatchewan. See, for example, *Canadian Bank Note Limited v Saskatchewan Government Insurance*, 2016 SKQB 362.

[29] As well, as counsel for [redacted] correctly points out, record production under *LAFOIPA* is not an all-or-nothing proposition. Section 8 permits a

record to be redacted or to have certain portions severed from that which is produced.

[30] Finally, I note the parties to this appeal have agreed that s. 21 is not in play herein. Section 21 deals with the issue of solicitor-client privilege. Justice Mills considered that provision and that broad issue in *Saskatchewan* (*Office of the Information and Privacy Commissioner) v University of Saskatchewan*, 2017 SKQB 140. That case is before the Saskatchewan Court of Appeal. To allow much of [redacted]'s matter to proceed, the parties had agreed to proceed before the Commissioner only on the documents where the s. 21 argument was not being used by the University. Those documents to which a s. 21 privilege claim applies will be dealt with in a second round of proceedings before the Commissioner. The Commissioner's initial finding and report reflects this arrangement. Accordingly, I am not passing upon any issues of solicitor-client privilege as contemplated by s. 21, at the express agreement and invitation of the parties.

[31] Those being the general principles applicable, I turn now to the parties' arguments respecting each statutory provision invoked.

2. Does s. 28(1) LAFOIPA have any application to the relevant records?

[32] In my previous fiat the University was directed to serve and file a summary of the documents in issue. It did so.

[33] With respect to s. 28(1) only one document, #34, is the subject of an exemption claim based on "personal information".

[34] The following *LAFOIPA* provisions are relevant to this consideration:

Interpretation

2(h) "personal information" means personal information within the meaning of Section 23.

Interpretation

23(1) Subject to subsections (1.1) and (2), **"personal information"** means personal information about an identifiable individual that is recorded in any form, and includes:

…

(k) the name of the individual where:

(i) it appears with other personal information that relates to the individual; or

(ii) the disclosure of the name itself would reveal personal information about the individual.

(2) **"Personal information"** does not include information that discloses:

(a) the classification, salary, discretionary benefits or employment responsibilities of an individual who is or was an officer or employee of a local authority;

(b) the personal opinions or views of an individual employed by a local authority given in the course of employment, other than personal opinions or views with respect to another individual;

…

(g) the academic ranks or departmental designations of members of the faculties of the University of Saskatchewan or the University of Regina; or

(h) the degrees, certificates or diplomas received by individuals from the Saskatchewan Polytechnic, the University of Saskatchewan or the University of Regina.

Disclosure of personal information

28(1) No local authority shall disclose personal information in its possession or under its control without the consent, given in the prescribed manner, of the individual to whom the information relates except in accordance with this section or section 29.

[35] The record in question is an email. That email refers to [redacted] giving some documents to another person, whose name is redacted in the document given to [redacted]. The University relies upon s. 23(1)(k). The email's author reviews some preparations she undertook, including stating that she ". . . reviewed the

documentation you supplied to [name redacted] in May regarding your outcomes for the period since your appointment."

[36] I have reviewed the document. I cannot find that the exemption under this subsection applies to the document in question. From the context of the entire document as well as the passage referring to the individual, it appears [redacted] was a party to communications with the unidentified individual. That, together with the temporal context provided in the subject email, would likely allow [redacted] to infer the name of this individual.

[37] This, however, ignores both the purpose and fundamental operating principle of this legislation, set out above. A person seeking information under *LAFOIPA* is entitled to get that information unless the head can justify non-disclosure through an exception or exemption.

[38] But perhaps even more importantly, the name of the individual is virtually a passing reference, and is certainly (at best) incidental to the main import of the email. The University is taking too restrictive a view of the terms "personal information" within the meaning of s. 23 and in particular both parts of s. 23(1)(k). There is no "other personal information" as to the redacted individual, nor would disclosure of the name itself reveal any other personal information as to the redacted individual.

[39] The University also expresses concerns as to [redacted]'s use of this record if he receives it. If [redacted] uses it for some improper purpose, both the University and any other individual affected by such improper use are entitled to legal remedies. It cannot simply be assumed that just because [redacted] is disgruntled with or in disputes with the University that he will do something wrong with documents he

obtains under *LAFOIPA*. The University's position almost assumes [redacted] seeks the information for an improper purpose. If that was the test, very little would ever be disclosed under *LAFOIPA*. It is not the test. The law is, [redacted] gets the information unless the University establishes there is a good reason for [redacted] not to get the information.

[40] Given the nature of this matter and this document I agree with the Commissioner and I find the University has failed to establish any basis to resist production of a full copy of this document to [redacted], and I therefore order and direct that an unredacted copy of document #34 be provided to [redacted] forthwith.

