



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

INTERIM ORDER PO-2701-I

Appeal PA08-36

Sault College of Applied Arts and Technology



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NATURE OF THE APPEAL:

Sault College of Applied Arts and Technology (the College) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following records:

1. The requester's personal file;
2. All documentation, notes, complaint forms relating to allegations of harassment/bullying or abusive communications made against a member of [a named] faculty for 2005, 2006 and 2007, including closed and current files;
3. all notes, records, minutes relating to meetings where the requester has been present, or in her absence where she was discussed, in the [named] faculty for 2005, 2006 and 2007; and
4. all information relating to student code of conduct and the teacher code of conduct for 2005, 2006 and 2007 in the [named] faculty.

The College located responsive records and granted the requester complete access to the records responsive to part 1 of her request and partial access to the records responsive to part 3 of her request. The College denied the requester access to the remainder of the records responsive to part 3 of her request citing the personal privacy exemption in section 21 of the *Act*. The College advised the requester that records responsive to parts 2 and 4 of her request did not exist.

The requester, now the appellant, appealed this decision. During mediation, the College issued a revised decision letter to the appellant, confirming its original decision, and, as the records contained the personal information of the appellant and other identifiable individuals, the College claimed the discretionary exemption in section 49(b) in conjunction with section 21.

Also during mediation, the appellant agreed to narrow the scope of part 4 of her request to only the teacher code of conduct.

The College then issued another decision letter in which it stated that the College does not have a teacher code of conduct, and confirmed that there are no additional records responsive to part 3 of the appellant's request.

On receipt of this letter, the appellant accepted the College's position on the teacher code of conduct, but asked that the file be moved to adjudication based on the exemptions claimed for part 3 of her request and on the issue as to whether the College has conducted a reasonable search for responsive records to parts 2 and 3 of her request. The file was transferred to me to conduct an inquiry. I sent a Notice of Inquiry to the College, setting out the facts and issues in this appeal, seeking its representations. I received representations from the College. I sent a complete copy of the College's representations to the appellant, along with a Notice of Inquiry. I received representations from the appellant in response.

RECORDS:

The records consist of Incident Reporting Forms and attachments comprising nine pages in total.

DISCUSSION:

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains “personal information” and, if so, to whom it relates. That term is defined in section 2(1) as follows:

“personal information” means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (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;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be “about” the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

Effective April 1, 2007, the *Act* was amended by adding sections 2(3) and 2(4). These amendments apply only to appeals involving requests that were received by institutions after that date. Section 2(3) modifies the definition of the term “personal information” by excluding an individual’s name, title, contact information or designation which identifies that individual in a “business, professional or official capacity”. Section 2(4) further clarifies that contact information about an individual who carries out business, professional or official responsibilities from their dwelling does not qualify as “personal information” for the purposes of the definition in section 2(1).

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

Neither the College nor the appellant address this issue in their representations.

Analysis/Findings

Upon my review of the records, I find that they contain the personal information of the appellant and other identifiable individuals in their personal capacities. This personal information includes identifying numbers, addresses, phone numbers, the views or opinions of other individuals about the individuals and these individuals’ names where they appear with other personal information relating to these individuals.

PERSONAL PRIVACY

Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an “unjustified invasion” of the other individual’s personal privacy, the institution may refuse to disclose that information to the requester.

If the information falls within the scope of section 49(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester’s right of access to his or her own personal information against the other individual’s right to protection of their privacy.

If the information fits within any of paragraphs (a) to (e) of section 21(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b). The information at issue does not fit within these paragraphs.

In deciding whether the exemption in section 49(b) applies, 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 the personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the institution to consider in making this determination. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

If any of paragraphs (a) to (d) of section 21(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b). The information does not fit within these paragraphs.

If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 49(b). The information does not fit within these paragraphs.

If no section 21(3) presumption applies, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy [Order P-239].

The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2) [Order P-99].

