



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

ORDER P-1133

Appeals P-9500285 and P-9500286

St. Lawrence College of Applied Arts and Technology



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NATURE OF THE APPEALS:

These are appeals under the Freedom of Information and Protection of Privacy Act (the Act). St. Lawrence College of Applied Arts and Technology (the College) received two requests from the same requester. These requests pertain to an investigation conducted by the College into allegations by students that the activities of an instructor at the College constitute harassment. The requester (who will be referred to as the appellant in this order) is the instructor against whom the allegations were brought. The request was made on the appellant's behalf by his union representative. The appellant has also filed a grievance against the College regarding this matter.

In the first request (Appeal Number P-9500286), the appellant requested access to the names of all students and staff members who were interviewed during the investigation, the names of the interviewers for each interviewee, the interview location, a copy of the questions that were asked, and the interviewers' handwritten notes.

The College located records responsive to this request and granted partial access to them. The College denied access to the names of the interviewers and interviewees and to the interviewers' notes.

In the second request (Appeal Number P-9500285), the appellant requested a copy of the recommendations made with respect to the harassment complaint concerning the instructor. In addition, the appellant requested the names of the instructor's former students and colleagues who were interviewed, the dates and times these interviews were held and the interviewers' handwritten notes of these interviews and of the notes taken during an interview with the instructor.

The College located records responsive to this request and granted partial access to them. The College denied access to the names of the former students and colleagues who were interviewed, the dates and times these interviews were held, and the notes taken during all the interviews except that of the instructor.

The information to which access was denied is all contained in 33 pages of the interviewers' notes which contain each interviewee's name, the date the interview was held, and what was discussed. In processing the first request, the College considered both interviews with current and former students and colleagues as responsive to the request. Consequently, the records at issue in the first request (i.e. those which were not disclosed) encompass those in the second.

In both instances, the College denied access to the records which I have identified above on the basis of the following exemptions under the Act:

- third party information - section 17
- solicitor-client privilege - section 19
- danger to safety or health - section 20
- invasion of privacy - sections 21(1) and 49(b)
- discretion to refuse requester's own information - section 49(a)

The appellant appealed both decisions.

Following extensive mediation of these two appeals, a Notice of Inquiry was sent to the appellant and the College. One of the individuals who complained about the appellant (the complainant) was also notified. Representations were received from the College and the appellant only.

During the inquiry stage of these appeals, the College advised this office that, as a result of a ruling of the Arbitrator in the grievance proceedings, a large number of the records at issue were ordered to be disclosed to the appellant. Consequently, the appellant has agreed that these records are no longer at issue in this appeal.

The records remaining at issue in this appeal consist of the withheld portions of pages 1, 24, 25 and 26. The rest of the information contained in the 33 pages at issue was disclosed pursuant to the Arbitrator's ruling.

The College did not address section 17 in its representations. Because section 17 is a mandatory exemption, I have reviewed the remaining records at issue. I am satisfied that this section is not applicable in the circumstances of this appeal, and I will not consider it further.

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including 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.

I have reviewed the records at issue to determine whether they contain personal information, and if so, to whom the personal information relates.

Page 1 consists of the names and telephone numbers, and in one case, the address, of interviewees. Pages 24 and 25 contain notes made during an interview. As well, page 25 contains notes which the interviewer made to herself regarding an interviewee. I find that these three pages contain the personal information of the individuals referred to in them, including the complainant. The portions of all four pages which are at issue also relate to the appellant in that these records pertain to the investigation of him. Although this individual is not mentioned by name in these portions of the records, I find that he would be an "identifiable individual" in the circumstances of this case. Therefore, I find that the records also contain his personal information.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

I have found that all of the records contain the appellant's personal information. Section 47(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 49 provides a number of exceptions to this general right of access.

Under section 49(a) of the Act, the institution has the discretion to deny access to an individual's own personal information in instances where certain exemptions would otherwise apply to that information. Section 49(a) states as follows:

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

where section 12, 13, 14, 15, 16, 17, 18, **19, 20** or 22 would apply to the disclosure of that personal information. (emphases added)

In order to determine whether the exemption provided by section 49(a) applies in this case, I will begin by considering the Ministry's claims that particular records qualify for exemption under sections 19 and 20, both of which are referred to in section 49(a).