3. Does s. 14(1)(d) LAFOIPA have any application to the relevant records?

[41] Here, the University relies upon s. 14(1)(d) of *LAFOIPA*, and resists production of its records on the basis that such disclosure would be injurious to its position in legal proceedings involving [redacted].

[42] Section 14(1)(d) of *LAFOIPA* reads as follows:

> **Law enforcement and investigations**
> 14(1) A head may refuse to give access to a record, the release of which could:
>
> (d) be injurious to the local authority in the conduct of existing or anticipated legal proceedings.

[43] I have examined this exemption claim from two perspectives: are there existing or anticipated legal proceedings between [redacted] and the University; and if so, would production of the records be injurious to the University? This mode of analysis has been used previously; for example see *Saskatchewan Power Corporation (Re)*, 2015 CanLII 64791 (SK IPC), at paras 9 and 10.

[44] So, first: are there existing or anticipated legal proceedings? "Legal proceedings" have been defined and considered in the context of privacy law:

> [10] *Legal proceedings* are proceedings governed by rules of court or rules of judicial or quasi-judicial tribunals that can result in a judgment of a court or a ruling by a tribunal. Legal proceedings include all proceedings authorized or sanctioned by law, and brought or instituted in a court or legal tribunal, for the acquiring of a right or the enforcement of a remedy.
>
> *Saskatoon (City) (Re),* 2015 CanLII 6098 (SK IPC).

[45] In *The Evidence Act*, SS 2006, c E-11.2, the Saskatchewan Legislature has defined legal proceeding in two portions of s. 2:

> **"action"** means:
>
> (a) a civil proceeding commenced by statement of claim or in any other manner authorized or required by statute or rules of court; or
>
> (b) any other original proceeding between a plaintiff and a defendant; …
>
> **"matter"**, in relation to proceedings in a court, means every civil proceeding that is not an action; …

[46] In the *Canada Evidence Act*, RSC, 1985, c C-5, s. 30(12) defines "legal proceeding" as "any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes an arbitration".

[47] Labour grievances have been acknowledged to be "legal proceedings" for statutory purposes: *Park v Canada*, 2012 TCC 306.

[48] Thus the modern definition of "legal proceeding" is relatively expansive and inclusive. It is not limited to the traditional lawsuit in a court. It can include matters taken before alternative boards and tribunals.

[49] *LAFOIPA* does not define "legal proceeding" nor limit same. I cannot

disagree with the definition used by the Commissioner from time to time, as set out above.

[50] I note that in considering whether "legal proceedings" exist or are anticipated I am not dealing with issues of "pure" solicitor-client privilege. That is an issue distinct from the s. 14 *LAFOIPA* exemption.

[51] Based on the evidence before me I am prepared to find that there are existing or anticipated legal proceedings between [redacted] and the University. As part of its material on this application (and with notice to counsel for [redacted]) the University filed a copy of an affidavit in another action, being [redacted] *v University of Saskatchewan,* QBG 227 of 2016, Judicial Centre of Battleford, sworn October 27, 2016 by a Labour Relations Specialist employed at the University. That affidavit sets out a number of matters already undertaken or arising between the parties:

(a) Around December 12, 2014 [redacted] filed a discrimination and harassment complaint under the University's policy in that regard, leading to an independent investigation of the allegations.

(b) On or about April 8, 2015 [redacted] filed a complaint about alleged retaliation from the University resulting from his discrimination and harassment complaint. That matter was initially dealt with by a Health Officer of Saskatchewan's Occupational Health and Safety Harassment and Discriminatory Action Prevention Unit, and that Health Officer provided a written decision on June 5, 2015 in which [redacted]'s complaint was dismissed. [redacted] appealed to an independent adjudicator who dismissed his appeal on April 14, 2016 in a 23-page written decision. Then, [redacted] appealed that decision to the

Saskatchewan Labour Relations Board which heard argument in September 2016 but still has that matter on reserve. The decision on this proceeding between parties is pending. The Labour Relations Board issued a decision on October 31, 2016 reported at 2016 CanLII 74280 (SK LRB). [redacted]'s appeal of the prior decisions against him was dismissed by the LRB. It has not been disclosed whether he took any judicial review or other application regarding the LRB decision.

(c) In January 2015 the University's Faculty Association (on behalf of [redacted]) filed a grievance (#2014-2). This grievance pertained to a change of duties for [redacted] which was alleged to violate the collective bargaining agreement. As well, an allegation of discrimination was associated with the grievance. That matter is not presently outstanding as it was settled prior to a hearing.

