Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3740

Appeal PA16-198

Carleton University

June 23, 2017

Summary: A request was made to the university for all information contained in an occurrence report pertaining to the requester. The university located a responsive record but denied access to the entire report citing sections 14(1) (law enforcement) and 21(1) (personal privacy) of the *Act*. During the course of this appeal, the university also relied on section 65(6)3 taking the position that the report was excluded from the *Act*. In this order, the adjudicator finds that the record is not excluded from the scope of the *Act* under section 65(6)3. The adjudicator upholds the university's decision to withhold the record under section 49(a) in conjunction with 14(1)(e) and section 49(b) in conjunction with 21(3)(b).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, 2(1) (definition of personal information), 14(1)(e) (law enforcement), 21(1) (personal privacy), 21(2)(a), 21(2)(f), 21(2)(h), 21(3)(b), 49(a), 49(b), 65(6)3.

Orders and Investigation Reports Considered: MO-1453, MO-1654-I, P-1223, P-1535, PO-2518, PO-3660, PO-3662.

Cases Considered: *Ontario (Ministry of Correctional Services) v. Goodis* [2008] O.J. No. 289.

BACKGROUND:

[1] The appellant made a request to Carleton University (the university) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following

records:

> All the information contained in the report [specified number] pertaining to myself issued by the security office.

[2] The university contacted an affected party to inquire if they would consent to the release of their information contained in the record. The affected party did not consent. The university issued a decision denying access to the requested report under sections 14(1) (law enforcement) and 21(1) (personal privacy) of the *Act*.

[3] The appellant appealed the university's decision to this office and a mediator was assigned to the appeal.

[4] During the mediation, the university issued a revised decision to the appellant clarifying its position that the record qualifies for exemption under sections 49(b) in conjunction with section 21(3)(b) and 49(a) in conjunction with section 14(1)(e).

[5] As mediation did not resolve the dispute, this appeal was transferred to the adjudication stage, where an adjudicator conducts a written inquiry under the *Act*. I began my inquiry by seeking the representations of the parties including an affected party. Representations were received and shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[6] In its representations, the university raises the issue of the possible application of section 65(6), taking the position that the record is excluded from the *Act*. This issue was added to the appeal.

[7] In this order, the adjudicator finds that the record is not excluded from the *Act* by section 65(6)3. It is also found that the record contains the personal information of both the appellant and the affected party, however, the adjudicator does not order the university to provide the appellant with a copy of the record as he upholds the university's decision to deny access under sections 49(a) and 49(b).

RECORDS:

[8] The record at issue consists of an occurrence report.

ISSUES:

A. Does section 65(6) exclude the record from the *Act*?

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

C. Does the discretionary exemption at section 49(b) apply to the information at issue?

D. Does the discretionary exemption at section 49(a) (discretion to refuse one's own information) in conjunction with the section 14(1)(e) exemption apply to the information at issue?

E. Did the institution exercise its discretion under section 49(a) or 49(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A: Does section 65(6) exclude the record from the *Act*?

[9] Section 65(6) is an exclusion that limits the authority of this office to review access decisions by institutions. Section 65(6) is record-specific and fact-specific. If section 65(6) applies, and none of the exceptions found in section 65(7) apply, section 65(6) has the effect of excluding the records from the scope of the *Act*. The university first indicated that it relies on section 65(6)3, in its representations. Section 65(6)3 provides:

> Subject to subsection (7), this *Act* does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

[10] In order for the records to be excluded from the *Act* under section 65(6), the university must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and,

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

[11] The type of records excluded from the *Act* by section 65(6) are documents related to matters in which the institution is acting as an employer, and terms and

conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.[1]

Parties' Representations:

[12] The university states that the Divisional Court in *Reynolds v. Ontario (Information and Privacy Commissioner)*[2] when looking at the municipal *Act*'s equivalent to section 65(6), examined the wording "labour relations or employment-related matters in which the institution has an interest." The Divisional Court stated at paragraph 60:

> It seems probable that the intention of the amendment was to protect the interests of institutions by removing public rights of access to certain records relating to their relations with their own workforce.

[13] Further, the university referred to the Divisional Court in *Ministry of Community and Social Services v. Doe et al.*[3] which confirmed that section 65(6)3 is intended to exclude records which are about labour relations or employment-related matters. In that decision, the Divisional Court distinguished between operational records and records relating to an institution's role as an employer:

> Accordingly, a purposive reading of the *Act* dictates that if the records in question arise in the context of a provincial institution's operational mandate, such as pursuing enforcement measures against individuals, rather than in the context of the institution discharging its mandate qua employer, the s. 65(6)3 exclusion does not apply.

