



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

ORDER P-377

Appeal P-910589

Georgian College of Applied Arts and Technology



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télé: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

ORDER

BACKGROUND:

Georgian College (the College) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to all records relating to the College's decision to serve a "Notice: Trespass to Property Act" on the requester.

The College denied access to all responsive records, except the actual Notice of Trespass, pursuant to sections 19 and 14 of the Act, and the requester appealed the College's decision.

Mediation was not possible, and notice that an inquiry was being conducted to review the College's decision was sent to the appellant, the College, and two individuals who authored one of the responsive records (the affected persons). In the Notice of Inquiry, the College and the appellant were asked to consider the possible application of sections 49(a) and (b) of the Act, and the College responded by claiming these sections as the basis for exempting certain records. The College was also asked to provide a more comprehensive index of records, which it did, listing the 14 records which it found to be responsive to the request.

Record 6, the actual Notice of Trespass, was released to the appellant in response to his original request. Records 1 and 2 are the appellant's access request and the College's decision letter, which have been provided to the appellant and are not at issue in this appeal. Record 10 is a security report prepared after the issuance of the Notice of Trespass, which I find is not responsive to the appellant's request and is outside the scope of this appeal. The College released portions of Records 4 and 8 to the appellant during the course of this appeal.

Therefore, the records which remain at issue are the severed portions of Record 4 and 8, and Records 3, 5, 7, 9 and 11-14. These records consist of memoranda, notes and correspondence relating to the College's decision to issue a Notice of Trespass to the appellant.

ISSUES:

The issues arising in this appeal are as follows:

- A. Whether the information contained in the records qualifies as "personal information", as defined in section 2(1) of the Act.
- B. Whether the discretionary exemption provided by section 14 of the Act applies to the records.
- C. Whether the discretionary exemption provided by section 19 of the Act applies to the records.
- D. If the answer to Issue A and Issues B and/or C is yes, whether the discretionary exemption provided by section 49(a) applies to the records.

- E. If the answer to Issue A is yes, whether the discretionary exemption provided by section 49(b) of the Act applies to the records.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the information contained in the records qualifies as "personal information", as defined in section 2(1) of the Act.

The introductory wording of the definition of personal information contained in section 2(1) of the Act states, in part:

"personal information" means recorded information about an identifiable individual, including,

...

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

...

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

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

Having reviewed the records, in my view, they all contain the personal information of the appellant, in the context of the decision made by the College to issue the Notice of Trespass.

As far as other identifiable individuals are concerned, the College claims that Records 3, 4, 5, 8, and 9 contain the personal information of persons other than the appellant, and exempts this information under section 49(b) of the Act. The information in these records concerns College staff, faculty and/or members of the administration of the College. Consistent with previous orders, I find that this information was provided by individuals in their professional capacity or the execution of employment responsibilities and, therefore, is not the personal information of these individuals [Orders 113, 139, 157, P-257 and P-326]. Because section 49(b) is the only exemption claimed by the College for the information severed from Record 8, this record should be released to the appellant in its entirety.

Record 7 is a letter sent to the College by the affected persons, who are not College staff, faculty or administrators of the College, and contains information which was considered in the context of the College's decision to issue the Notice of Trespass. I find that Record 7 contains the personal information of both the appellant and the affected persons.

Section 47(1) of the Act gives individuals a general right of access to any personal information about themselves in the custody or under the control of an institution. However, this right of access is not absolute. Section 49 provides a number of exemptions to this general right of access, including sections 49(a) and (b) of the Act, which read as follows:

A head may refuse to disclose to the individual to whom the information relates personal information,

- (a) where section 12, 13, **14**, 15, 16, 17, 18, **19**, 20, or 22 would apply to the disclosure of that personal information; [emphasis added]
- (b) where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

I will now consider whether the exemption provided by section 49(a) applies to any of the records at issue in this appeal, by virtue of the application of sections 14 and/or 19.

ISSUE B: Whether the discretionary exemption provided by section 14 of the Act applies to the records.

The College claims sections 14(1)(a) and (b) and 14(2)(c) of the Act as the basis for exempting Record 3, 5, 7, 9 and the severed portions of Record 4. These sections state:

- (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
 - (a) interfere with a law enforcement matter;
 - (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
- (2) A head may refuse to disclose a record,

- (c) that is a law enforcement record where the disclosure could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability;

In order for the record to qualify for exemption under section 14, the matter to which the record relates must first fall within the following definition of the term "law enforcement" contained in section 2(1) of the Act:

"law enforcement" means,

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
- (c) the conduct of proceedings referred to in clause (b);

The matter to which the records at issue in this appeal relate is clearly not "policing".

