

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3750

Appeal PA16-352

University of Toronto

July 21, 2017

Summary: The appellant submitted a request for campus police records. The university located responsive records and granted the appellant partial access. The university submits that disclosure of the withheld information would constitute an unjustified invasion of personal privacy under section 49(b). The university also submits that the withheld information qualifies for exemption under section 49(a) in conjunction with section 20 (danger to safety or health). The appellant appealed the university's decision to this office and the adjudicator finds that the records qualify for exemption under section 49(b). As a result, the adjudicator upholds the university's access decision and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss.2(1) definition of "personal information"; 21(2)(d), 21(3)(b) and 49(b).

OVERVIEW:

[1] The appellant filed a request with the University of Toronto (the university) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to a complaint filed against her. In her request, the appellant advises that she suspects that the complainant (affected party) tampered with electronic messages she exchanged with him in order to bolster his complaint against her. The affected party's complaint to campus police resulted in a Trespass Order being made against the appellant which was subsequently rescinded.

[2] The university located 3 records and advised the appellant that two of the records responsive to this request were disclosed to her in a previous request. The university provided the appellant with duplicate copies of these records but denied the

appellant access to the remaining information, including seven additional pages which were not located in the first request. The university takes the position that disclosure would constitute an unjustified invasion of personal privacy of another individual under section 49(b) and/or section 21(1)(personal privacy). The university also claims that these records qualify for exemption under section 49(a) in conjunction with section 20 (danger to safety or health). Finally, the university submits that some portions of the campus police report contains non-responsive information.

[3] The appellant appealed the university's access decision to this office and a mediator was assigned to the appeal. During mediation the appellant confirmed that she sought access to the withheld records. As no issues were resolved in mediation, the file was transferred to the adjudication stage of the appeals process in which an adjudicator conducts an inquiry under the *Act*.

[4] During the inquiry process, the university and appellant submitted representations to this office. In her representations, the appellant indicates that she is no longer pursuing access to any information identified as non-responsive in the records. Accordingly, this issue has been removed from the scope of the appeal.

[5] In this order, I find that disclosure of the withheld information would constitute an unjustified invasion of personal privacy under section 49(b). Accordingly, the university's access decision is upheld and the appeal is dismissed.

RECORDS:

[6] The records at issue in this appeal are described in the following index:

Record	General Description	Disclosed	Exemption
1	Word document	No	49(a)/20 and 49(b)/21(1)
2	Phone and electronic mail messages	No	49(a)/20 and 49(b)/21(1)
3	Campus police occurrence report	Partial disclosure	49(a)/20 and 49(b)/21(1)

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1), and if so, to whom does it relate?
- B. Would disclosure of the records to the appellant constitute an unjustified invasion of personal privacy under section 49(b)?
- C. Did the university properly exercise its discretion under section 49(b)?

DISCUSSION:

A. Does the record contain “personal information” as defined in section 2(1), and if so, to whom does it relate?

[7] 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.

[8] 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.¹

[9] 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.²

[10] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.³

[11] The parties are in agreement that the records contain the personal information of the appellant and the affected party. In particular, the university submits that the records contain the personal opinions or views of the appellant and affected party along with their name as defined in paragraphs (e), (g) and (h) of section 2(1).

[12] I have reviewed the records and am satisfied that the records contain the personal information of the appellant and affected party. As the records contain the personal information of the appellant, I will determine whether disclosure to her would constitute an unjustified invasion of personal privacy under section 49(b). Section 49(b) 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 own information.

B. Would disclosure of the records to the appellant constitute an unjustified invasion of personal privacy under section 49(b)?

[13] Section 49(b) states:

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

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

if disclosure would constitute an unjustified invasion of another individual's personal privacy.

[14] Because of the wording of section 49(b), the correct interpretation of "personal information" in the preamble is that it includes the personal information of other individuals found in records which also contain the requester's personal information.

[15] In other words, where a record contains personal information of both the requester and another individual, and the 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.

[16] In the circumstances of this appeal, I must determine whether disclosing to the appellant the information the affected party provided to campus police would constitute an unjustified invasion of their personal privacy under section 49(b).

[17] Sections 21(1) to (4) provide guidance in determining whether disclosure of the information would be an unjustified invasion of personal privacy under section 49(b).

[18] In making this determination, this office will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties.⁴ However, if the information fits within any of paragraphs (a) to (e) of section 21(1) or within 21(4), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b).

[19] If the information fits within any of paragraphs (a) to (h) of section 21(3), disclosure of the information is presumed to be an unjustified invasion of personal privacy. Also, 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. Some of the factors listed in section 21(2), if present, weigh in favour of disclosure, while others weigh in favour of non-disclosure. 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).⁵

[20] The university has not claimed that any of the exceptions in section 21(1) or exclusions in section 21(4) apply. The appellant submits that the exception in section 21(1)(e)(iii) could apply. Section 21(1)(e)(iii) states:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

(e) for a research purpose if,

⁴ Order MO-2954.

⁵ Order P-239.

(iii) the person who is to receive the record has agreed to comply with the conditions relating to security and confidentiality prescribed by the regulations

[21] In support of her position, the appellant advises that another university department has volunteered to act as a third party to compare her copies of the messages she exchanged with the affected party with the information he provided campus police. However, the appellant now proposes that her spouse conduct this review. Given that section 21(1)(e)(iii) requires that a research agreement between the institution and the individual who is to receive the record must exist, I find that this exception does not apply in the circumstances of this appeal.