(d) In May 2016 another grievance (#2016-05) was filed on behalf of [redacted] by the Faculty Association. That grievance seeks the withdrawal of a letter of reprimand issued to [redacted] for allegedly recording conversations occurring between he and the Dean, and other library employees. That matter is listed as pending in the affidavit filed.

(e) At some time in 2016 [redacted] issued a statement of claim in Battleford, naming the University and his Dean as defendants. The affidavit filed was in support of an application to strike same. From the record before me it is unclear what happened in that action, or whether it is ongoing.

[52] With respect to the complaint regarding retaliation (item (b) above),

which wound its way through the Labour Relations Board, an Agreed Statement of Facts and an Additional Statement of Facts were filed. These were adopted by the LRB. The salient factual findings from the April 14, 2016 adjudicator's appeal decision are as follows:

> 15. On or about December 12, 2014, [redacted] filed a complaint pursuant to the University's Discrimination and Harassment Prevention Policy (the "December 2014 Complaint) alleging discrimination and harassment by [redacted].
>
> 16. On January 16, 2015, the Appellant met with Officers of the Occupational Health and Safety Division to discuss the OH&S procedure.
>
> 17. On January 21, 2015, the Appellant was advised by the employer, via Human Resources, that a formal investigation of his complaint was to be conducted by external investigators. The Appellant was further advised that, in the interim, he would not be reporting to [redacted] (as [redacted] had also requested).
>
> 18. On January 29, 2015, in the course of an investigative interview, the Appellant revealed to the external investigators that he had recorded meetings and conversations between he and [redacted] on ten (10) separate occasions from July 3, 2014, up to and including October 16, 2014. The recordings also included conversation between colleagues of the Appellant in which the Appellant was not a party to the conversation. [redacted] made the recordings using his mobile phone, without [redacted]'s or the other colleagues' knowledge or consent. Through the Additional Statement of Facts, the Appellant indicates that in two (2) or three (3) instances persons who were not the target of the recording were picked up by the recording microphone [on his mobile smart phone] on an incidental basis. For the purposes of this hearing and only for the purposes of this hearing, this statement, while not admitted by the University, is not contested.
>
> …
>
> 24. On April 2, 2015 the Interim President, notified the Appellant by letter stating the Appellant was relieved of his regular duties and suspended from his position with pay pending a separate investigation into the matter of the "surreptitious recordings". The Appellant was assigned new office space at the University and permitted to continue research and scholarly work during the period of suspension. In the letter, Dr. Barnhart noted that the suspension was not intended to be punitive or disciplinary and was intended to

> allow time for the University to investigate the circumstances of the surreptitious recordings and to consider the necessary steps to take.
>
> 25. On April 8, 2015, the Appellant filed a Discriminatory Action complaint with OH&S alleging at Paragraph 1, page 4 that the suspension was in direct retaliation for exercising a right under the Act, with reference, at Paragraph 3 to the December, 2014 complaint against [redacted].

[53] In his material before this court [redacted] did not set out any of these proceedings, or the results thereof. He did not comment in his evidence as to existing or anticipated legal proceedings between he and the University.

[54] The record before me, such as it is, discloses that some of the legal matters in issue between the parties have been resolved. The OH&S complaint that went to the Labour Relations Board appears to have been resolved. Grievance 2014-2 was resolved without a hearing.

[55] Again, based on the material placed before me, grievance #2016-05 regarding the letter of reprimand appears to be outstanding.

[56] It must be recalled that these proceedings must be taken in their temporal context. At the very time that [redacted] made his original *LAFOIPA* request, he was also engaging in the litigious acts set out above. The *LAFOIPA* request of the Commissioner and [redacted] was made April 27, 2015. The University's response to that request came on July 24, 2015, and the Commissioner's initial report on this matter was rendered May 24, 2016 -- both were squarely in the midst of these grievances and other proceedings [redacted] was taking.

[57] So, at that time, had the University established there were "legal proceedings" between the parties? Even from the scarce record before me, the University has shown this to be the case. There were live labour relations matters.

Those matters qualify as "legal proceedings" as they proceed before an independent adjudicator or panel, and the decision made can substantively affect the rights of the parties.

[58] In this context it was, and is, reasonable for the University to "anticipate" further legal proceedings. "Anticipated" means more than merely possible. As argued by counsel for [redacted], "anticipated" can equate with "expected". Given all that has already gone on, it is entirely reasonable for the University to anticipate further legal proceedings with [redacted].

[59] I must then consider the second aspect of the s. 14 exemption: would production of the records be injurious to the University in the conduct of those existing or anticipated legal proceedings?

