Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3987

Appeal PA17-415

Algonquin College of Applied Arts and Technology

August 29, 2019

Summary: Algonquin College of Applied Arts and Technology (the college) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to the injuries sustained by the requester during a massage therapy lab incident. The college issued a decision denying access to the responsive records pursuant to section 49(a) (discretion to refuse a requester's own information) in conjunction with section 19 (solicitor-client privilege) of the *Act*. The requester, now the appellant, appealed the college's decision to this office. In this order, the adjudicator upholds the college's decision, and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 49(a) and 19.

OVERVIEW:

[1] Algonquin College of Applied Arts and Technology (the college) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to the injuries sustained by the requester during a massage therapy lab incident. In particular, the requester sought:

> . . . all notes, records, emails, and other communications by or concerning [named individual #1], [named individual #2], and any other employee or student regarding [the incident], as well any adverse event reports, incident reports, or descriptions of the event recorded by [named individual #1], [named individual #2], and any other employee or

> student, and includes any records pertaining to events that occurred subsequent to [the incident].

[2] The college issued a decision denying access to the responsive records pursuant to section 19 (solicitor-client privilege) of the *Act*.

[3] The requester, now the appellant, appealed the college's decision to this office.

[4] The college subsequently revised its decision and provided partial disclosure to the appellant. Access to some of the information was denied pursuant to section 19 of the *Act*. The college provided an updated index of records to indicate what records were released in full or in part, or withheld in full.

[5] The college confirmed that it is raising section 49(b) (personal privacy) of the *Act* to withhold the information in Record 29. The college also confirmed that it is relying on section 49(a) (discretion to refuse requester's own information), in conjunction with section 19 (solicitor-client privilege), to withhold information from all the records, including Record 29.

[6] As further mediation was not possible, the appeal proceeded to the adjudication stage, where an adjudicator may conduct an inquiry under the *Act*. I commenced an inquiry and invited representations from both parties. Representations were received from both parties, but portions of the college's representations were severed in accordance with the IPC's *Practice Direction Number 7* due to confidentiality concerns.

[7] In its representations, the college conceded that the section 19 exemption does not apply to the withheld information in Tabs 9, 13, 15 and 24, and agreed to disclose this information to the appellant. Accordingly, this information is no longer at issue in this appeal.

[8] In this order, I uphold the college's decision and dismiss the appeal.

RECORDS:

[9] The information at issue consists of information in Records 6, 8, 25, 27, 29, 30, 32, 33 and 47-62 as listed in the updated index of December 8, 2017.

[10] In her representations, the appellant noted that the college had previously disclosed the email dated October 26, 2016, found at Tab 7 of the records at issue, and she argued that this disclosure amounts to waiver of privilege. I will deal with the appellant's argument with respect to waiver of privilege below. However, since the appellant already has a copy of the email, it is no longer at issue at this appeal.

ISSUES:

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

B. Does the discretionary exemption at section 49(a) in conjunction with the section 19 exemption apply to the information at issue?

C. Did the institution exercise its discretion under sections 49(a) and 19? If so, should this office uphold the exercise of discretion?

DISCUSSION:

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

[11] 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) and the relevant portions are as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> > a. 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,
> >
> > g. the views or opinions of another individual about the individual.

[12] 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.[1]

[13] Both parties submit that there is no dispute that the records contain the personal information of the appellant. The college also submits that the records could contain the personal information of other individuals to a certain extent.

[14] After reviewing the records and the representations of the parties, I find that the records at issue contain the personal information of the appellant and that of an affected party within the meaning of that term as defined in paragraphs (b), (c), (d), (e), and (g) of the definition of "personal information" in section 2(1) of the *Act*.

Does the discretionary exemption at section 49(a) in conjunction with the section 19 exemption apply to the information at issue?

[15] 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.

[16] 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.

[17] 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.[2]

[18] Where access is denied under section 49(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information. I address the college's exercise of discretion under Issue C.