SOLICITOR-CLIENT PRIVILEGE

The College submits that section 19 applies to all four of the records at issue. Section 19 consists of two branches, which provide an institution 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).

A record can be exempt under Branch 2 of section 19 regardless of whether the common law criteria relating to Branch 1 are satisfied.

Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. The record must have been prepared by or for Crown counsel; **and**
2. The record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

For a record to be subject to the common law solicitor-client privilege, the College must provide evidence that the record either:

- constitutes a written or oral communication of a confidential nature between a client and legal advisor which relates directly to seeking, formulating or giving legal advice; or
- was created or obtained especially for a lawyer's brief for existing or contemplated litigation.

The College submits that the common-law solicitor-client privilege (Branch 1) applies to page 26, and that the litigation privilege components of both Branch 1 and Branch 2 apply to pages 1, 24 and 25.

The withheld portion of page 26 consists of a handwritten note made by the investigator regarding a conversation with the College's solicitor. I am satisfied that this portion of page 26 reveals the contents of a confidential solicitor-client communication which is directly related to the seeking, formulating or giving of legal advice (Order 49), and accordingly, it qualifies for exemption under Branch 1 of section 19. On this basis, it is exempt under section 49(a) of the Act.

The College asserts that the other three records, which were created as part of the investigation into the appellant's conduct, were created in anticipation that litigation would arise as a result of discipline imposed by the College. In this regard, the College provides an affidavit from the Vice President, Administration and Human Resources for the College (the Vice President).

In his affidavit, the Vice President outlines the nature of the allegations and the steps taken by the College in investigating the allegations which ultimately led to dismissal of the appellant. He also refers to the collective agreement (the agreement) in force when the appellant was terminated. The agreement requires that the College have "just cause" before disciplining or discharging an employee and the existence of just cause must be proven at a grievance arbitration hearing.

The Vice President states that the investigation was conducted for the purposes of collecting information for use in making a decision and in the presentation of the College's case at the grievance arbitration hearing that would follow discipline or dismissal or for any other litigation which would arise as a result of action taken by the College.

The College also provided a copy of its harassment policy (the policy). The policy sets out the procedures to be followed by the College in the event that a complaint is received. In essence, the procedures provide that once a formal complaint is made, an individual designated under the policy will investigate the complaint, which includes conducting confidential interviews, and make recommendations following his or her investigation to the Director, Human Resources. The Director will either make a decision on the basis of these recommendations, or will appoint a committee to review the case and make further recommendations.

Previous orders have held that grievance proceedings (Order M-86 and M-315) and proceedings before administrative tribunals (Order M-162) qualify as litigation for the purposes of this exemption. Further, "Crown counsel" includes any person acting in the capacity of legal advisor to an institution (Order 52), and would include, therefore, the College's solicitor.

Despite the College's assertion that disciplinary action taken as a result of its investigation into the allegations would lead to grievance proceedings or other litigation, I am not persuaded that the investigation was conducted for this purpose. In my view, the investigation, which was conducted pursuant to the College's harassment policy, was for the purpose of determining whether the allegations were founded and whether disciplinary action should result. In view of the action taken, especially in light of the collective agreement, it is not unexpected that

grievance proceedings would follow the College's decision. However, this was not the dominant purpose for which the records were created. Accordingly, I find that the records at issue were not created or prepared for counsel's brief for litigation or in contemplation of litigation as required in order to fall within the litigation components of Branch 1 and 2 of section 19. I, therefore, find that the exemption in section 19 does not apply to pages 1, 24 and 25.

DANGER TO SAFETY OR HEALTH

I have already found that page 26 is properly exempt under section 49(a). I will therefore restrict my discussion of this section to the remaining information at issue on pages 1, 24 and 25. Section 20 of the Act provides:

A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

The College submits that the nature of the allegations which were brought against the appellant as well as certain actions taken by him following his dismissal raise a reasonable expectation that disclosure of the information contained in these records will endanger safety or health. In his affidavit, the Vice President outlines his concerns regarding possible retaliation by the appellant.