[22] Having regard to the above, I am satisfied that none of the exceptions in section 21(1) or exclusions in section 21(4) apply in the circumstances of this appeal.

[23] The university submits that the presumption at section 21(3)(b) and the factors favouring privacy protection at sections 21(2)(e), (f), (h) and (i) apply in this appeal. Though the appellant's representations did not specifically raise any factors favouring disclosure, I find that her submissions indirectly raise the possible application of the factor favouring disclosure at section 21(2)(d).

21(3)(b): investigation into violation of law

[24] Section 21(3)(b) states:

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

[25] Even if no criminal proceedings were commenced against any individuals, section 21(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.⁶

[26] The presumption can apply to a variety of investigations, including those relating to by-law enforcement⁷ and violations of environmental laws or occupational health and safety laws.⁸

[27] The university submits that disclosure of the record would reveal the affected party's contacts and communications with campus police and would reveal the type of information he provided campus police in support of his complaints about the appellant.

⁶ Orders P-242 and MO-2235.

⁷ Order MO-2147.

⁸ Orders PO-1706 and PO-2716.

[28] Though the appellant's representations do not specifically address whether section 21(3)(b) applies to the circumstances of this appeal⁹, I have reviewed the file and it appears that there is no dispute between the parties that the records were created as a result of the affected party filing a complaint with campus police.

[29] Having regard to the records themselves and the university's submissions, I am satisfied that the records were created as part of campus police's investigation into a possible violation of law, namely a *Criminal Code* offence.

[30] As the presumption only requires that there was an investigation into a possible violation of law, it applies even if no proceedings were commenced. Accordingly, I find that the presumption at section 21(3)(b) applies in the circumstances of this appeal.

21(2)(d): fair determination of rights

[31] In my view, the appellant's submissions appear to argue that the factor favouring disclosure at section 21(2)(d) could apply. Section 21(2)(d) states:

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,

the personal information is relevant to a fair determination of rights affecting the person who made the request;

[32] Throughout her submissions, the appellant raised concerns about campus police's investigation and argues that they relied on tampered email and text messages. However, she also advises that she is "not in conflict with the university" as the trespass order has been rescinded and that her main concern now is to investigate whether the affected party submitted "tampered evidence".

[33] For section 21(2)(d) 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

⁹ The appellant's submissions on this issue focus on her allegations that the complainant provided tampered messages to campus police.

4. the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.¹⁰

[34] Given that the subject matter of the appeal relates to campus police's investigation into a matter which resulted in a trespass notice being made against the appellant, I am satisfied that part 1 of the test has been met. In order for section 21(2)(d) to be given any consideration, the appellant must establish that all four parts of the test have been met.

[35] As mentioned earlier, the appellant advises that another university department has volunteered to review and compare her documentation regarding any communication and contact she had with the affected party for the purpose of investigating whether the affected party provided tampered evidence. In my view, the review process described by the appellant does not identify a proceeding which would determine her legal rights. Even if I was satisfied that part 2 of the test had been met, there is insufficient evidence demonstrating that parts 3 and 4 of the test have also been met. Accordingly, I find that the factor at section 21(2)(d) does not apply to this appeal.

[36] Given that the presumption at section 21(3)(b) applies and I found that no other factors favouring disclosure apply, it is not necessary that I also consider whether the factors favouring privacy protection at sections 21(2)(e), 21(2)(f), 21(2)(h) and 21(2)(i) also apply.

[37] I am also satisfied that no other unlisted factor or the absurd result principle apply in the circumstances of this appeal. The appellant is not seeking access to her own statement to campus police, was not present when the affected party provided his statement or evidence to campus police and the information at issue is not clearly within her knowledge.

[38] Accordingly, I find that disclosure of the records to the appellant would constitute an unjustified invasion of personal privacy under section 49(b), subject to my assessment of whether the university properly exercised its discretion.

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

[39] 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.

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

¹⁰ 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.).

- 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.

[41] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹¹ This office may not, however, substitute its own discretion for that of the institution.¹²

[42] The university submits that it properly exercised its discretion and took into account relevant factors. The university also submits that it exercised its discretion in good faith and not for an improper purpose. In support of its position, the university advises:

- it considered the purposes of the *Act*, including that information should be available to the public and exemptions from the right of access should be limited and specific;
- it took into account the sensitive nature of the information at issue;
- it concluded that disclosure of the records would not increase public confidence in the university's operations; and
- some information was disclosed to the appellant.

[43] The appellant's representations did not specifically address this issue but throughout her representations, she takes the position that she is entitled to access records on the basis that they contain her personal information or consist of messages she sent to the affected party. In addition, she argues that disclosure of the records would demonstrate that the affected party provided tampered evidence to campus police.

[44] Given the amount of information the university disclosed to the appellant, I am satisfied that it took into consideration the principle that individuals should have a right of access to their own personal information. I also find that the university considered the sensitive nature of the information at issue combined with the fact that it was compiled as a part of campus police investigation. I am also satisfied that the university did not exercise its discretion in bad faith or for an improper purpose.

[45] Accordingly, I find that the university properly exercised its discretion to withhold the personal information I found exempt under section 49(b).

[46] As I have found that the records qualify for exemption under section 49(b), it is not necessary that I also determine whether the records qualify for exemption under

¹¹ Order MO-1573.

¹² Section 54(2).

section 49(a) in conjunction with section 20.

ORDER:

The university's decision is upheld and the appeal is dismissed.

Original signed by: _____
Jennifer James
Adjudicator

July 21, 2017 _____