

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3213

Appeal PA12-224

Algonquin College

June 12, 2013

Summary: The appellant sought access to the names of individuals who cast a ballot in an election for faculty representative on the college's Board of Governors. The appellant was granted access to his own name from this list, but access to the remaining names was denied under the discretionary exemption in section 49(b) on the basis that the list contained the personal information of other identifiable individuals. This order upholds the college's decision that the record contains the personal information of those who cast ballots in the election, and finds the record exempt from disclosure under section 49(b).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, definition of the term "personal information" in section 2(1), sections 49(b), 21(2)(a), (e), (f), (h) and (i).

OVERVIEW:

[1] A request was submitted to Algonquin College (the college) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

1. List of eligible voters for the 2012 Board of Governors election for the Faculty Representative.
2. List of people who voted in the 2012 Board of Governors election for the Faculty Representative.

[2] The college located the responsive records and disclosed them, in part, claiming the application of the mandatory personal privacy exemption in section 21(1) of the *Act* to the undisclosed portions. The requester, now the appellant, appealed the college's decision.

[3] During mediation, the appellant confirmed that he sought access only to the list of people who voted in the 2012 Board of Governors election for the Faculty Representative. The college advised that it would not disclose the list of people who voted in the 2012 Board of Governors election for the Faculty Representative as disclosure of this information would constitute an unjustified invasion of personal privacy under section 21(1). However, the college confirmed that the appellant's information was contained in this list. It subsequently agreed to disclose a redacted copy of the record to the appellant, disclosing his own personal information to him.

[4] As this disclosure did not resolve the appeal, it was moved to the adjudication stage of the appeals process. In the Mediator's Report provided to the parties, the mediator confirmed that because the responsive record includes the name of the appellant, the discretionary personal privacy exemption in section 49(b) of the *Act* may apply to the entire record, rather than the mandatory section 21(1) exemption.

[5] I sought and received the representations of the college and the appellant, copies of which were shared with the parties in accordance with Practice Direction 7 and section 7 of the *IPC Code of Procedure*. I also sought and received further representations from the college by way of reply.

[6] In this order, I uphold the college's decision to withhold access to the names of the electors on the basis that this information constitutes "personal information" for the purposes of the definition of that term in section 2(1). In addition, the personal information qualifies for exemption under the personal privacy exemption in section 49(b).

RECORDS:

[7] The record at issue in this appeal consists of a list of people who voted in the 2012 Board of Governors election for faculty representative.

ISSUES:

- A. Does the record contain "personal information?"
- B. Would disclosure of the record result in an unjustified invasion of personal privacy under section 49(b)?

C. Did the institution properly exercise its discretion under section 49(b)?

DISCUSSION:

Issue A: Does the record contain "personal information?"

[8] In order to determine whether section 49(b) of the *Act* may apply to the record, it is necessary to decide whether it 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;

[9] 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].

[10] Sections 2(3) and (4) also relate to the definition of personal information. These sections state:

(3) 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.

(4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[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 individual¹.

[12] 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 individual².

[13] In support of its argument that the names contained in the record constitute the personal information of the individuals, the college relies on the decisions in Orders MO-2058 and M-350, where it was held that the names of individuals which appeared on the sign-in page at a municipal community meeting constituted the personal information of these individuals. In both cases, it was decided that the sign-in sheets met the requirements of paragraph (h) of the definition in section 2(1) because they refer to the individual's name, as well as the fact that the individual attended the meeting. The college also relies on the decision of the Supreme Court of Canada in *Dagg v. Canada (Minister of Finance)*³ in which the Court found that sign-in logs which indicated the name, identification number and signature of employees who entered and left a work place over a weekend constituted the personal information of those individuals.

¹ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

² Orders P-1409, R-980015, PO-2225 and MO-2344.

³ [1997] 2 S.C.R. 403.

[14] The college submits that the record at issue in this appeal also contains the personal information of the individuals whose names appear on the record as it refers to them by name and indicates whether they voted in the Board of Governors election. The college argues that this information is analogous to a sign-in sheet at a public meeting which was found to contain personal information in Orders MO-2058 and M-350.