As far as paragraph (b) of the definition is concerned, the College submits that the documents refer to:

... an investigation which occurred in early 1991 into the activities and behaviour of [the appellant] which were causing problems on the ... Campus. The College undertook this investigation because of its responsibility to respond to complaints from the college community and to ensure the safety of its staff and students. The investigation commenced in approximately March 1991 and resulted in the decision to issue a Notice under the Trespass to Property Act. This Notice was delivered to [the appellant] on May 21, 1991 and states, 'in the event you enter upon College grounds or buildings, you will be considered a trespasser and proceedings will be taken without further notice to you.'. These investigations could lead to proceedings in a civil or criminal court if [the appellant] trespasses on College property in violation of this Notice. The enabling legislation is the Trespass to Property Act, R.S.O. 1990, c.T.21, ss. 2, 9, 10 and 12.

...

... Although this investigation ended with the Notice, the College will continue to be vigilant regarding the possibility of trespass.

It has been established in a number of previous orders that the definition of law enforcement found in section 2(1) does not extend to internal disciplinary-related matters [Orders 157, 170, 182, 192]. Based on the representations provided by the College, it is my view that the investigation conducted by the College which led to the issuance of the Notice of Trespass is

properly characterized as an internal administrative decision which does not satisfy the requirements of the definition of "law enforcement" contained in section 2(1). The investigation was conducted to provide the College with information required to make a decision about the appellant. The decision made by the College as a result of this investigation was to revoke the appellant's student registration and issue a Notice of Trespass to bar his entry onto the College property. In my view, this investigation was an internal matter and was not undertaken with a view to providing a court or tribunal with the facts by which it would make a determination of a party's rights. The College itself acknowledges that "this investigation ended with the Notice".

Therefore, I find that the matter which gave rise to the investigation does not meet the definition of "law enforcement" in section 2(1) of the Act, and the exemptions provided by sections 14(1)(a) and (b) and 14(2)(c) are not available to the College.

Because section 14 is the only section claimed by the College in support of its decision to exempt Records 3, 5, 9 and the severed portion of Record 4 under section 49(a) of the Act, these records should be released to the appellant in their entirety.

ISSUE C: Whether the discretionary exemption provided by section 19 of the Act applies to the records.

The College claims that Records 11, 12, 13 and 14 qualify for exemption under section 19 of the Act.

Section 19 provides that:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

This section consists of two branches, which provide a head with the discretion to refuse to disclose:

- (1) a record that is subject to the common law solicitor-client privilege (Branch 1); and
- (2) a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the College must provide evidence that the record satisfies either of the following tests:

1. (a) there is a written or oral communication, **and**
- (b) the communication must be of a confidential nature, **and**

- (c) the communication must be between a client (or his agent) and a legal adviser, **and**
- (d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

- 2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Order 49]

Records 11-14 consist of four pieces of correspondence to the College from a legal adviser retained by the College in the context of its decision to issue the Notice of Trespass. In my view, each of these records satisfies the requirements for exemption under Branch 1 of the common law solicitor-client exemption: they are written communications, of a confidential nature, sent by a legal advisor to a client, and directly relate to the giving of legal advice.

ISSUE D: If the answer to Issue A and Issues B and/or C is yes, whether the discretionary exemption provided by section 49(a) applies to the Record.

Under Issue A, I found that Records 11, 12, 13 and 14 contain the personal information of the appellant, and under Issue C, I found that these records qualify for exemption under section 19 of the Act. Therefore, the discretionary exemption provided by section 49(a) is available to the College with respect to these records. The College has provided representations regarding its decision to exercise discretion in favour of not disclosing these records. I have reviewed these representations and find nothing improper in the circumstances of this appeal.

ISSUE E: If the answer to Issue A is yes, whether the discretionary exemption provided by section 49(b) of the Act applies to the records.

I found under Issue A that Record 7 contains the personal information of both the appellant and the affected persons. This record must now be considered under section 49(b) of the Act.

Section 49(b) introduces a balancing principle. The College must look at the information and weigh the appellant's right of access to his own personal information against the affected persons' right to the protection of their privacy. If the College determines that the release of the information would constitute an unjustified invasion of the affected persons' personal privacy, then section 49(b) gives the College discretion to deny the appellant access to his personal information [Order 37].