[14] The university argues that matters relating to harassment in the workplace and its efforts to protect staff from same are excluded under section 65(6)3. The university refers to its obligation under section 25(2)(h) of the *Occupational Health and Safety Act* (*OHSA*) to "take every precaution reasonable in the circumstances" to protect its employees in the workplace and that steps taken by an institution in accordance with this obligation occur in the context of the institution discharging its mandate "qua employer".

[15] The university submits that the appellant engaged in a number of inappropriate behaviours toward the affected party, an employee of the university, in his personal and professional life. The affected party eventually sought the assistance of the Ottawa

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[1] *Ontario (Ministry of Correctional Services) v. Goodis*, (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

[2] (2006) O.J. No. 4356.

[3] (2014) 120 O.R. (3d) 451.

Police and the university's Department of University Safety (University Safety) to deal with this issue. The university submits that the record was prepared in relation to the University Safety's meeting and discussion with the affected party relating to his efforts in this respect and was used by the university in respect of internal meetings and discussions about reasonable precautions in the circumstances to protect the employee.

[16] The university submits that the meeting between University Safety and the affected party was about an employment-related matter, given its statutory duty to protect its employees from hazards in the workplace, including harassment. When the affected party identified his concerns about the appellant's behaviour in his workplace, and sought the university's assistance in dealing with it, the university argues, he triggered the university's *OHSA* obligation to take reasonable precautions to protect him. The university argues that its meeting with the affected party was, consequently, about an employment-related matter.

[17] The university also states that the record was subsequently used as the basis of a recommendation by the director of University Safety to issue a Notice Prohibiting Entry to the appellant. The university submits that issuing this notice was taken in accordance with the university's obligation under the *OHSA* and that the issuance of the notice was about an employment-related matter. The university also states that the record was maintained in order to document its meeting with the affected party and was kept in the University Safety's system in the event that appellant was stopped on campus in the future. It is argued that this was also in accordance with the university's statutory obligations under the *OHSA*.

[18] The appellant briefly comments on this issue in her representations stating that the issue is not related to a workplace grievance.

Analysis and finding:

[19] The university claims that the occurrence report is excluded from the *Act* under section 65(6), I find their interpretation is overly broad.

[20] Beginning with the first part of the test for exclusion under section 65(6)3, I am satisfied from my review of the record and the university's representations that the occurrence report was a result of meetings and discussions between University Safety and the affected party and, therefore, that they were collected, prepared, maintained or used by the university.

[21] Regarding part two of the test, I am also satisfied that this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications. Accordingly, I find that parts 1 and 2 of the test under section 65(6)3 have been met.

[22] However, in order to establish part 3 of the section 65(6)3 test, the university was required to provide evidence to demonstrate that the consultations, discussions or

communications that took place were about labour relations or employment-related matters in which the university had an interest.

[23] Past decisions of this office have found the phrase "labour relations or employment-related matters" to apply in the context of:

- a job competition[4]
- an employee's dismissal[5]
- a grievance under a collective agreement[6]
- disciplinary proceedings under the *Police Services Act*[7]
- a "voluntary exit program"[8]
- a review of "workload and working relationships"[9]

[24] In addition, it was found that the phrase "in which the institution has an interest" means more than a "mere curiosity or concern", and refers to matters involving the institution's own workforce.[10]

[25] The university submits that the occurrence report relates to matters in which the institution is acting as an employer. I have reviewed the record in its entirety and find that it does not relate to an employment-related matter. The record is an occurrence report completed by the University Safety documenting the affected party's allegations about the appellant. On the university's website, the Department of University Safety is identified as a department of the Finance and Administration Division of Carleton University to address the needs of the community for personal safety, protection of property and parking needs. I find that the occurrence report was created as part of a function of that department, to investigate matters brought to its attention by faculty or students, and not for the purpose of meeting its obligations under the *OHSA*.

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[4] Orders M-830 and PO-2123.

[5] Order MO-1654-I.

[6] Orders M-832 and PO-1769.

[7] Order MO-1433-F.

[8] Order M-1074.

[9] Order PO-2057.

[10] *Ontario (Solicitor General)* v. *Ontario (Assistant Information and Privacy Commissioner)*, cited above.

[26] In *Ontario (Ministry of Correctional Services) v. Goodis*[11], the Divisional Court discussed the section 65(6) exclusion. It referred to two prior Court of Appeal decisions where it dealt with the interpretation of section 65(6) and reinforced the conclusion that "the provision protects the confidentiality of records pertaining to terms of employment or conditions of work in an employer-employee or collective bargaining relationship or a quasi-collective bargaining relationship."

[27] The occurrence report at issue is more appropriately characterized as relating to the University Safety's mandate to protect the security of staff and students than to labour-relations or employment-related matters. Therefore, the third requirement has not been met and section 65(6) does not apply to the record at issue. Accordingly, I will proceed to consider whether any of the claimed exemptions apply.