The College appears to be raising the applicability of the factors against disclosure of the records in sections 21(2)(e), (f), (h) and (i). These sections read:

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,

- (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; and
- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

The College submits that:

The pertinent documents in question are the actual student complaints against [the appellant]. The College has considered the appellant's request and we are of the view that the complainants' personal information would be breached by the release of those documents. Further, the release of such information could be viewed as [a] form of intimidation and we do not believe it is in the public's best interest that such documents be released. In our view, complaints lodged under a formal process should have the protection of confidentiality where bullying and intimidation is a factor.

The appellant does not address this issue in her representations, other than stating that:

This request is not a form of intimidation. I have had no contact with the complainants since the investigation.. The bullying/intimidation complaints were found to be untrue and unsubstantiated. I was NOT the only student who had complaints lodged and all complaints were found to be untrue.

Analysis/Findings

Based on my review of the records, I agree with the College that the factors listed above, which weigh against disclosure of the records, apply. In particular, the identifiable individuals other than the appellant in the records will be exposed to unfair harm to their reputation or incur mental distress. As stated by the appellant, the records concern unfounded allegations of misconduct made by and against students at the College. According to the appellant, these allegations include information that is "hearsay information, opinions [and] observations of conduct of students as it related to other students."

In addition, I find that the personal information in the records is highly sensitive information. Disclosure of the information could reasonably be expected to cause significant personal distress to the individuals other than the appellant identified in the records [Order PO-2518].

Furthermore, the information was provided to the College, by the individuals to whom it relates, in confidence. The records are forms on which the student complaint is filled in. These forms, entitled "Student Code of Conduct Reporting Form", are labelled as "CONFIDENTIAL" and contain the following statement:

All information relating to a violation of the Student Code of Conduct and the investigation into such matters is confidential.

Disclosure of the information in the records could expose the individuals concerned to repercussions, such as intimidation by other individuals named in the records, as a result of their involvement in the investigations by the College [Order PO-1659]. This result is unfair in the circumstances of a confidential complaint process.

The appellant appears to be relying on the unlisted factor that she should be entitled to receive access to the records as the subject of an investigation of an unfounded complaint made against her. However, I find that the factors in this appeal that weigh in favour of the privacy of the individuals in the records other than the appellant outweigh this unlisted factor in favour of disclosure of the records relied upon by the appellant.

Therefore, subject to my discussion below as to the College's exercise of discretion, I find that the records are exempt by reason of section 49(b).

EXERCISE OF DISCRETION

The section 49(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

As stated above, the College considered the personal privacy of the identifiable individuals other than the appellant in the records. It also considered the public's interest in disclosure of the records and the confidentiality of the records.

The appellant did not address this issue in her representations.

Analysis/Findings

I find that the College exercised its discretion in a proper manner, taking into account relevant factors and not taking into account irrelevant factors, in denying the appellant access to the information in the records for which it has claimed the section 49(b) exemption. In particular,

the appellant does not have a sympathetic or compelling need to receive this information and the information is sensitive. Disclosure will not increase public confidence in operation of the College. In the circumstances of this appeal, the privacy rights of the identifiable individuals in the records other than the appellant are significant.

Accordingly, I uphold the College's exercise of discretion and find that the records are properly exempt under section 49(b).

SEARCH FOR RESPONSIVE RECORDS

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

The College was asked to provide a written summary of all steps taken in response to the request. In particular, the College was asked to respond to the following, preferably in affidavit form:

1. Did the College contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.
2. If the College did not contact the requester to clarify the request, did it:
 - (a) choose to respond literally to the request?
 - (b) choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the institution inform the requester of this decision? Did the institution explain to the requester why it was narrowing the scope of the request?

3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.
4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

If the College provides an affidavit from the person or persons who conducted the actual search, it should be signed and sworn or affirmed before a person authorized to administer oaths or affirmations.

