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

ORDER P-810

Appeal P-9400108

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NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The appeal stems from a hearing into allegations of racial discrimination and sexual harassment at Fanshawe College of Applied Arts and Technology (the College). The complaint was made by a student at the College against an employee of the College. The student alleged that her course marks had deteriorated as a result of the discrimination and harassment by the College employee (the respondent).

The hearing into the complaint was undertaken by a three person committee (the Committee) convened by the President of the College, composed of an independent chair chosen jointly by the College and the respondent's union, an individual named by the complainant and an individual named by the respondent. According to College policy, the Committee is to review the matter with the persons concerned, investigate the circumstances of the complaint and forward its written findings and recommendation to the President. The President, after affording the parties five days to respond to the recommendation of the Committee, is required to make a final decision as to the resolution of the complaint, including a remedy and/or disciplinary action where appropriate.

Prior to the commencement of the hearing, the respondent asked the Committee to require the complainant to support her allegations with documentary evidence of her marks both before and after the alleged harassment took place, and therefore sought disclosure of the academic record of the complainant. The Committee, having no power to subpoena documents, asked the complainant to consent to the disclosure to the respondent of information concerning her academic record held by the College. The complainant refused, on the grounds that it was not relevant to her complaint. In the opinion of the Committee, however, the nature of the complaint and the relief requested from the College did place her academic record in issue and her lack of consent made it impossible for the information to be made available through the testimony of witnesses.

The respondent requested disclosure of the information in question under the Act from the College. The College did not disclose the records, and relies on the following exemption:

- invasion of privacy - section 21(1)

A Notice of Inquiry was provided to the College, the respondent (the appellant) and the complainant. Representations were received from all of the parties. The records at issue consist of notes, assessments and evaluations respecting the complainant's academic performance while enrolled at the College.

The final report from the Committee has been completed and provided to the parties. The Committee did not uphold the complaint. However, the issue of disclosure continued unresolved throughout the hearing, and to date remains an issue of concern to the appellant.

DISCUSSION:

INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined to mean recorded information about an identifiable individual. All of the parties in this appeal submit that the requested records contain the personal information of the complainant and I agree.

Much of the appellant's representations in this appeal are devoted to the application of section 42 of the Act which appears in the privacy protection provisions of the legislation. The section referred to by the appellant permits the College to disclose personal information for the purpose for which it was obtained or compiled or for a consistent purpose (section 42(c)) and to disclose personal information to an officer or employee of the College who needs the record in the performance of his or her duties and where disclosure is necessary and proper in the discharge of the institution's functions (section 42(d)).

In Order M-96, former Assistant Commissioner Tom Mitchinson commented on the relationship between section 32 of the Municipal Freedom of Information and Protection of Privacy Act (the equivalent of section 42 of the Act) and the access provisions contained in Part I of that Act (which corresponds to Part II of the provincial Act). He there stated that:

> This Part [of the Act] establishes a set of rules governing the collection, retention, use and disclosure of personal information by institutions in the course of administering their public responsibilities. Section 32 prohibits disclosure of personal information except in certain circumstances; it does not create a right of access. The [appellant's] request ... was made under Part I of the Act [the equivalent of Part II of the provincial Act], and this appeal concerns the Board's decision to deny access. In my view, the considerations contained in Part II of the Act [the equivalent of Part III of the provincial Act], and specifically the factors listed in section 32, are not relevant to an access request made under Part I.

I agree with this analysis and adopt it for the purposes of this appeal.

The result is that the wording of section 42 of the Act is not a relevant consideration in determining whether the release of the complainant's personal information constitutes an unjustified invasion of her personal privacy.

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this information except in the circumstances listed in sections 21(1)(a) through (f) of the Act.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. Again, all of the parties in this appeal

concur that the presumption against disclosure contained in section 21(3)(d) of the Act (employment or educational history) applies to the personal information at issue and I agree.

The appellant submits that section 21(2) of the Act can, in cases where the circumstances are compelling, override the presumption in section 21(3). However, the Ontario Court (General Division)(Divisional Court) has determined that where one of the presumptions in section 21(3) applies to the personal information found in a record, the only way such a presumption can be overcome is if the personal information at issue falls under section 21(4) of the Act or where a finding is made that section 23 of the Act applies to the personal information (see John Doe v. Ontario (Information and Privacy Commissioner)(1993), 13 O.R. (3d) 767). I adopt this interpretation for the purposes of this appeal.

I have considered section 21(4) of the Act and find that none of the personal information at issue in this appeal falls within the ambit of this provision. Accordingly, I find that the disclosure of the personal information contained in the records at issue would constitute an unjustified invasion of the personal privacy of the complainant and is, therefore, properly exempt from disclosure under section 21(1) of the Act.

PUBLIC INTEREST IN DISCLOSURE

The appellant submits that there exists a compelling public interest in the disclosure of the record under section 23 of the Act. In order for this provision to apply, two requirements must be met. First, there must be a compelling public interest in the disclosure of the record. Second, this interest must clearly outweigh the purpose of the exemption which otherwise applies to the record.

The appellant submits that there is a compelling public interest in ensuring that legal technicalities do not preclude informal complaint procedures from effectively dealing with harassment or discrimination complaints. The appellant also submits that there is a compelling public interest in ensuring that natural justice is available to individuals who are faced with a complaint which impugns a person's character to the extent which occurs in a sexual harassment complaint or other similar human rights complaint. The appellant submits that this must include access to all relevant information which is necessary to a proper investigation and adjudication of the complaint.

The concerns raised by the appellant are valid. However, in my view, the appellant has not demonstrated the existence of a compelling **public** interest in the disclosure of the particular information found in the record. Accordingly, I find that section 23 does not apply in the circumstances of this appeal.

ORDER:

I uphold the College's decision.

Original signed by: December 6, 1994
Holly Big Canoe
Inquiry Officer

POSTSCRIPT:

In the representations provided during the course of this inquiry, both the College and the appellant pointed out that the Committee, which is charged with the responsibility of investigating and adjudicating harassment and discrimination complaints, has no right to subpoena documentary evidence or to compel witnesses to testify. Both parties are concerned about the Committee's ability to perform its responsibilities based on less than adequate evidence. The issue considered in this order, however, is not the disclosure of information to the Committee (which may be addressed through other mechanisms contained in the Act), but disclosure to the appellant (respondent) pursuant to an access request.