

Information and Privacy Commissioner,  
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,  
Ontario, Canada

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## **INTERIM ORDER PO-3165-I**

Appeal PA11-567

Mohawk College of Applied Arts and Technology

February 22, 2013

**Summary:** The appellant sought access to all records about himself from the college. The college relied on the mandatory exemption in section 21(1) (invasion of privacy) and the discretionary exemption in section 20 (danger to safety or health) to withhold portions of the records. This interim order finds that some information in the records qualifies for exemption under the discretionary exemption in section 49(b) (invasion of privacy), and it directs the college to exercise its discretion under this section. This interim order also finds that the records do not qualify for exemption under the discretionary exemption in section 49(a) (discretion to refuse requester's own information), in conjunction with section 20.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1), 20, and 49(a) and (b).

**Orders and Investigation Reports Considered:** M-352 and PO-2225.

### **OVERVIEW:**

[1] A student of Mohawk College of Applied Arts and Technology (the college), had an altercation with college staff.<sup>1</sup> The college conducted an investigation into the

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<sup>1</sup> The college asserts the altercation involved two staff members, while the appellant asserts that it involved only one.

altercation and decided that the student had violated its Student Behaviour Policy. As a result, the college suspended the student and required him to meet a number of conditions before permitting him to re-enter his academic program. The student initiated a Student Behavioural Appeal, and his suspension was overturned with conditions.

[2] The student subsequently made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the college for access to:

Everything Mohawk College has concerning myself. Including personal records, all records concerning problems I had with the college. Everything concerning the hearing board and their decision. All Assoc. Deans, Deans and administrative files including any and all security reports. I want everything because in court I want no surprises from the college because they held back information. I want any and all decisions that were made concerning myself. I also want any students reports concerning myself. I want everything. [*sic*]

[3] The college located 60 records that were responsive to the request. It granted the appellant access to 57 records in their entirety. The college granted partial access to the remaining three records relying on the discretionary exemption in section 20 (danger to safety or health) of the *Act* to withhold portions of records 2, 14 and 60.

[4] The student, now the appellant, appealed the college's decision.

[5] Mediation did not resolve the appeal, and it was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

[6] During the inquiry into this appeal, this office sought representations from the college, the appellant, and an individual whose interests could be affected by the disclosure of the records (the affected party). Since the records appear to contain the personal information of the appellant, the adjudicator asked the parties to consider whether the records contain information that meets the definition of personal information in section 2(1) of the *Act*. In addition, the adjudicator asked the parties to consider the possible application of the discretionary exemption in section 49(b) (personal privacy).

[7] The college and the appellant provided representations which were shared in accordance with section 7 of this office's *Code of Procedure and Practice Direction 7*. The affected party did not submit representations.

[8] The appeal was subsequently transferred to me for disposition.

[9] After reviewing the appeal file, I sought clarification from the college regarding its representations on record 2, and its position on two withheld emails in record 60 which appeared to have been previously disclosed to the appellant. In response, the college provided the requested clarification. It also acknowledged that the two withheld emails in question had indeed been disclosed to the appellant, and therefore, it was no longer claiming any exemptions in respect of them.

[10] As no exemptions are being claimed for these two emails in record 60 that have already been disclosed to the appellant, I need not consider them further in this appeal.

[11] In this interim order, I find that record 2 and portions of record 60 contain only the appellant's personal information and I order that this information be disclosed to the appellant. I further find that the withheld portions of records 14 and 60 that contain the personal information of the appellant and the affected party, qualify for exemption under section 49(b), and I order the college to exercise its discretion under this section.<sup>2</sup> I also find that the records do not qualify for the exemption in section 49(a), in conjunction with section 20.

## **RECORDS:**

[12] The records that remain at issue in this appeal are the withheld portions of the following:

- Record 2 consisting of handwritten notes taken during a meeting of three administrators regarding the altercation in which the appellant was involved.
- Record 14 consisting of an email exchange.
- Record 60, which is the report prepared by the Manager, Security & Parking, about the appellant following the altercation.

## **ISSUES:**

A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

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<sup>2</sup> The ability of this office to issue orders based on a part of the *Act* which an institution has not referred to in its decision, but which part it was directed to and invited to provide representations on by this office, was set out in detail in Order M-352. Subsequent orders have adopted the approach taken in Order M-352, establishing that where a record contains the personal information of the requester and another individual, the request falls under Part III of the *Act* and the applicable exemption is found under section 49. See for example, Order PO-3129.