[60] The Commissioner's decisions on this point (including the decision in this case) have been consistent. He has essentially equated the issue of injuriousness with that of admissibility. The rulings have held that production of the documents now, under *LAFOIPA*, in no way jeopardizes the ability of the parties to argue admissibility before the court or tribunal constituting the "legal proceedings".

[61] As far as that reasoning goes, it is true. However, and most respectfully, in my view that reasoning does not go far enough.

[62] The above admissibility-centred analysis fails to consider the concept of use. In litigation and arbitration, disclosure and production of documents is (of course) subject to a ruling on admissibility by the adjudicator(s). However, disclosure and production of documents is also subject to a well-defined set of rules as to the use that may be made of those documents, irrespective of whether they are found

admissible or even used or tendered in the actual proceedings. A party's possession and use of disclosed documents is subject to restrictions, such as the implied undertaking rule. A party receiving a document in an adjudicative process cannot use it for whatever purpose he or she wishes. It must only be used for the purpose of that litigation. The document is not "public", *per se*, unless it is admitted into evidence within hearing of the legal proceeding.

[63] To accept that a person seeking disclosure under *LAFOIPA* is entitled to all the documents or records absent any rules or restrictions as to the use to be made of such documents is tantamount to making all of those documents public and widely available before any proper ruling is made as to privilege or admissibility. With respect, the Commissioner's prior decisions fail to consider this aspect of injury that disclosure could cause to the disclosing party.

[64] Further, the Commissioner's rulings seem to suggest that admissibility is the only possible prejudice or injury a litigant could sustain from production of records under *LAFOIPA*. Privilege issues suggest otherwise. If there are, for example, email communications between lawyer and client relating to advice and options as to how to deal with an employee, disclosure of same under *LAFOIPA* would tend to put a chill on legal consultation generally. If an employer emails its lawyer asking what it should document regarding an employee's substandard performance to bolster its position *vis-à-vis* a contemplated dismissal of that employee, should that set of emails be produced under *LAFOIPA*? They will not necessarily be admissible at a trial, but by then the claimant has the information. By then the genie cannot be stuffed back inside the bottle.

[65] As well, given that *LAFOIPA*'s process entails counsel submitting their briefs without exchanging same, dealing with any claims of privilege poses

difficulties. The submissions are effectively made in silos. The disclosing authority must establish exemptions without information as to the arguments of the other side. Conversely, the party seeking records is groping around in a dark room as it has no idea what the local authority is arguing. In terms of litigation before a court or tribunal, this is an unsatisfactory process within which to decide what must and must not be disclosed in that litigation.

[66] In my view, *LAFOIPA* cannot trump every potential privilege claim simply because the documents disclosed may later be argued to be inadmissible. The essence of privilege is non-disclosure in any context; that is, some communications are to remain private. Justice Kalmakoff very recently dealt with privilege, particularly litigation privilege (and the distinction from solicitor-client privilege) in *R v Husky Energy Inc.,* 2017 SKQB 383. In doing so he reviewed the Supreme Court's pronouncements on privilege in *Lizotte v Aviva Insurance Company of Canada*, 2016 SCC 52, [2016] 2 SCR 521. At paras 21 to 25 of *Husky* he summarized the applicable principles:

> [21] Litigation privilege is a common law rule that gives rise to immunity from disclosure of documents and communications whose dominant purpose is preparation for litigation. Its purpose is to create a zone of privacy in relation to pending or ongoing litigation: *Lizotte v Aviva Insurance Company of Canada,* 2016 SCC 52, [2016] 2 SCR 521 [*Lizotte*].
>
> [22] Litigation privilege is distinct from solicitor-client privilege in a number of ways. First, while solicitor-client privilege protects a relationship, litigation privilege protects the efficacy of the adversarial process. Second, solicitor-client privilege is permanent; litigation privilege is time-limited, and expires with the end of the litigation in question. Third, unlike solicitor-client privilege, litigation privilege applies to unrepresented parties and non-confidential documents: *Lizotte,* at paras 22 – 24; *Blank v Canada (Minister of Justice)*, 2006 SCC 3, [2006] 2 SCR 319 [*Blank*]. Fourth, litigation privilege is to be applied more narrowly, rather than being seen as an equal partner to solicitor-client