[19] In this case, the college relies on section 49(a) in conjunction with section 19. Section 19 of the *Act* states, in part:

> A head may refuse to disclose a record,
>
> > that is subject to solicitor-client privilege[.]

---

[1] Order 11.
[2] Order M-352.

[20] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege. Litigation privilege protects records created for the dominant purpose of litigation. It is based on the need to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial.[3] Litigation privilege protects a lawyer's work product and covers material going beyond solicitor-client communications.[4] The litigation must be ongoing or reasonably contemplated.[5]

[21] Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily demonstrates an intention to waive the privilege.[6]

[22] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.[7] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[8]

Representations of the college

[23] The college submits that the records at issue are litigation privileged and exempt from disclosure pursuant to section 19 of the *Act*. The college submits that records at issue contain witness statements and communications relating to the incident in question, all of which were collected or created in contemplation of forthcoming litigation, and that the college is justified in withholding the records.

[24] The college submits that litigation privilege at common law attaches to records as soon as litigation is reasonably contemplated, and does not require the presence of actual litigation. The college submits that the point at which litigation is reasonably contemplated as a question of fact to be decided in the specific circumstances of each case.

---

[3] *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).
[4] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).
[5] Order MO-1337-I and *General Accident Assurance Co. v. Chrusz,* cited above; see also *Blank v. Canada (Minister of Justice)*, cited above.
[6] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).
[7] *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.
[8] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).

[25] The college submits that as of October 19, 2016, the appellant had suggested to the college that she would be pursuing litigation. The college submits that this, in and of itself, is sufficient to conclude that litigation was reasonably contemplated as there was not a vague or general apprehension of litigation based on the incident in question, but rather a realistic and reasonable contemplation based on communication from the appellant as to her future intentions.

[26] The college submits that there has been no waiver of privilege, and it has at all times throughout the investigation and throughout these proceedings asserted privilege over all portions of records relating to the investigation of the incident, and all communications addressing potential litigation arising from the incident.

Representations of the appellant

[27] The appellant submits that she is seeking: (1) all documents created prior to December 1, 2016 from the college, (2) a more descriptive index of documents, (3) disclosure of the witness statements and/or incident reports outlined in the college's representations; and (4) disclosure of the signed and dated incident report of [a specified individual].

[28] The appellant submits that she does not dispute that litigation privilege may apply to some of the records withheld by the college. The appellant submits, however, that it applies more narrowly than the college asserts in light of when litigation was reasonably contemplated and the college's waiver of privilege.

[29] The appellant submits that she disagrees with the college's representations regarding the timing of litigation privilege. The appellant argues that her email of October 12, 2016 (Record 16), wherein she mentions a simple conversation with a best friend is not enough to give rise to a reasonable contemplation of litigation. The appellant adds that it is clear from the rest of the record that she was mainly focused on financial accommodation for students with disabilities in that email.

[30] The appellant argues that litigation privilege arose on December 1, 2016, after the college's Risk Manager emailed the appellant and laid out her options, one of which included litigation. The appellant submits that once the college brought up the possibility of litigation to her, it had a reasonable contemplation that litigation may be pending. The appellant argues, alternatively, that a reasonable contemplation of litigation did not arise before November 7, 2016, when the college's Risk Manager became involved in the file and met with the appellant.

[31] The appellant submits that the time elapsed between the incident and when the records at issue were created does not support a claim of litigation privilege, because the appellant's relationship continued normally with the college until her graduation in spring of 2017. Therefore, the appellant argues that the records at issue were created as part of her normal schooling.

[32] As noted above, the appellant submits that the college knowingly waived its privilege over some records by disclosing them in the initial August 2, 2017 disclosure package. One of these records is the email of October 26, 2016, containing the statement of a specified individual. The appellant argues that since the college has disclosed the email, which contains the contents of the individual's statement, it would be inconsistent for the college to claim privilege over the paper copy at this stage.