- B. Does the discretionary exemption at section 49(a), in conjunction with section 20, apply to the information at issue in records 2, 14 and 60?
- C. Does the discretionary exemption at section 49(b) apply to the information at issue in records 14 and 60?
- D. Did the college properly exercise its discretion under section 49(b)?

## **DISCUSSION:**

### **A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?**

[13] 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) in part 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,  
...
- (e) the personal opinions or views of the individual except if 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;

[14] 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.<sup>3</sup>

[15] Section 2(3) also relates to the definition of personal information. It states:

Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[16] To qualify as personal information, the information must be about the individual in a personal capacity and it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>4</sup>

[17] 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.<sup>5</sup>

## **Representations**

[18] In its representations, the college does not specifically address the issue of whose "personal information" is contained in each record. Rather, the college submits that all of the withheld portions of the records contain the personal information of the affected party in accordance with the definition of that term in paragraph 2(1)(e). The college therefore submits that the views and opinions of the affected party about the appellant, represent the affected party's personal information. The college also states that it fully complied with section 10(2) of the *Act* and disclosed as much of the requested records as it reasonably could sever without disclosing exempt information.

[19] In his representations, the appellant similarly does not specify whose personal information is contained in each record. Rather, the appellant states that he requested access to his information and all his documents from the college, implying that all of the records contain his personal information. With respect to the college's submission that the records contain the personal information of the affected party as defined in section 2(1)(e), the appellant asserts that the college is attempting to "twist the intention of the *Act*" as the opinions of the affected party about him do not constitute the affected party's personal information.

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<sup>3</sup> Order 11.

<sup>4</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

<sup>5</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

## **Analysis and Findings**

[20] All three of the records at issue relate to matters involving the appellant during his final year of studies at the college and contain his personal information. Accordingly, my consideration of the exemption of the records from disclosure will be done under Part III of the *Act*, specifically, sections 49(a) and (b), which assess the right of access to information of an individual to whom the information relates.

[21] In addition, with respect to each record, I make the following findings:

### ***Record 2***

[22] Record 2 contains handwritten notes taken during a meeting of the Manager, Security & Parking, another administrator, and a faculty member who was present during the altercation involving the appellant. The meeting is about the altercation. The record contains the appellant's name, along with other personal information about him, which qualify as personal information under paragraph (h). In addition, record 2 includes information about his education, which qualifies as personal information under paragraph (b) of section 2(1).

[23] The withheld portion of record 2 consists of the affected party's name and her opinion of the appellant. Although the college submits that the opinion about the appellant qualifies as the personal information of the affected party in accordance with paragraph (e) of section 2(1), I reject this argument. Paragraph (e) of section 2(1) states:

"personal information" means recorded information about an identifiable individual, including, the personal opinions or views of the individual *except where they relate to another individual*. [emphasis added]

[24] In accordance with the exception in the latter part of the definition in section 2(1)(e), the affected party's opinions and views about the appellant do not qualify as the personal information of the affected party under paragraph (e); rather, they qualify as the personal information of the appellant alone under paragraph (g) of section 2(1), which states that personal information about an identifiable individual includes "the views or opinions of another individual about the individual."

[25] In addition, I find that the affected party's name in record 2 appears in her professional, rather than her personal, capacity. Section 2(3) of the *Act* states that the name of an individual that identifies the individual in a professional capacity, does not constitute personal information. Order PO-2225 established the following two-part test for distinguishing personal information from professional information:

1. In what context does the name of the individual appear?

2. Is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual?

[26] I adopt the two-part test in this appeal. In response to the first question, I find that the affected party's name appears in a professional context which is removed from the personal sphere. Specifically, it appears in a recitation of events by a faculty member to college administrators, describing what happened during the altercation.

[27] In response to the second question, I find that nothing inherently personal would be revealed if the affected party's name is disclosed. The record reflects the fact that the affected party requested and attended the meeting with the appellant and another faculty member in her professional capacity, as the coordinator of the appellant's academic program. The record also demonstrates that the meeting related to the appellant's academic program and his conduct. The record further indicates that during the meeting, the affected party provided her professional opinion of the appellant's academic prospects. In doing so, I conclude that the affected party was not acting in her personal capacity.