> privilege. A claim of litigation privilege will not be made out simply because litigation support is one of the purposes of a document's preparation, even if it is a substantial purpose. Litigation must be the dominant purpose in order for litigation privilege to exist: *Blank*; *TransAlta Corporation v Market Surveillance Administrator*, 2015 ABQB 180, 613 AR 165 [*TransAlta Corporation*].
>
> [23] Despite these differences, litigation privilege, like solicitor-client privilege, is a class privilege. Documents which fall into that class (*i.e.* those whose dominant purpose is preparation for litigation) will be protected by immunity from disclosure unless an exception applies. The exceptions to litigation privilege are narrow and clearly defined. They include those which apply to solicitor-client privilege (*i.e.* criminal communications, innocence of an accused person, and public safety), as well as circumstances where the communication or document in question is evidence of abuse of process or similarly blameworthy conduct on the part of the claimant: *Lizotte; Blank.*
>
> [24] Litigation privilege can also be asserted against third parties, including third party investigators who have a duty of confidentiality: *Lizotte* at para 31.
>
> [25] As with solicitor-client privilege, in an application such as this one, the party claiming litigation privilege bears the onus of proving, on a balance of probabilities, that it applies. Litigation privilege will apply where the dominant purpose of the creation of the document or communication in question is to prepare for litigation, and the litigation in question (or related litigation) is pending or may reasonably be apprehended: *Lizotte* at para 33.

[67] In *Lizotte* (paras 47 to 53) the Supreme Court noted the dangers inherent in a "free for all" type of disclosure:

> [47] These arguments are unconvincing. I instead agree with the courts that have held that litigation privilege can be asserted against anyone, including administrative or criminal investigators, not just against the other party to the litigation: *R. v. Kea* (2005), 27 M.V.R. (5th) 182 (Ont. S.C.J.), at paras. 43-44; *D'Anjou v. Lamontagne*, 2014 QCCQ 11999, at paras. 92-93.
>
> [48] There are several reasons that justify this conclusion. The first is that the disclosure of otherwise protected documents to third parties who do not have a duty of confidentiality would entail a serious risk for the party who benefits from the protection of

litigation privilege. There would be nothing to prevent a third party to whom such documents are disclosed from subsequently disclosing them to the public or to the other party, which could have a serious adverse effect on the conduct of the litigation in question. The documents could then be presented to the court in a manner other than that contemplated by the party protected by the privilege. This is the very kind of harm that litigation privilege is meant to avoid: *Susan Hosiery Ltd.*, at pp. 33-34. Moreover, in *Blank*, which concerned the *Access to Information Act*, this Court held that a provision authorizing the government to invoke solicitor-client privilege could also be used to invoke litigation privilege in order to deny a request for access to information by a third party to the litigation (for example, the media or a member of the public) (para. 4).

[49] There are also cases in which the courts have held that disclosure to a third party of a document covered by litigation privilege could result in a waiver of the privilege as against all: *Rodriguez v. Woloszyn*, 2013 ABQB 269, 554 A.R. 8, at para. 44; *Aherne v. Chang*, 2011 ONSC 3846, 337 D.L.R. (4th) 593, at paras. 12-13. The decisions in those cases are based on the assumption that litigation privilege can be asserted against third parties. To conclude that there are consequences associated with disclosure to third parties, one must first assume that confidentiality in relation to those parties corresponds to a normal application of the privilege.

[50] As for the exception the syndic proposes for third party investigators who have a duty of confidentiality, it is hardly more justifiable. Even where a duty of confidentiality exists, the open court principle applies to proceedings that can be initiated by a syndic (s. 376 *ADFPS* and s. 142 of the *Professional Code*; art. 11 of the *Code of Civil Procedure*, CQLR, c. C-25.01). If, in the case at bar, the syndic had decided to file a complaint with the Chamber's discipline committee, or if she had decided to turn to the common law courts (to obtain, for example, an injunction against the person being investigated, as the syndic of the Barreau du Québec did in *Guay v. Gesca ltée*, 2013 QCCA 343), [2013] R.J.Q. 342), it is far from certain, in light of the open court principle, that the documents that would otherwise be protected by litigation privilege would not have had to be disclosed in the course of those proceedings.

[51] In *Basi*, this Court held that informer privilege could not be lifted in favour of defence counsel merely because those counsel were bound by orders and undertakings of confidentiality. In the Court's opinion, "[n]o one outside the circle of privilege may access information over which the privilege has been claimed until a judge has determined that the privilege does not exist or that an exception applies" (para. 44). In that case, the fact that the third parties had

duties of confidentiality and the reduced risk of harm did not preclude asserting informer privilege against them.

[52] This reasoning applies with equal force to litigation privilege. It would not be appropriate to exclude third parties from the application of this privilege or to expose the privilege to the uncertainties of disciplinary and legal proceedings that could result in the disclosure of documents that would otherwise be protected. Moreover, even assuming that there is no risk that a syndic's inquiry will result in the disclosure of privileged documents, the possibility of a party's work being used by the syndic in preparing for litigation could discourage that party from writing down what he or she has done. This makes it clear why it must be possible to assert litigation privilege against anyone, including a third party investigator who has a duty of confidentiality and discretion. I am thus of the view that unless such an investigator satisfies the requirements of a recognized exception to the privilege, it must be possible to assert the privilege against him or her.