[33] The appellant further submits that she is unable to ascertain whether or not the college continues to claim privilege over other information that it had disclosed in its initial disclosure package of August 2, 2017, and argues that if it does, privilege is waived over those records as well.

Reply of the college

[34] The college submits that the appellant does not have a right to an amended index. The college submits that nothing in the *Act* or Regulations requires the college to provide an index of records, and it has no obligation to do so. Furthermore, the college adds that there is no requirement to include any particular information in an index, even if it chooses to prepare one.

[35] The college submits that litigation was contemplated on October 12, 2016. The college submits that litigation is not reasonably contemplated only when the college acknowledges to a potential claimant that they may decide to pursue litigation as asserted by the appellant. The college submits that litigation is reasonably contemplated when there is a reasonable prospect that litigation may rise in relation to an incident. In this particular case, the college submits that the appellant wrote to the college on October 12, 2016, and stated:

> After digesting your email response and speaking to my partner and best friend who deals with litigation matters I have two requests/questions for you relating to my injury that happened at Algonquin College:…

[36] The college argues that while the appellant dismisses it as "a simple mention of a conversation with a best friend", the only reasonable explanation for why the appellant chose to mention that her best friend "deals with litigation matters" was to imply to the college that if she did not receive fair compensation she would be pursuing litigation.

[37] The college further argues that the appellant's comment in her email of October 12, 2016, had the desired effect and the college engaged its risk management process, and investigated the appellant's allegations. The college adds that this is supported by the comments of the Risk Manager in the email dated October 19, 2019, at Tab 8 of the records at issue. Therefore, the college argues that litigation was both reasonably and actually contemplated by both parties as of October 12, 2016, and litigation privilege attaches to all records prepared after that date in the course of the Risk Manager's investigation into the appellant's claims.

[38] The college submits that it did not at any time waive privilege over any of the records at issue. The college submits that it is well established that a waiver of privilege requires evidence of a voluntary intention to waive privilege, and there is no evidence in this case. The college submits that it has maintained its position that the email dated October 26, 2016, contained in Tab 7 of the records at issue, was being withheld pursuant to section 19 of the *Act*. The college adds that the email at Tab 7 is the only statement of that individual contained in the records at issue.

[39] Furthermore, the college submits that if the appellant did receive the email as part of the initial disclosure package on August 2, 2017, it was due to a clerical error, and a clerical error cannot give rise to a waiver of privilege. The college further submits that if the appellant already has a copy of the email at Tab 7, the question of whether that record in particular should or should not be disclosed to the appellant on the basis of privilege is moot, and this office does not need to make a determination.

Analysis and findings

[40] With respect to the appellant's request for an updated index of documents containing more detailed information, I find that the index the college has already supplied is sufficiently detailed for the appellant to make arguments in the context of this appeal. Furthermore, requiring the college to provide further details could reveal the content of the records. Therefore, I will not order the college to provide a more fulsome index of documents.

[41] Based on my review of the records at issue, I find that they predominantly consist of emails chains between employees of the college and the college's Risk Manager with respect to the appellant's claims. Neither party disputes that at least some of the records at issue are covered by litigation privilege. The parties disagree on when litigation privilege arose. In order for litigation privilege to arise, litigation must be reasonably contemplated. The crux of this appeal is when litigation was first reasonably contemplated.

[42] In order to conclude that there was contemplated litigation, there must be evidence that litigation was reasonably in contemplation, which requires more than a vague or general apprehension of litigation.[9] The question of whether litigation is reasonably contemplated is a question of fact that must be decided in the specific circumstances of each case.[10] The college argues that litigation was reasonably contemplated on October 12, 2016, while the appellant argues that it was contemplated on either November 7, 2016 or December 1, 2016.

---

[9] Order PO-2323.
[10] Order PO-3059-R.

