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

ORDER PO-2722

Appeal PA07-136-3

University of Windsor

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NATURE OF THE APPEAL:

The University of Windsor (the University) received three separate requests under the *Freedom of Information and Protection of Privacy Act* (the *Act*). They are described in greater detail as follows:

> Request #1
>
> The first request was for access to any information that the Campus Police may have recorded in relation to events that occurred on December 2, 1991 relating to the requester. In particular, the request was for information that documented the Campus Police's transport of the requester to a local hospital and records that were made in connection with that transport, including any records of prescription medication that the requester was in possession of at the time of transport.
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> Request #2
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> The second request was for two occurrence reports, numbers 7395-91 and 7403-91 from the University of Windsor Campus Police.
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> Request #3
>
> The third request was for any comments made by [named professor] to the University, concerning the requester's withdrawal in 1993.

The University responded to these three requests by issuing two decision letters that stated:

> Decision letter #1 - June 8, 2007
>
> This decision responded only to request number one. In its decision letter, the University granted full access to the sole responsive record. Subsequently, a revised decision letter was issued on October 30, 2007 that indicated an error was discovered in the University's disclosure of the responsive record. This letter also confirmed that the requester had returned to the University page one of the responsive record and received a redacted page one in its place. The University relied on the mandatory personal privacy exemption in section 21(1) of the *Act* to withhold the undisclosed portions of this record.
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> Decision letter #2 - October 25, 2007
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> This decision responded to request numbers two and three. In its decision letter, the University granted partial access to the two occurrence reports relating to request number two; again, severing portions of the records pursuant to section 21(1) of the *Act*.
>
> In response to request number three, which related to any comments made by [named professor] to the University concerning the requester's withdrawal in 1993, the University confirmed that "a search has been conducted at the Faculty

> of Education." It goes on to state that "the University has not been able to find any records that are responsive to this request. I have been informed that the Faculty of Education doesn't retain records from those students enrolled in the B.Ed. program at Windsor beyond 10 years, as such, they believe that the records were destroyed some time ago. Notwithstanding the destruction practice referred to above the records storage area has been search several time [sic] and no responsive records were located."

The requester, now the appellant, appealed this decision.

During the mediation stage of the appeal, the parties agreed that all three requests and the subsequent decisions would be dealt with under this appeal. The appellant confirmed with the Mediator that request number one relating to campus police report number 7423-91 was no longer at issue in this appeal. However, the appellant continued to question the reasonableness of the University's search for records relating to any comments made by the named professor to the University, concerning the appellant's withdrawal from the University's Faculty of Education in 1993.

No further mediation was possible and accordingly, the file was moved to the adjudication stage of the appeals process. I sought and received the representations of the University, initially. Based on my review of the records, they appeared to contain the personal information of the appellant. As a result, I asked the University to make its submissions based on the possible application of the discretionary exemption in section 49(b) of the *Act*, rather than the mandatory section 21(1) personal privacy exemption.

In its representations, the University confirmed that additional disclosure to the appellant took place on June 9, 2008. This was confirmed by a letter of that date and a second letter from the University to the appellant on June 27, 2008. I also provided the appellant with a Notice of Inquiry, along with the non-confidential portions of the University's representations. The appellant also provided me with representations and indicated that he wished to continue the appeal, as he is interested in obtaining access to the severed portions of the identified records.

RECORDS:

The records remaining at issue consist of the undisclosed information contained in University of Windsor Campus Police Report numbers 7395-91 and 7403-91. The appellant also maintains that records relating to any comments made by the named professor to the University concerning the appellant's withdrawal from the Faculty of Education in 1993 also should exist.

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].

I have carefully reviewed the contents of the two University of Windsor Campus Police reports at issue. The first, entitled Occurrence Report 7395-91, contains the personal information of the appellant, including his name, address, student identification number, date of birth and apparent condition. This information qualifies as "personal information" within the meaning of paragraphs (a), (c), (d) and (h) of the definition of that term in section 2(1). In addition, this document also contains the personal information of another identifiable individual. Specifically, the personal information consists of his/her name, along with other personal information about him or her, as contemplated in paragraph (h) of the definition in section 2(1). The second, entitled Occurrence Report 7403-91, contains only the personal information of an identifiable individual other than the appellant. This information consists of the individual's address, marital status, occupation, apparent condition, home telephone number, sex and date of birth, as well as his or her name and other personal information about him or her. This information qualifies as personal information under paragraphs (a), (c) and (h) of the definition of that term in section 2(1).