[53] I would add that any uncertainty in this regard could have a chilling effect on parties preparing for litigation, who may fear that documents otherwise covered by litigation privilege could be made public. The United States Supreme Court gave a good description of this chilling effect, which litigation privilege (referred to as the "work product doctrine") is in fact meant to avoid:

> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways — aptly though roughly termed by the Circuit Court of Appeals in this case as the "work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And

> the interests of the clients and the cause of justice would be poorly served. [Emphasis added.]
>
> (*Hickman v. Taylor*, 329 U.S. 495 (1947), at pp. 510-11).

[68] This articulately captures the "cat is out of the bag" theory behind the privacy and confidentiality of some documents. I see the problem as twofold: not only is there potential use and abuse of the disclosed record before any admissibility ruling is made under the adjudicative process, there is also the broader problem of the undercutting of the free communications essential to seeking and obtaining legal advice.

[69] For these reasons I find I cannot agree with the broad position espoused by the Commissioner.

[70] Based on the evidence before me, [redacted] and the University have been at odds for several years. [redacted] [redacted]'s first complaint (of discrimination/harassment against the Dean) was levied on December 12, 2014. Obviously the matters giving rise to that complaint arose prior to that date. [redacted]'s request for documents under *LAFOIPA* covers the span between March 1, 2014 and April 24, 2015.

[71] Having reviewed the documents in issue in light of the legal principles set out herein, I have determined that the following documents of the University are exempted from disclosure and production under s. 14(1)(d) of *LAFOIPA*:

> 8, 8.1, 9, 15, 36, 38.5, 39, 39.1, 43, 44, 48 and the two additional documents forwarded by University counsel.

4. Does s. 16(1)(a) LAFOIPA have any application to the relevant records?

[72] The University further relies on s. 16(1)(a), which states:

> **Advice from officials**
> 16(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:
>
> (a) advice, proposals, recommendations, analyses or policy options developed by or for the local authority.
>
> …

[73] The University's position is that almost all of the records in issue fall within this exemption. The University says the communications, in whole or in part, relate to advice sought and/or received regarding [redacted], to manage the employment relationship (which was growing in complexity) with him.

[74] The Commissioner dealt with this exemption claim at paras. 37 to 45 of his initial report. At para. 38 he set out his understanding of the appropriate test to apply:

> [38] Subsection 16(1)(a) is meant to allow for candor during the policy-making process, rather than providing for the non-disclosure of all forms of advice. The three part test that must be met in order for subsection 16(1)(a) of LA FOIP to apply is as follows:
>
> 1. Does the information qualify as advice, proposals, recommendations, analyses or policy options?
> 2. The advice, proposals, recommendations, analyses or policy options must:
>   i. be either sought, expected, or be part of the responsibility of the person who prepared the record; and
>   ii. be prepared for the purpose of doing something, for example, taking an action or making a decision; and
>   iii. involve or be intended for someone who can take or implement the action.
> 3. Was the advice, proposals, recommendations, analyses or policy options developed by or for the public body?

[75] On review of the materials and on application of the above test, the Commissioner found that s. 16(1)(a) applied to some but not all of the records the University claimed exempt. On this appeal the University maintains its position as to the broad application of s. 16 to its documents.

[76] I agree with [redacted]'s counsel when he argues s. 16 cannot apply to the disclosure of "purely factual information". He cites *Canada (Office of the Information Commissioner) v Canada (Prime Minister)*, 2017 FC 827, wherein there was a challenge over disclosure of the records pertaining to some senators. At paras. 26 and 27 the Federal Court held that such purely factual information does not amount to advice or recommendations, and that even if some of each document was to be redacted the factual portions were to be disclosed.