[15] The appellant contends that the fact that an individual voted in an election “does not reveal any protected personal information.” He also suggests that the exception in section 2(3) applies to this information as it relates exclusively to “an employment – related activity of the College employees in their business or professional capacity.”

[16] In its reply submissions, the college argues that the disclosure of the names of the employees who voted in the election would reveal not only that they were eligible to vote, but that they exercised that right. It submits that this information qualifies as “personal information” because it reveals something of a private nature about the employee; that he or she made a choice to vote in the election.

[17] In Order PO-2225, former Assistant Commissioner Tom Mitchinson discussed this office’s approach to the definition of personal information when an individual is engaged in a business activity. In that appeal, the information at issue was a list of non-corporate landlords owing a debt to the Ontario Rental Housing Tribunal. The former Assistant Commissioner stated:

Previous decisions of this office have drawn a distinction between an individual’s personal and professional or official government capacity, and found that in some circumstances, information associated with a person in a professional or official government capacity will not be considered to be “about the individual” within the meaning of the section 2(1) definition of “personal information” (Orders P-257, P-427, P-1412, P-1621). While many of these orders deal with individuals acting as employees or representatives of organizations (Orders 80, P-257, P427, P-1412), other orders have described the distinction more generally as one between individuals acting in a personal or business capacity...

Based on the principles expressed in these orders, the first question to ask in a case such as this is: “*in what context do the names of the individuals appear*”? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere?

...

The analysis does not end here. I must go on to ask: “*is there something about the particular information at issue that, if disclosed, would reveal something of a*

personal nature about the individual”? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

[18] I find the reasoning in the above order to be applicable to the circumstances before me. In this appeal, the names which comprise the list at issue consist of eligible Academic Staff Members who include teachers, counselors or librarians who actually cast a ballot in an electronic election for an academic staff representative on the college’s Board of Governors. The record does not reveal who they cast a ballot for, but does reveal whether they did so or not. The appellant has been provided with a copy of the voters list so if this record were to be disclosed to him, he could compare the two and determine who on the full voters list did not cast a ballot. The college argues that this would reveal something of a personal nature about the identifiable individuals on both lists; that they did or did not cast a ballot in the election, within the meaning of paragraph 2(1)(h) of the definition of the term “personal information.”

[19] The appellant argues that this does not represent something personal about the individuals listed on the record. He submits that the fact that they participated in the election is “information related to their employment rather than private, personal information.” The appellant also suggests that the mere fact that someone voted, without revealing who they voted for, is not confidential information that merits protection as “personal information.” He submits that the information sought in the request “is exclusively about their participation as employees of the college in a workplace activity that is mandated by the *Regulations* and the College’s *Bylaws*.” [appellant’s emphasis]

[20] In my view, the information contained in the list of individuals who voted constitutes the personal information of these individuals. I find that the fact that they participated in the election, when taken with their names, constitutes their personal information within the meaning of paragraph (h) of the definition as it represents the individual’s name, along with other personal information relating to him or her, specifically the fact that they voted in the election. I further find that their participation in the election was not in the course of their employment responsibilities with the college. Rather, it represents a personal choice on the part of the individual to participate, or not participate, in the election.

[21] As a result of this finding, I conclude that the list of names constitutes the “personal information” of those appearing on the record, including the appellant.

Issue B: Would disclosure of the record result in an unjustified invasion of personal privacy under section 49(b)?

General principles

[22] 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.

[23] 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.

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

[25] I find that none of the exceptions in sections 21(1)(a) to (e) or any of the presumptions in section 21(3) apply in the circumstances. The appellant argues that the college was obliged to seek the consent of each of the many individuals listed in the record under section 21(1)(a). However, the appellant also recognizes that the college is under no statutory obligation to seek the consent of each of the listed individuals. In my view, this exception to the prohibition against the disclosure of personal information in sections 21(1)/49(b) has no application to the present appeal.

Section 21(2) factors

[26] 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].

[27] 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].

[28] The college relies on the considerations listed in sections 21(2)(e), (f), (h) and (i), which favour privacy protection, while the appellant argues that the factor is section 21(2)(a) favouring access to the information in the record applies. 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;
- (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.