The appellant claims that there should exist additional responsive records to parts 2 and 3 of her request. These parts read:

2. All documentation, notes, complaint forms relating to allegations of harassment/bullying or abusive communications made against a member of [a named] faculty for 2005, 2006 and 2007, including closed and current files;
3. all notes, records, minutes relating to meetings where the [appellant] has been present, or in her absence where she was discussed, in the [named] faculty for 2005, 2006 and 2007; and

In response to these questions, the College did not provide details of the searches undertaken. It submits only that:

With respect to [part] two the only complaints lodged in the [named faculty] in the named years were complaints lodged by students against the appellant [the records at issue in this appeal]. To our knowledge no formal written complaints have been lodged in that time period...

The appellant's request under [part 3] is broad in scope, however, it is the College's view that we have reviewed all of our files and have provided every document to [the appellant], save and except the actual complaint documents filed against her by fellow students.

In a subsequent FOI request by the appellant ..., another search was conducted... These documents ...were not a part of the appellant's original request with respect to this appeal. I have raised this only to demonstrate that the College has reviewed its files on numerous occasions in order to comply with our legislative

obligations. I am not aware of any other documents that the College has that [the appellant] does not have (save the complaints noted above).

In response, the appellant disputes that the only complaints lodged were against the appellant by students. She claims that six other students also received letters that they were being investigated at the same time that she received a letter that she would be investigated. In addition, she claims that she personally made a complaint against a named professor at the College. The appellant alleges that during the investigations, meetings were held where notes were taken. She states that

All [of these] students [complained against] ...received follow up letters indicating that their alleged misconduct has been found to be "inconclusive" ... at the conclusion of all investigations.

The complainants made complaints alleging misconduct. The complainants made complaints about at least 7 students in a number of interviews...

The appellant alleges the complainants were told at the beginning of the investigation that they would need to provide signed statements as to the allegations. The FOI notations are located at the bottom of the standard form. I have not yet seen these signed statements and request disclosure of all documents relating to this investigation. Disclosure relating to all students who were investigated, the complainants and the victims...

Analysis/Findings

Based on my review of the records and the parties' representations, I find that the appellant has provided a reasonable basis for me to conclude that additional responsive records exist concerning both parts 2 and 3 of her request.

In particular, the College has not provided any records responsive to part 2 concerning complaints made against the named faculty members, nor has it made any direct reference to the same in its representations.

In response to part 3, further responsive records should exist relating to the appellant. Both the appellant's representations and the records already produced indicate that the complaints were made against the appellant and other students. As a result, responsive records should exist, including investigation and meeting notes and statements taken concerning the complaints against these individuals.

Therefore, I will order the College to conduct another search for responsive records.

ORDER:

1. I uphold the College's decision to deny access to the nine pages of records referred to above.
2. I order the College to conduct a new search for responsive records related to parts 2 and 3 of the appellant's request. I order the College to provide me with an affidavit sworn by the individual(s) who conducted the search, confirming the nature and extent of the search conducted for the responsive records within 30 days of this interim order. At a minimum the affidavit should include information relating to the following:
 - (a) information about the employee(s) swearing the affidavit describing his or her qualifications and responsibilities;
 - (b) the date(s) the person conducted the search and the names and positions of any individuals who were consulted;
 - (c) information about the type of files searched, the search terms used, the nature and location of the search and the steps taken in conducting the search; and,
 - (d) the results of the search.
3. The affidavit referred to above should be sent to my attention, c/o Information and Privacy Commissioner/Ontario, 2 Bloor Street East, Suite 1400, Toronto, Ontario, M4W 1A8. The affidavit provided to me may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in IPC Practice Direction 7.
4. If, as a result of the further search, the College identifies any additional records responsive to the request, I order the College to provide a decision letter to the appellant regarding access to these records in accordance with the provisions of the *Act*, considering the date of this Order as the date of the request.
5. I remain seized of this appeal in order to deal with any outstanding issues arising from this appeal.

Original signed by: _____

Diane Smith
Adjudicator

July 29, 2008