[77] I further note that the subsection refers to "advice and recommendations". These are two separate if closely related terms, perhaps best described in *John Doe v Ontario (Finance)*, 2014 SCC 36 at paras 22 to 24, [2014] 2 SCR 3:

> [22] The Court of Appeal also found that "'[a]dvice' may be construed more broadly than 'recommendation'" (para. 29). However, it distinguished these terms by finding that "'recommendation' may be understood to 'relate to a suggested course of action' more explicitly and pointedly than 'advice'", while "'[a]dvice' . . . encompass[es] material that permits the drawing of inferences with respect to a suggested course of action, but which does not itself make a specific recommendation" (*ibid.*). In oral argument in this Court, the Information and Privacy Commissioner of British Columbia and the Canadian Civil Liberties Association made a similar distinction: that while "recommendation" is an express suggestion, "advice" is simply an implied recommendation (transcript, at pp. 52 and 57).
>
> [23] In this case, the IPC Adjudicator applied *MOT*. She found that to qualify as "advice" and "recommendations" under s. 13(1), "the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised" (p. 4). I accept that material that relates to a suggested course of

> action that will ultimately be accepted or rejected by the person being advised falls into the category of "recommendations" in s. 13(1).
>
> [24] However, it appears to me that the approach taken in *MOT* and by the Adjudicator left no room for "advice" to have a distinct meaning from "recommendation". A recommendation, whether express or inferable, is still a recommendation. "[A]dvice" must have a distinct meaning. I agree with Evans J.A. in *3430901 Canada Inc. v. Canada (Minister of Industry)*, 2001 FCA 254, [2002] 1 F.C. 421 ("*Telezone*"), that in exempting "advice or recommendations" from disclosure, the legislative intention must be that the term "advice" has a broader meaning than the term "recommendations" (para. 50 (emphasis deleted)). Otherwise, it would be redundant. By leaving no room for "advice" to have a distinct meaning from "recommendation", the Adjudicator's decision was unreasonable.

[78] [redacted] relies heavily on *The IPC Guide to Exemptions For FOIP and LA FOIP* (Office of the Saskatchewan Information and Privacy Commissioner, 2017), online: <www.oipc.sk.ca/assets/ipc-guide-to-exemptions.pdf> (October 2017), a document published by the Commissioner's office and updated in October 2017. While helpful, the *IPC Guide* is not an exhaustive authority. In fact, the cover of that document contains the following disclaimer:

> …The guidance provided is non-binding and every matter should be considered on a case-by-case basis. In some instances, public bodies may wish to seek legal advice.

[79] On page 5 of the *IPC Guide* is the following statement from the Office of the Commissioner:

> The tests, criteria and interpretations established in this guide reflect the precedence set by the current and/or former Information and Privacy Commissioners in Saskatchewan through the issuing of Review Reports. Where this office has not previously considered a section of FOIP or LA FOIP, we look to other jurisdictions. This includes consideration of other IPC Orders, Reports and/or other relevant resources. In addition, court decisions from across the country are relied upon. This guide will be updated regularly to reflect any changes in precedence.

[80] The *IPC Guide* is exactly that: a guide, a document containing the Commissioner's opinions that will help users navigate Saskatchewan's privacy legislation (including *LAFOIPA*). It is not, and appears not to have been intended to be, the last word on how to interpret these statutes. In many instances the interpretations contained in the *IPC Guide* are the opinions of the Commissioner -- educated, experienced opinions, to be sure, but not opinions conclusive of how to properly interpret the statutes in issue.

[81] For example, at page 20 of the *IPC Guide* s. 16(1)(a) is considered. The Commissioner's view is that "*advice* includes the analysis of a situation or issue that may require action and the presentation of options for future action". Well, sometimes it will include that. But other times it will not. For example, if there are ongoing management discussions about an employee, counsel or someone internally might say "in considering this issue, we should be mindful of the following case". That is not necessarily "analysis" or "presentation of options for future action". But in the proper context, would that be advice within s. 16(1)(a)? I think so.

[82] I note that in its written submissions the University placed significant reliance on *Weidlich v Saskatchewan Power Corp*. (1998), 164 Sask R 204 (QB). With respect, that is a somewhat dated decision and there are other controlling appellate authorities on point. Previous decisions of this and the previous Commissioner do not ignore *Weidlich,* as the University suggests; they distinguish that case.

[83] Having said that, the "three part test" set out at para. 38 of the Commissioner's report in this matter reflects language and considerations not contained in s. 16. The statute's language is broad; the Commissioner's attempt to refine or define a single applicable test to apply to a myriad of situations seems to me

to be a stretch. Sometimes the considerations identified by the Commissioner in para. 38 will be applicable, but sometimes the facts will be such that those considerations will not apply. One size does not fit all. I would not adopt the relatively narrow test set out by the Commissioner.

[84] I have examined the records in question and find that s. 16(1)(a) of *LAFOIPA* applies to the following records which are exempt from production in whole or in part:

> 8, 8.1, 9, 12 (in part), 15, 21, 30, 31 (in part), 32, 36, 38.5, 39, 43, 44, 48, and the two additional documents forwarded by University counsel.