21(2)(a): public scrutiny

[29] This section contemplates disclosure in order to subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny [Order P-1134]. In order for this section to apply, it is not appropriate to require that the issues addressed in the records have been the subject of public debate; rather, this is a circumstance which, if present, would favour its application [Order PO-2905].

[30] Simple adherence to established internal procedures will often be inadequate, and institutions should consider the broader interests of public accountability in considering whether disclosure is desirable for the purpose outlined in section 21(2)(a) [Order P-256].

[31] The appellant has made extensive submissions with respect to the application of this factor in the circumstances of this appeal. He submits that the election in question was conducted electronically, as opposed to the casting of a ballot where scrutineers could ensure that only eligible people voted. The appellant states that he seeks access to the record in order to "review it and satisfy himself, the College's Academic Staff Members, and the public at large that the election was conducted properly, fairly, and in a manner that withstands public scrutiny and warrants public confidence."

[32] The appellant also indicates that while section 21(2)(a) is usually applied in situations where "questions of financial integrity and responsibility" come into play, it has equal application to general issues of "public accountability regarding the way in which government institutions conduct business." He submits that scrutiny of the

college's adherence to "established policies, procedures and administrative principles" in the conduct of the election in question is necessary and that the disclosure of the information will enable him to do so.

[33] The appellant discounts the college's suggestion that because an internal committee has been struck by the college with representatives from all constituencies within the college community, a degree of public scrutiny of the election process has already been brought to bear on this issue.

[34] In my view, there appears to exist a degree of interest within the college community about the outcome of the election in question. This public interest was sufficient to bring the college to initiate a process of reviewing the fairness of the election. However, I find it significant that I have not been provided with any evidence to indicate that any public interest whatsoever has been expressed outside the confines of the college. In my view, the section 21(2)(a) factor is applicable and weighs in favour of a finding that the personal information ought to be disclosed. However, I will accord this factor low weight in balancing the privacy and access interests at stake in this appeal.

21(2)(e) and (i): pecuniary or other harm/ unfair damage to reputation

[35] In order for section 21(2)(e) to apply, the evidence must demonstrate that the damage or harm envisioned by the clause is present or foreseeable, and that this damage or harm would be "unfair" to the individual involved.

[36] The applicability of section 21(2)(i) is not dependent on whether the damage or harm envisioned by the clauses is present or foreseeable, but whether this damage or harm would be "unfair" to the individual involved [Order P-256].

[37] The college argues that because the appellant is a representative of the bargaining agent for certain college staff, the "disclosure of the identity of people in the bargaining unit who did not vote may expose these individuals to recriminations or retribution from the union executive for failing to support the local union executive's candidate." It suggests that disclosure could result in possible harm to these individuals or their reputations if the fact that they did not vote in the election was made known to the appellant.

[38] The appellant objects strenuously to the college's reliance on these factors and argues that there is no evidence that such harms are present or foreseeable. I agree with the position of the appellant on the application of these considerations and find that I have not been provided with sufficient evidence to substantiate their application. Accordingly, I will not consider the application of either sections 21(2)(e) or (i) when balancing the factors to determine if disclosure would result in an unjustified invasion of personal privacy under section 49(b).

21(2)(f): highly sensitive

[39] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed⁴.

[40] The college argues that the information in the record is “highly sensitive” because “the decision of whether to vote or not to vote is a deeply personal one, deserving of privacy.” It submits that individuals may have many reasons for choosing to vote or not to vote, and would reasonably expect that the choice and the reasons for that choice would remain private. The college submits this is particularly the case where voting was carried out online and no one was required to even appear at a polling station in order to vote.

[41] Although I accept that individuals may well regard their decision about whether or not to vote as a personal matter, I am not convinced on that basis alone that the disclosure of this type of information would give rise to “significant personal distress” as contemplated by section 21(2)(f). As a result, I find that this factor has no application in the circumstances of this appeal.

21(2)(h): supplied in confidence

[42] This factor applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 21(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation [Order PO-1670].