The appellant's agent states that there has been no history of violence nor threats of violence which would lead anyone to believe that harm may come to them.

Having carefully reviewed the records, the submissions of the parties, and the affidavit of the Vice President, it is my view that I have not been provided with sufficient evidence to demonstrate a reasonable expectation that a serious threat to the safety or health of an individual would result from disclosure of the records. Therefore, I find that section 20 of the Act does not apply.

Because of the findings I have made, it is not necessary for me to consider the possible application of section 49(a) to pages 1, 24 and 25.

INVASION OF PRIVACY

I have already found that all of the records contain the personal information of the appellant and that pages 1, 24 and 25 also contain the personal information of other individuals.

As previously noted, section 47(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 49 provides a number of exceptions to this general right of access.

Under section 49(b) of the Act, where a record contains the personal information of both the appellant and other individuals and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of

personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions found in section 21(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is where the personal information falls under section 21(4) or where a finding is made that section 23 of the Act applies to the personal information.

If none of the presumptions contained in section 21(3) apply, the institution must consider the application of the factors listed in section 21(2) of the Act, as well as all other considerations that are relevant in the circumstances of the case.

The College relies on sections 21(2)(e), (f) and (h) to support its decision to withhold the information at issue on pages 1, 24 and 25.

The College also considered whether section 21(2)(d) might be applicable in the circumstances of this appeal and concluded that it was not.

Sections 21(2)(d), (e), (f) and (h) provide:

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;

Sections 21(2)(e), (f) and (h) are factors which weigh against disclosure of the information. Section 21(2)(d) is a factor which weighs in favour of disclosure. The preamble to section 21(2) indicates that, in deciding whether disclosure would be an unjustified invasion of personal privacy, "all the relevant circumstances" should be considered. In my view, there is also one "relevant circumstance" not listed in section 21(2) which weighs in favour of disclosure. This consideration, which has been referred to as "adequate degree of disclosure", has been applied in previous orders of the Commissioner in the context of harassment complaints. The College has alluded to this consideration in its submissions regarding section 21(2)(d).

I will now consider each factor and consideration as it relates to the three pages at issue.

Section 21(2)(e)

The College submits that the nature of the allegations which led to the investigation is evidence that the complainant and/or others will be exposed to similar harm should the information be disclosed. The College argues further that “retaliation” would constitute a harm within the meaning of this section and that the appellant has contacted individuals involved in the arbitration. The College submits that it is reasonable to expect that the appellant will continue to harass individuals involved in the complaint.

While I recognize that the human dynamics in a harassment complaint are intense and antagonistic, the College’s arguments are not sufficient to persuade me that the complainant or other witnesses would be exposed unfairly to harm, physical, emotional or otherwise, should the information in the records be disclosed. Accordingly, I find that this factor is not relevant in the circumstances of this appeal.

Section 21(2)(f) and (h)

These two sections relate to information which is highly sensitive (section 21(2)(f)), and information provided in confidence (section 21(2)(h)).

Many previous orders of the Commissioner’s office have addressed arguments concerning the confidentiality of the harassment investigation process. They have concluded, generally, that despite assurances of confidentiality, complete confidentiality of information provided during these investigations cannot be guaranteed. Further, these orders have found that information provided in direct response to the complaint is among the most sensitive information contained in the records. Disclosure of this information would likely cause considerable personal distress to the affected persons (Order P-1014).

Similarly, in the current appeal, I find that the information provided by the individuals who were interviewed concerning the complaint was provided in confidence. Thus, section 21(2)(h) is a relevant consideration with respect to this information.

Further, I am satisfied that disclosure of any information concerning or provided by the interviewees would cause considerable personal distress to these individuals, and section 21(2)(f), therefore, is also relevant.

Section 21(2)(d)

As I indicated above, the College also considered whether section 21(2)(d) might be applicable in the circumstances of this appeal and concluded that it was not. In this regard, the College indicates that the disclosure mechanisms under the Labour Relations Act provides the appellant with the relevant documentation for the grievance arbitration hearing. The College submits further that the Commissioner should defer to the expertise and judgment of the arbitration board concerning what may be relevant to a “fair determination of the rights” of the appellant.