[28] Accordingly, I find that the withheld information in record 2 does not include the affected party's personal information; it contains only the appellant's personal information and, therefore, section 49(b) cannot apply to it. However, the college has claimed that section 20 also applies to exempt record 2 from disclosure. I will address below whether section 49(a), in conjunction with section 20, applies to this record.

#### ***Record 14***

[29] Record 14 consists of an email exchange between college faculty and administrators. One of the two emails in the exchange has been withheld in its entirety. The withheld email contains the affected party's name and other personal information about her, thereby engaging paragraph (h) of the definition of personal information in section 2(1). Applying the two-part test from Order PO-2225 to this record, I find that while the affected party's name appears in a professional context in the withheld email, disclosure of the information in the email would reveal something of a personal nature about her. Therefore, the affected party's information in record 14 is about her in her personal capacity and thus qualifies as her personal information.

[30] The email also contains the appellant's name, the fact that a security report was prepared about him by the Manager, Security & Parking, and that he was suspended, all of which qualify as his personal information under paragraphs (b) and (h) of the definition of that term in section 2(1). Accordingly, I will determine whether section 49(a) and/or (b) applies to the withheld information in record 14.

**Record 60**

[31] Record 60 is the five page report prepared by the college's Manager, Security & Parking, about the appellant following the altercation, and I find that it contains the appellant's personal information as defined in paragraphs (a), (b), (e), (g) and (h). Similar to my findings regarding record 14 above, the withheld paragraph in record 60 also contains the affected party's personal information as defined in paragraphs (e), (g) and (h). Most of record 60 was disclosed to the appellant with only paragraph 12 being withheld.

[32] There are a number of complete sentences and passages within paragraph 12 that contain the personal information of the appellant alone. Because these passages contain only the personal information of the appellant, section 49(b) cannot apply to them. I will consider whether section 49(a), in conjunction with section 20, applies to them below. I will consider whether section 49(a) and/or (b) applies to the remaining personal information in this record.

[33] In summary, I find that all three records contain the personal information of the appellant, and the withheld information in record 2 and certain portions of the withheld paragraph in record 60, constitute the personal information of the appellant alone.

[34] As a result of my findings, I will consider the application of the section 49(a) exemption to all of the withheld information in records 2, 14 and 60. I will also consider the application of the section 49(b) exemption to the withheld information that contains the personal information of the appellant and the affected party in records 14 and 60.

**B. Does the discretionary exemption at section 49(a), in conjunction with section 20, apply to the information at issue in records 2, 14 and 60?**

[35] Section 47(1) 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.

[36] Section 49(a) reads:

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

where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.



[37] Section 20 states:

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.

[38] Section 49(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.<sup>6</sup>

## **Representations**

[39] The college's representations detail the events leading up to the request, and focus on the college's view of these events and its concern that the appellant poses a threat to certain college faculty members. For this reason, the college claims that the withheld information is exempt from disclosure under section 20.

[40] To support its claim that section 20 applies, the college asserts that the appellant's "argumentative, disruptive and inappropriately rude" conduct during the altercation prompted it to have an investigation conducted by the Manager, Security & Parking, who in turn found that the appellant was "fixated" on the affected party and that the majority of the appellant's hostility was aimed at her. The college also points to the findings set out in the report of the Manager, Security & Parking, that the appellant "had a high degree of hostility toward women staff members" and provided unsolicited information about his familiarity with firearms. The college also states that the appellant sent a "number of distressing e-mails" in which he "harassed college staff."

[41] Along with its representations, the college provided an affidavit from the Manager, Security & Parking, which states that in the Manager's opinion, the appellant may reasonably pose a threat of harm, harassment or possibly even violence against certain female staff.

[42] The college argues that the appellant's threatening behaviour toward the affected party and the threatening emails he sent to the college, establish a reasonable basis for believing that the affected party's safety will be threatened if the withheld portions of the records are disclosed to the appellant. In making its arguments, the college refers to a number of orders of this office and to the decision of the Ontario Court of Appeal in *Ontario (Ministry of Labour) v. Ontario (Information & Privacy Commissioner)*<sup>7</sup> which dealt with the test under section 20 as follows:

The expectation of harm must be reasonable, but it need not be probable...[S]ection 20 calls for a demonstration that disclosure could

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<sup>6</sup> Order M-352.