[43] The college submits that although those who cast ballots in the election for the Board of Governors position were not explicitly advised that their names and the fact that they voted would be kept confidential, the individuals who chose to vote did so under the understanding that their decision to participate in the process would be protected (both the act of voting and how they chose to vote). The college points to the fact that the vote was cast through an online tool to support its submission about the expectation of confidentiality. The appellant submits, among other things, that although there is an expectation of privacy concerning one’s ballot, it is well understood by voters generally that the fact of whether or not one has cast a ballot will be recorded and retained for purposes of ensuring that only eligible voters cast ballots and that no eligible voters are permitted to cast multiple ballots. He submits that Canadian voters are fully accustomed to having their identities verified and their names checked off a list when they vote and that it is their expectation that such procedures, including scrutineering and independent verification, are essential to ensuring the integrity of elections and the legitimacy of results.

⁴ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

[44] There is merit to some of the appellant's observations about the electoral process. Voters in political elections likely understand that elections officials will record whether or not they voted, for verification purposes. They may well understand and accept that scrutineers will also be present at polling stations and observe whether or not they voted. Such general observations do not assist in the circumstances here. They do not lead me to conclude that there is no privacy interest in the contents of the list of persons who voted in this election, outside the context of the election, and the face of an access request for the list. I agree with the college that a relevant consideration in this case is that the voting was conducted through an online tool. I find it likely that persons who voted in this manner would have an expectation that their participation in the vote would be kept confidential.

[45] I conclude, on the circumstances before me, that the names of those individuals who cast ballots in the election was supplied to the college with an expectation of confidentiality in the election process that extended not only to the actual voting decision made, but also to the individual's decision to vote at all.

[46] I find, therefore, that the consideration listed in section 21(1)(h) is a relevant factor weighing in favour of privacy protection.

Finding with respect to section 49(b)

[47] I have found in my discussion above that the consideration favouring disclosure which is listed in section 21(2)(a) has some application to the circumstances in this appeal, as does the factor weighing against such a finding in section 21(2)(h). Balancing the relevant factors under section 21(2), I find that the privacy protection consideration in section 21(2)(h) should be afforded greater weight and tips the scale in favour of a finding that the personal information in the records ought not to be disclosed.

[48] In the circumstances before me, I find that the factor in section 21(2)(h) outweighs that favouring access in section 21(2)(a) and the disclosure of the personal information in the record would result in an unjustified invasion of personal privacy under section 49(b). As a result, the record qualifies for exemption under that section.

Issue C: Did the institution properly exercise its discretion under section 49(b)?

General principles

[49] 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.

[50] 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.

[51] 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

[52] 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.

[53] The college submits that there is no evidence that it exercised its discretion in bad faith, or for an inappropriate motive. It indicates that it balanced the public interest in the disclosure of the personal information in the record against “the potential harms resulting from such disclosure . . .” It goes on to submit that the appellant was provided with a complete list of all eligible voters and that it is only withholding the list of those individuals who actually voted in the election. The college submits that it examined the “nature and effect of the release of such personal information and the expectations of confidentiality that voters would have held” and came to the conclusion that the information ought not to be disclosed.

[54] The appellant argues that the college relied upon an improper and irrelevant factor in making its decision not to disclose the record. He submits that the college ought not to have imputed certain motives or outcomes about the appellant’s potential use of the information. He argues that the college did not place sufficient emphasis on the role that disclosure might play in increasing the level of public scrutiny in the oversight of the election process when it exercised its discretion not to disclose the records.

[55] I have carefully reviewed all of the considerations referred to by the appellant and the college respecting the manner in which the college exercised its discretion to deny access to the personal information of other individuals that is contained in the record. In my view, while the college relied on an irrelevant consideration, the factor listed in section 21(2)(f), in deciding as it did not to disclose the personal information in the record, it properly balanced the relevant factors under section 21(2)(a) and (h). As a result, it came to a reasonable conclusion when weighing the relevant factor in favour of disclosure against the applicable consideration favouring privacy protection. I find nothing improper in the manner in which the college exercised its discretion and I will not disturb it on appeal.

ORDER:

I uphold the college's decision to deny access to the personal information contained in the record.

Original Signed By: _____ June 12, 2013
Donald Hale
Adjudicator