PERSONAL PRIVACY

I have found above that Occurrence Report 7395-91 contains the personal information of the appellant and another identifiable individual. I will, accordingly, determine whether it qualifies under the discretionary exemption in section 49(b), which is found in Part III of the *Act* and addresses the situation where a requester is seeking his or her own personal information. Because Occurrence Report 7403-91 contains only the personal information of an individual other than the appellant, I will apply the mandatory exemption in section 21(1), as found in Part II of the *Act*.

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.

However, under section 21, where a record contains personal information only of an individual other than the requester, the institution must refuse to disclose that information unless disclosure would not constitute an "unjustified invasion of personal privacy". In both these situations,

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

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 sections 49(b) and 21. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies. [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

The University argues that the personal information contained in both records was compiled and is identifiable as part of an investigation by the University of Windsor Campus Police into a possible violation of law. Accordingly, it argues that the personal information falls within the ambit of a presumed unjustified invasion of personal privacy under section 21(3)(b), which reads:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation

The appellant's representations do not directly address this issue.

Based on my review of the contents of the two occurrence reports at issue in this appeal, I find that they were compiled and are identifiable as part of an investigation by the University's Campus Police into a possible violation of law. As a result of one of these occurrences, a charge of mischief was laid against the appellant. The fact that the charge was ultimately withdrawn by the Crown Attorney does not negate the fact that the investigation was undertaken with a view to determining whether a violation of law had taken place.

Accordingly, I find that the disclosure of the personal information in both of the occurrence reports is presumed to constitute an unjustified invasion of personal privacy under section 21(3)(b). I find that the personal information contained in Occurrence Report 7395-91 is exempt from disclosure under section 49(b) while the personal information in Occurrence Report 7403-91 is exempt under section 21(1). I will address the manner in which the University exercised its discretion not to disclose the personal information in Occurrence Report 7395-91 below.

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)].

The University submits that it considered whether to exercise its discretion to disclose the personal information in Occurrence Report 7395-91 and decided that, because of the circumstances surrounding the creation of this document, it would not do so. It also evaluated the possible application of some of the factors listed in section 21(2) in making this decision.

Based on my own review of the records and the circumstances under which they were completed, I find that the University has properly exercised its discretion not to disclose this information to the appellant. In my view, the University relied only on relevant factors in making the decision to exercise its discretion in the manner that it did.

REASONABLE SEARCH

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.

As noted above, the appellant maintains that records relating to comments made by a named professor to the University concerning the appellant's withdrawal from the Faculty of Education in 1993 should exist. He has not, however, provided me with any basis for this belief.

The University submitted with its representations a sworn affidavit in which the affiant describes in detail the steps which she took to locate information in the record-holdings of the Faculty of Education relating to the appellant. In the affidavit, this individual indicates that a total of three separate searches were conducted of the Faculty's records storage area using the appellant's student number and an incorrect version of the appellant's former name. The appellant's former first name is incorrectly described in the affidavit but, for the reasons set out below, I am of the view that this error did not impair the University's efforts to locate responsive records.

The appellant was enrolled in and withdrew from the Faculty of Education in 1993. The records he is seeking date from that time period. The individual who swore the affidavit on behalf of the University indicates that its records retention schedule mandates the destruction of records relating to students after the lapse of a ten-year period. Accordingly, the affiant states that even if such records existed at one time, they would have been destroyed in 2003 in accordance with the records retention schedule. I also note that the search parameters employed by the University only included the appellant's former last name and his student number, and that the searches conducted were not undertaken using the incorrect first name which was erroneously referred to in other correspondence.

Based on my review of the evidence presented by the University, and in the absence of some cogent evidence from the appellant to the contrary, I am satisfied that the searches conducted for responsive records were reasonable. In particular, I am satisfied that the records that the appellant is seeking, if they ever existed at all, were likely destroyed in accordance with the University's records retention policy in 2003. As a result, I dismiss this portion of the appeal.

ORDER:

I uphold the University's decision to deny access to the withheld portions of the records and find that its search for records responsive to the third request was reasonable.

September 30, 2008

Donald Hale
Adjudicator