[43] After reviewing the representations of the parties and the records at issue, I find that litigation was reasonably contemplated by the college on October 19, 2016. While the appellant may not have intended to communicate that she was contemplating litigation with her email of October 12, 2016, it still resulted in the college engaging its risk management process in preparation for potential litigation. On October 19, 2016, the college's Risk Manager first became involved with the appellant's case and made comments with respect to potential litigation with the appellant. From my review of the records, especially Tab 8, the college reasonably contemplated litigation on October 19, 2016, prompted by the appellant's email of October 12, 2016. Therefore, I find that litigation privilege arose on October 19, 2016.

[44] The appellant argued that the college waived privilege over some of the records at issue, specifically the email dated October 26, 2019, found at Tab 7 of the records. As noted above, since the appellant already has a copy of the email, I do not need to decide whether or not it should be disclosed, and whether or not privilege was waived over that email. With respect to the rest of the records still at issue in this appeal, the college submits that it has not waived privilege, and I find that there is no indication that it has done so.

[45] I am satisfied from my review of the records that ligation privilege applies, because the records at issue were created as part of the college's investigation into the appellant's claims in contemplation of litigation. I find that litigation privilege arose on October 19, 2016, when the college first reasonably contemplated litigation. Therefore, I find that the records at issue are exempt from disclosure pursuant to the discretionary exemption at section 49(a) in conjunction with section 19(a) of the *Act*, subject to my findings below with respect to the college's exercise of discretion. Given this finding, I do not need to review whether the exemption in section 49(b) would also apply to Record 29.

Did the institution exercise its discretion under sections 19 and 49(a)? If so, should this office uphold the exercise of discretion?

[46] The sections 49(a) and 19 exemptions are discretionary, and permit 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.

[47] 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.

[48] 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]

[49] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[13]

- 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.

---

[11] Order MO-1573.
[12] Section 54(2) of the *Act.*
[13] Orders P-344 and MO-1573.

Representations

[50] The college submits that with respect to the records withheld under section 49(a) in conjunction with section 19 of the *Act*, the college considered the appellant's interest in receiving the records, but also the need for confidentially and the reasonable prospect of litigation. The college further submits that it also considered that voluntarily disclosing the records may constitute a waiver of privilege, with serious consequences for its ability to conduct the now active litigation in a "zone of privacy".

[51] The college submits that it has exercised its discretion properly under sections 49(a) and 19, and it only considered relevant factors and not irrelevant or improper factors. The college further submits that it acted in good faith in furtherance of its duties under the *Act*. The college submits that it has severed and disclosed all that it reasonably could disclose without disclosing information which is exempt.

[52] The appellant submits that the college did not adequately consider the right of the appellant to access her own information, her right to know the full facts of the incident to which she was a party, and the continuing impact of her injuries arising from the incident.

[53] The appellant submits that further considerations the college should have taken into account include: the appellant is seeking her own personal information; she has a need to understand all facts that gave rise to the incident; she is an individual; and the college, as her educational institution, was in a position of power over the appellant at the time of the incident and the creation of the records at issue.

[54] The appellant further submits that the college did not make full use of its ability to sever privileged information from an otherwise responsive document in balancing the rights of the appellant and the rights of third parties, nor balancing the *Act*'s overall purpose of disclosure with its discretionary rights under section 19.

Analysis and findings

[55] After considering the representations of the parties and the circumstances of this appeal, I find that the college did not err in its exercise of discretion with respect to its application of section 49(a) in conjunction with section 19 of the *Act*. I am satisfied that it did not exercise its discretion in bad faith or for an improper purpose. I am also satisfied that the college took into account relevant factors, and did not take into account irrelevant factors in the exercise of its discretion.

[56] In particular, it is evident that the college took into account the fact that the records contain the appellant's own personal information, and I am satisfied that the college provided her with access to as much information as possible by applying the exemptions in a limited and specific manner. Accordingly, I find that the college exercised its discretion in an appropriate manner in this appeal, and I uphold it.

ORDER:

I uphold the college's decision, and dismiss the appeal.

Original Signed By | August 29, 2019

Anna Truong
Adjudicator