5. Does s. 16(1)(b) LAFOIPA have any application to the relevant records?

[85] The University also relies upon s. 16(1)(b) of *LAFOIPA* which states:

> **Advice from officials**
> **16**(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:
>
> (b) consultations or deliberations involving officers or employees of the local authority.
>
> …

[86] While clearly related to subsection 16(1)(a), this subsection is distinct. The University submits this subsection relates to purely internal discussions and exempts the disclosure of records reflecting those discussions.

[87] In the context of labour relations, one could easily contemplate where there would be discussions within management, and between managers and employees of varying levels. All such discussions could readily relate to the proper management of a particular employee.

[88] [redacted]'s counsel points to the *IPC Guide.* It is argued that "consultation" and "deliberation" are prospective only; that is, that the exemption can only apply to the University considering future actions and outcomes in response to a developing situation, as opposed to any deliberations about past courses of action.

[89] Again, this is unduly restrictive. Surely in the case of an employer considering what to do with an employee in the future, what has been done in the past can be summarized. It may be that such portion of a record is not exempt, but I am not prepared to read s. 16(1)(b) so narrowly as to preclude any discussion of the past from a legitimate consideration of what to do in the future.

[90] I have examined the records in question and find that s. 16(1)(b) of *LAFOIPA* applies to the following records which are exempt from production in whole or in part:

> 8, 8.1, 9, 11, 12, 15 (in part), 21, 29, 30, 31 (in part), 32, 33, 35, 36, 38 (in part), 38.5, 39, 39.1, 43, 44, 47 (in part), 48.

6. Does s. 30(2) LAFOIPA have any application to the relevant records?

[91] Subsection 30(2) states:

> **30**(2) A head may refuse to disclose to an individual personal information that is evaluative or opinion material compiled solely for the purpose of determining the individual's suitability, eligibility or qualifications for employment or for the awarding of contracts and other benefits by the local authority, where the information is provided explicitly or implicitly in confidence.

[92] Both counsel referred me to *Fogal v Regina School Division No. 4*, 2002 SKQB 92, 216 Sask R 137. There the court determined that this exemption is not limited to the stage at which employees are hired. Evaluations of an employee's

suitability for that employment can occur throughout the employee's tenure. Justice Hrabinsky further determined that even where parents' letters of complaint/concern were not tendered for evaluative purposes, where they were used for that purpose the test for exemption was met.

[93] [redacted]'s counsel distinguishes *Fogal* from the case at bar by noting that the teachers' collective agreement had a provision that such complaints would be held in confidence (*Fogal*, para 10). While this is a factual distinction it is not one that Justice Hrabinsky exclusively relied upon in deciding *Fogal*. When the entire case is reviewed and in particular paras. 11 through 14, the provisions of the collective agreement were very much an alternative finding. In para. 13 he makes his finding that the exemption applies entirely apart from the collective agreement, focussing only on s. 30(2).

[94] I have examined the records in question and find that s. 30(2) of *LAFOIPA* applies to the following records which are exempt from production in whole or in part:

33, 35 and the attachments to 38.

7. What order should be made regarding release of any of these records?

[95] I have set out in each section of argument the result of the application of the law and findings made to the exemption claimed. For greater certainty I have set this out comprehensively in the conclusion at the end of this judgment.

8. What order should be made as to costs?

[96] Neither party argued costs in its material. Subsections 47(5)(b) and

(7)(b) state that after determining the main issue the court may "make any other order the court considers appropriate". Presumably this includes costs.

[97] My initial reaction is that success on this appeal has been divided. Some records, or parts thereof, were ordered to be disclosed. Others sought by [redacted] were not. However, as neither party has had an opportunity to address me on costs I leave it to counsel to determine whether either or both wish to address costs with me. In either event, counsel shall contact the Local Registrar within 45 days of the date hereof to advise whether they require a date for a hearing on costs.

Conclusion

[98] Accordingly, I make the following order:

1. The University shall forthwith provide full copies of the following documents to [redacted]:

   10.1, 13, 15.1, 17, 18, 24, 24.1, 25, 26, 26.1, 28, 34, 37, 37.1, 38.1, 38.3, and 38.4.

2. The University shall forthwith provide copies of the following documents to [redacted] containing redactions as noted herein:

   - 15 (withholding the emails dated December 5, 2014 12:41 and December 5, 2014 1:28:19.)
   - 31 (withholding the emails but releasing the form containing the grievance).
   - 38 (releasing the first two pages containing the emails, and of the 26 pages of the attached Curriculum Vitae withholding pages 1, 2, 3 and 5.
   - 47 (withholding the email of April 23, 2015).

3. Both parties are to contact the Local Registrar within 45 days of the date hereof to advise whether a further hearing as to costs is required.

_____ J.
R.W. DANYLIUK