<sup>7</sup> (1999), 46 O.R. (3d) 395 (C.A.).

reasonably be expected to seriously threaten the safety or health of an individual, as opposed to there being a groundless or exaggerated expectation of a threat to safety. Introducing the element of probability in this assessment is not appropriate considering the interests that are at stake, particularly the very significant interest of bodily integrity. It is difficult, if not impossible, to establish as a matter of probabilities that a person's life or safety will be endangered by the release of a potentially inflammatory record. Where there is a reasonable basis for believing that a person's safety will be endangered by disclosing a record, the holder of that record properly invokes [section ]... 20 to refuse disclosure.

[43] In his representations, the appellant focuses on refuting the allegations of the college that he is a threat to the affected party's safety. The appellant asserts that many of the statements made by the college in its representations are not true, and that the college has fabricated a version of events that suits its needs. Specifically, the appellant argues that the undisclosed information is not being withheld because he is a threat, but because it proves that the college acted improperly towards him. He further argues that the college's motive for withholding portions of the records is to minimize the damage of any legal action that he may take against it for mishandling his situation.

[44] The appellant states that the altercation was in fact a five minute argument that did not involve any physical contact, aggressive gestures or threats. He states that he was the one who felt threatened by the affected party; he did not want to meet with the affected party alone, as is evidenced by his email to the associate dean the night before the altercation, in which he asked the associate dean to attend the meeting in order to protect him. The appellant asserts that the affected party unfairly targeted him, and insisted on having a meeting with him about an issue at his academic placement which had already been resolved by the college liaison to the satisfaction of all parties concerned.

[45] He also states that the affected party inappropriately changed another student's failing grade to the highest grade in his group placement, and that during his meeting with the affected party, he challenged her decision to do so. The appellant argues that the affected party and the college are attempting to conceal this "indiscretion" and that the affected party lied to the college about her version of events.

[46] The appellant states that he provided information on his previous employment in the security field in response to a question by the Manager, Security & Parking, during the investigation. He takes issue with the validity of the investigation and argues that the Manager, Security & Parking, is not competent to conduct such an investigation.

[47] In respect of the allegations that he sent inappropriate emails to college staff, the appellant states that he emailed the college information which confirmed that his placement liaison lied about her credentials. He also challenged the college for

advertising that it was the "best college in Ontario" when statistical information indicated that the college ranked much lower than first place. The appellant states that the college did not want to accept these truths, and labeled his actions harassing. The appellant goes on to explain that even though the college contacted the police a number of times and attempted to involve them in the matter, the police confirmed to him that his actions did not constitute harassment.

[48] The appellant concludes by asserting that he is not a threat to the affected party, and despite the college's unwarranted punishment of him following the altercation, he has not done anything that could be considered threatening. He points to an email from the associate dean that was disclosed to him in which the associate dean confirmed that he "poses no threat to staff." He argues that the college's claims about him are outlandish and groundless, and are intended to conceal the college's unfair treatment of him while he was a student.

### **Analysis and Findings**

[49] I have carefully reviewed the extensive representations of the college and the appellant on this issue, as well as all of the responsive records in the materials, and I see no evidence that disclosure of the withheld information in the records could reasonably be expected to seriously threaten the safety or health of an individual as contemplated by section 20.

[50] As noted by the college in its representations, the test articulated by the Ontario Court of Appeal in *Ontario (Ministry of Labour) v. Ontario (Information & Privacy Commissioner)* is the one to be applied in this appeal. The Court stated that to satisfy the test, the party refusing disclosure must demonstrate that disclosure could reasonably be expected to seriously threaten the safety and health of an individual. The college has not demonstrated this.

[51] The evidence before me reveals that the appellant and the affected party had a heated verbal exchange on one occasion. This exchange was the impetus for a number of subsequent actions taken by the college including, suspension of the appellant, and issuance of a Notice of Trespass to him. The appellant in his view, took steps to protect his reputation and gain back his right to complete his academic program and graduate.

[52] Having reviewed the emails referred to by the Manager, Security & Parking, as "harassing", I do not agree with this characterization. The emails from the appellant indicate that the appellant looked into the professional qualifications of individuals who supervised him in his academic program and that one of these individuals did not have the necessary professional designation she claimed to possess. I do not accept that bringing misrepresented professional qualifications of an individual associated with the college to its attention in an email, constitutes a threat.