The appellant has not submitted representations on this section. His agent indicates that the information in the records relating to the allegations is about the appellant only. She does not believe that the names of the interviewees constitute personal information in this context. The appellant’s agent goes on to say, however, that:

The point of this entire appeal is that the information that the College is withholding is not information about those individuals who are being interviewed. The information contained in this file pertains to [the appellant]. The information is about him and relates to personal facts about him as an individual. This is all that we are asking for.

In my view, the proceedings before the grievance arbitration board pertain to a legal right of the appellant. I am also of the view that the personal information in the records which identifies the witnesses, and any other information in the records which is directly related to the subject matter of the investigation, the investigator's findings and the College's final disposition of the matter, would have a bearing on the determination of these rights. Accordingly, I find that section 21(2)(d) is a relevant consideration in the circumstances of this appeal.

Adequate Degree of Disclosure

This consideration relates to the fairness of administrative processes, and the need for a degree of disclosure to the parties which is consistent with the principles of natural justice. Previous orders have found that adequate disclosure is a fundamental requirement in a proceeding such as a harassment investigation (Order P-1014). In these types of investigations, both the complainant and the respondent are entitled to a degree of disclosure which permits them to understand the findings that were made and the reasons for the decision. In particular, the appellant, who faces accusations which have resulted in his dismissal and which have ultimately led to administrative proceedings, is entitled to know the case which has been made against him.

I note that the Arbitrator in the grievance proceeding has ordered disclosure to the appellant and that the vast majority of records which were originally at issue in this appeal were disclosed. Neither party has provided me with a copy of the Arbitrator's order, and the scope of disclosure is therefore not known. Despite the disclosure which the appellant has already received, in reviewing the parts of the records which remain at issue, I note that parts of pages 24 and 25 pertain directly to allegations raised by the complainant.

In the circumstances of this appeal, I find that the consideration requiring adequate disclosure is relevant to the personal information in the records which is directly related to the subject matter of the investigation.

Weighing the Factors

In considering the above, I have weighed the interests of the appellant in disclosure of this information against the factors favouring privacy protection. In turning my discussion to these competing interests, I will summarize briefly my findings regarding the applicable factors and consideration.

As I indicated above, page 1 contains the names, telephone numbers and in one case, the address of those individuals who were interviewed during the investigation. Page 24 also contains the name and telephone number of an interviewee. The top three lines of page 25 contain notes made by the interviewer regarding an interviewee. In my view, none of this information relates to the substance of the complaint. I have found further that the factors against disclosure in sections 21(2)(f) and (h) are relevant in the circumstances. I also found that the factor favouring disclosure in section 21(2)(d) is relevant with respect to the information contained on page 1. Many past orders have upheld the denial of access to information which could identify witnesses in harassment investigations. In balancing the interests of the appellant and that of the interviewees, I find that disclosure of the information described above, which appears on pages 1, 24 and 25 would constitute an unjustified invasion of personal privacy. Accordingly, I find that this information is exempt under section 49(b).

Parts of pages 24 and 25 contain notes made regarding a conversation with an interviewee regarding the allegations. I found that the factors favouring privacy protection in sections 21(2)(f) and (h) are relevant with respect to this record. However, because this information relates to the substance of the complaint, I also found that the factor favouring disclosure in section 21(2)(d) and the unlisted consideration pertaining to "Adequate Degree of Disclosure" are also relevant.

In the circumstances of this appeal, I find that the considerations favouring disclosure are more compelling, and I find that disclosure of the parts of pages 24 and 25 which relate to the substance of the complaint would not be an unjustified invasion of personal privacy. Accordingly, these parts of pages 24 and 25 are not exempt under section 49(b).

ORDER:

1. I uphold the decision of the College to withhold the information at issue on pages 1 and 26, as well as the name and telephone number of an interviewee on page 24 and the top three lines of page 25.
2. I order the College to disclose to the appellant the remaining parts of pages 24 and 25 by sending copies of these pages to the appellant on or before **March 28, 1996**, but not earlier than **March 23, 1996**.
3. In order to verify compliance with this order, I reserve the right to require the College to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: _____
Laurel Cropley
Inquiry Officer

February 22, 1996