Sections 21(2) and (3) of the Act provide guidance in determining if disclosure of personal information would constitute an unjustified invasion of another individual's personal privacy.

The College and the affected persons submit that sections 21(3)(b), (d) and (g), and sections 21(2)(e), (f) and (h) are relevant considerations; the appellant raises the applicability of section 21(2)(d).

Section 21(3) lists the types of information, the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Sections 21(3)(b), (d) and (g) read as follows:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

- (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
- (d) relates to employment or educational history;
- (g) consists of personal recommendations or evaluations, character references or personnel evaluations;

In my discussion of Issue B, I found that the investigation undertaken by the College did not qualify as a "law enforcement" matter. Consistent with this determination, I find that 21(3)(b) is not a relevant consideration in the circumstances of this appeal.

As far as section 21(3)(g) is concerned, if Record 7 can be said to contain any personal evaluations, they are evaluations about the appellant, and this section is not a relevant consideration in support of the position of the College and the affected persons.

I also find that Record 7, which is essentially a letter of complaint sent by the affected persons to the College, does not contain any information which could accurately be characterized as relating to the educational history of the affected persons.

Therefore, I find that none of the factors which would give rise to a presumed unjustified invasion of the affected persons' privacy are relevant considerations in the context of Record 7.

Turning now to section 21(2), sections 21(2)(e), (f) and (h) have been raised by the College and the affected persons in support of a finding that release of the record would constitute an unjustified invasion of privacy, and section 21(2)(d) has been raised by the appellant in favour of his position that the record should be disclosed. These sections state:

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

- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (f) the personal information is highly sensitive;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence;

Turning first to section 21(2)(e), the representations submitted by both the College and the affected persons express concern that disclosure of this record will lead to harassment and possible legal action by the appellant involving the affected persons. However, these representations simply state the concern, and I find that neither the College nor the affected persons have provided sufficient evidence to establish the relevance of section 21(2)(e) in the circumstances of this appeal.

As far as section 21(2)(f) is concerned, the affected persons submit that a certain portion of Record 7 contains information which is properly characterized as "highly sensitive", but make no reference to the rest of the record. The College simply states that "[t]his information is highly sensitive as it was used to make a decision to prohibit the appellant from having access to the College property". I accept that some of the parts of Record 7 referred to by the affected persons contain "highly sensitive" information, but I find that section 21(2)(f) is not a relevant consideration for the remaining parts of the record.

Similarly, I am prepared to accept that the same parts of Record 7 that are "highly sensitive" were provided by the affected persons with an implied expectation of confidentiality, as stated by the College in its representations. However, I find that the section 21(2)(h) is not a relevant consideration with respect to the remaining parts of Record 7.

The appellant submits that section 21(2)(d) is a relevant consideration because he has a right to appeal the College's decision to issue the Notice of Trespass, and that the records at issue in this appeal are crucial to the determination of his rights. Having reviewed Record 7 and the appellant's representations, I am prepared to accept that section 21(2)(d) is a relevant consideration in the circumstances of this appeal.

In balancing the factors under section 21(2)(d) and sections 21(2)(f) and (h), I find that disclosure of the parts of Record 7 which were provided to the College implicitly in confidence and contain highly sensitive information concerning the affected persons would constitute an unjustified invasion of the privacy of the affected persons, and qualify for exemption under section 49(b) of the Act. These parts include references which would serve to identify the affected persons. I also find that disclosure of the remaining parts of Record 7 would not

constitute an unjustified invasion of personal privacy, and should be released to the appellant. I have included a highlighted version of Record 7 with the copy of this order sent to the institution which identifies the parts of Record 7 which should not be released.

I have reviewed the representations provided by the College regarding its decision to exercise discretion in favour of claiming section 49(b), and I find nothing improper as it relates to those parts of Record 7 which I have found to be properly exempt.

ORDER:

1. I uphold the College's decision not to disclose Records 11, 12, 13 and 14.
2. I order the College to disclose Records 3, 4, 5, 8, 9 and the portions of Record 7 which are **not** highlighted in the copy of the record which is being forwarded to the College with this order, within 35 days of the date of this order and not earlier than the thirtieth (30th) day following the date of this order.
3. In order to verify compliance with the provisions of this order, I order the head to provide me with a copy of the record which is disclosed to the appellant pursuant to provision 2, **only** upon my request.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

_____ December 8, 1992