[53] I am similarly not satisfied that the appellant's behaviour during the altercation is sufficient to satisfy the test under section 20. While the affected party may have felt threatened during and after the altercation, an individual's subjective fear is only one of a number of relevant factors, and not determinative on its own of the application of the exemption in section 20.<sup>8</sup> I also note that in this appeal, the affected party was given an opportunity to provide representations on the application of the section 20 exemption, but did not do so.

[54] Finally, the college has already disclosed a great deal of information to the appellant, including information that is highly sensitive and comprises the affected party's personal information alone, namely, details of the affected party's state of mind after the altercation which were contained in a confidential email she sent to the college as her employer. This disclosure is not consistent with section 20 being an issue in this appeal, or with it being as significant a concern as the college argues that it is. Moreover, despite this extensive disclosure, there is no evidence that the appellant has attempted to contact the affected party since the altercation, or that he has exhibited any conduct that forms the basis of an expectation of harm.

[55] For all of the reasons set out above, I find that section 20 does not apply to the withheld information, and therefore, the withheld portions of the records do not qualify for exemption under section 49(a).

[56] Accordingly, I find that record 2, and the portions of record 60 that contain only the appellant's personal information should be disclosed to the appellant.

[57] Having found that the withheld portions of record 14 and the remaining portions of record 60 contain the personal information of both the appellant and the affected party, I will now consider whether section 49(b) applies to this information.

**C. Does the discretionary exemption at section 49(b) apply to the information at issue in records 14 and 60?**

[58] 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.

[59] 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 own personal information against the other individual's right to protection of her privacy.

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<sup>8</sup> Order PO-2003.

[60] Sections 21(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold under section 49(b) is met.

[61] Section 21(2) lists various factors that may be relevant in determining whether the unjustified invasion of personal privacy under section 49(b) is met.<sup>9</sup> The list of factors under section 21(2) is not exhaustive, and the institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2).<sup>10</sup>

## **Representations**

[62] In its representations, the college states that disclosure of the withheld portions of the records would be an unjustified invasion of the affected party's personal privacy. The college raises section 21(2)(e) as a relevant factor weighing in favour of a finding that disclosure would result in an unjustified invasion of her personal privacy under section 49(b). The college argues that disclosure of the withheld portions could unfairly expose the affected party to harm by possibly provoking the appellant "to take violent or aggressive action against [the affected party], particularly in light of evidence showing [the appellant's] propensity for aggressive and threatening behavior." While the college does not raise the application of the factor in section 21(2)(f), its representations allude to the possible application of this consideration.

[63] The appellant denies that the disclosure of the records would be an unjustified invasion of the affected party's personal privacy under section 49(b). He asserts that the college is withholding the information in order to minimize the damages it would be subject to in civil litigation. The appellant alleges that record 60, the investigation report prepared by the college, is inaccurate and unreliable, in that it characterizes him as a threat when he is not. He asserts that he requires complete disclosure of record 60 in order to pursue his legal rights against the college. In this regard, the appellant alludes to two of the factors listed in section 21(2) as criteria in determining whether disclosure of the records would constitute an invasion of privacy; sections 21(2)(a) and (d).

## **Analysis and Findings**

[64] I have found above that records 14 and 60 contain the personal information of both the appellant and the affected party. Section 21(1) was claimed by the college to exempt the withheld material from disclosure, but because records 14 and 60 contain the personal information of both the affected party and the appellant, that mandatory exemption cannot apply to these records. The mandatory exemption in section 21(1) can only be claimed for records which do not contain the requester's own personal information. This is confirmed in the beginning of the section which states "[a] head

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<sup>9</sup> Order P-239.

<sup>10</sup> Order P-99.

shall refuse to disclose personal information to any person other than the individual to whom the information relates.”

[65] Under section 49(b) of the *Act*, the withheld portion of record 14 and the remaining withheld portions of record 60 may be withheld if disclosure of the personal information would constitute an unjustified invasion of the affected party’s personal privacy. I will, therefore, rely on the college’s representations on the applicable factors under section 21(2) in considering whether section 49(b) applies to the withheld portion of record 14 and the remaining withheld portions of record 60.

[66] In asserting that disclosure of the records would be an unjustified invasion of the affected party’s personal privacy, the college relies on the factor at section 21(2)(e). Its representations also allude to the application of section 21(2)(f), while the appellant’s arguments that the records should be disclosed raise the application of the factors in sections 21(2)(a) and (d). 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,

- (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
- ...
- (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;

[67] Dealing first with the factor in section 21(2)(a) which favours disclosure, I find that it is not an applicable factor. This factor contemplates the situation where disclosure is desirable in order to subject the activities of the government, as opposed to the views or actions of private individuals, to public scrutiny.<sup>11</sup> Neither the appellant’s representations nor the records themselves have convinced me that the disclosure of the information at issue would shed light on the college’s activities or decisions with respect to its actions in this matter. Moreover, based on my review of the content of the

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<sup>11</sup> Order P-1134.

withheld portions of records 14 and 60, I find that they are focused on the affected party and do not reveal any information about the actions of the college.

[68] Section 21(2)(d) also favours disclosure. For this section to apply, the appellant must establish that:

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.<sup>12</sup>

[69] In his representations, the appellant asserts that the personal information is relevant to a fair determination of his rights as he is contemplating bringing an action against the college. The appellant's assertions in this regard, are vague, however, and he does not address the four elements that must be established for section 21(2)(d) to apply. Accordingly, I find that this factor does not apply to the records either.

[70] With respect to the factor favouring privacy protection in section 21(2)(e), I find that the college has not provided me with sufficient evidence to establish that disclosure of the remaining withheld information in records 14 and 60 will expose the affected party to pecuniary or other harm. As a result, I find that this consideration does not apply.

[71] The sole factor left to consider is section 21(2)(f), which favours privacy protection. In order for the personal information at issue to be considered "highly sensitive" there must be a reasonable expectation of significant personal distress if the information is disclosed.<sup>13</sup> The remaining withheld portions of records 14 and 60 do not refer directly to the appellant; rather, they contain information about the affected party's actions and state of mind at specific points in time. Considering the circumstances in this appeal, the contents of the responsive records, and the representations of both parties in their entirety, I am satisfied that disclosure of the

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<sup>12</sup> Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

<sup>13</sup> Orders PO-2518, PO-2617, MO-2262 and MO-2344.

remaining withheld portions of records 14 and 60, could reasonably be expected to cause the affected party significant personal distress.

[72] Accordingly, I find that the factor in section 21(2)(f), weighing against disclosure of the remaining withheld portions of records 14 and 60, applies. Balancing the appellant's right to access his personal information against the affected party's right to have her privacy protected, I find that the sole applicable factor in this appeal favours privacy protection, and there are no factors that weigh in favour of disclosure. Accordingly, I find that the personal information in the withheld portion of record 14 and the remaining withheld portions of record 60 is exempt under section 49(b) as its disclosure would result in an unjustified invasion of the affected party's personal privacy.

**D. Did the college properly exercise its discretion under section 49(b)?**

[73] Because section 49(b) is a discretionary exemption, the college has the discretion to apply it and withhold the information. The college alternatively has the discretion to disclose the information to which section 49(b) applies.

[74] The discretionary section 49(b) exemption thus 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.

[75] 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.

[76] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>14</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>15</sup>

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<sup>14</sup> Order MO-1573.

<sup>15</sup> Section 43(2).



[77] As noted above, the college did not provide representations on the applicability of the discretionary exemption in section 49(b). Accordingly, I order the college to exercise its discretion in applying section 49(b) to the withheld information in records 14 and 60 that qualifies for exemption. I will require that the college provide me with representations on this exercise of discretion, taking into consideration the following factors:

- 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.

**INTERIM ORDER:**

1. I order the college to disclose to the appellant by **March 29, 2013**, but not before **March 22, 2013**:
  - a. the two emails in record 60 which it acknowledged were previously disclosed in their entirety;
  - b. record 2 in its entirety; and
  - c. the portions of record 60 highlighted in green and attached to the college's copy of this interim order.
2. I order the college to exercise its discretion with respect to the withheld information in records 14 and 60 that qualifies for exemption under section 49(b), taking into account the factors set out above in paragraph 77, and to advise the appellant and this office of the result of this exercise of discretion in writing by **March 15, 2013**. For clarity, this information is highlighted in yellow and attached to the college's copy of this interim order.
3. If the college continues to withhold part of records 14 and 60, I also order it to provide me with representations on its exercise of discretion by **March 15, 2013**.
4. I remain seized of this matter pending the resolution of the outstanding issues in this appeal.

Original signed by: \_\_\_\_\_  
Stella Ball  
Adjudicator

\_\_\_\_\_ February 22, 2013