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

[28] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates. That term is defined in section 2(1), in part, as follows:

> "personal information" means recorded information about an identifiable individual, including,
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> > (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of 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

[11] [2008] O.J. No. 289 (Div. Ct.).

> (h) the individual's name if 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;

[29] 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.[12]

[30] 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.[13]

[31] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[14]

Parties' Representations:

[32] The university agrees that the record contains the appellant's name and other personal information. The university also notes that the record contains information about the impact of the appellant's actions on the affected party. The university refers to Order MO-1453 where Adjudicator Laurel Cropley found that information describing the impact of an incident on an affected party were the views and opinions of that affected party about themselves and therefore constitutes their own personal information.

[33] The university submits that in this case, the information in the record was collected in the context of the affected party seeking assistance from University Safety in addressing the appellant's behaviour. The university states that this context in and of itself reveals the affected party's views and opinions about the impact of the appellant's behaviour on him. The university submits that this is the personal information of the affected party.

[34] The university states that to the extent the record may contain professional information relating to the affected party, that same information reveals information of a personal nature about the affected party.

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[12] Order 11.

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

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

(C.A.).

[35] The appellant, in her representations, did not comment specifically regarding whether the record contained personal information.[15]

Finding:

[36] A review of the record shows that it contains the personal information of both the appellant and the affected party. The record contains the name of the appellant and other personal information about the appellant. The record also contains the identifying information of the affected party including his summary of the events leading up to his reporting to University Safety which includes his views and/or opinion about the events. This is the personal information of the affected party. I rely on Order MO-1453, referenced above, to make this finding.

[37] Also, I agree with the university that to the extent the record contains professional information relating to the affected party, that same information reveals information of a personal nature about the affected party.

[38] Further, under section 10 of the *Act,* if the university receives an access request that falls within one of the exceptions under sections 12 to 22, it "shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions." The university submits that given the nature of the context in which the record was created, no part of it can reasonably be severed and released without disclosing the nature of the information withheld. The entirety of the record contains the intertwined and inextricable personal information of both the appellant and the affected party. I will consider the appellant's access to this information under section 49(b).

C: Does the discretionary exemption at section 49(b) apply to the information at issue?

[39] Since I found that the record contains the personal information of both the appellant and the affected party, section 47(1) applies to this appeal. 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.

[40] Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. Since the section 49(b) exemption is discretionary, the institution may also decide to disclose the information to the

[15] The appellant's representations only marginally addressed the issues set out in the Notice of Inquiry. For the most part, however, the appellant's representations are not relevant to the issues in dispute.

requester.[16]

[41] 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).

[42] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 49(b), this office will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties.[17] If the information fits within any of paragraphs (a) to (e) of section 21(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b). 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.

[43] 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.[18] The list of factors under section 21(2) is not exhaustive.

[44] 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.[19] The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[20]

[45] The presumption can apply to a variety of investigations, including those relating to by-law enforcement[21] and violations of environmental laws or occupational health and safety laws.[22]

[46] Also, where the requester originally supplied the information, or the requester is otherwise aware of it, the information may not be exempt under section 49(b), because to withhold the information would be absurd and inconsistent with the purpose of the

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[16] See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 49(b).

[17] Order MO-2954.

[18] Order P-239.

[19] Orders P-242 and MO-2235.

[20] Orders MO-2213, PO-1849 and PO-2608.

[21] Order MO-2147.

[22] Orders PO-1706 and PO-2716.

exemption.[23]

[47] The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement[24]
- the requester was present when the information was provided to the institution[25]
- the information is clearly within the requester's knowledge[26]

[48] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.[27]

Section 21(3)(b) presumption:

[49] The university submits that the presumption at section 21(3)(b) applies and disclosure would constitute an unjustified invasion of the affected party's personal privacy.

[50] The record is an occurrence report, completed by University Safety after meeting with the affected party, concerning incidents involving the affected party and the appellant. As indicated, the record includes the personal information of both the affected party and the appellant. I find that the personal information in the record was compiled as part of University Safety's investigation into a possible violation of law. As a result of this occurrence report, the appellant was ultimately served with a Notice Prohibiting Entry. Given the nature of the record, I find that the presumption at section 14(3)(b) applies and therefore weighs in favour of non-disclosure of the record.

Section 21(2) factors:

[51] In its representations, the university submits that disclosure of the record would constitute an unjustified invasion of personal privacy and it is therefore entitled to exercise its discretion to withhold the record under section 49(b) and/or 21(1)(f) of the *Act*. The university states that in order to determine whether disclosure would constitute an unjustified invasion of personal privacy, it first determined that none of

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[23] Orders M-444 and MO-1323.

[24] Orders M-444 and M-451.

[25] Orders M-444 and P-1414.

[26] Orders MO-1196, MO-1755 and PO-1679.

[27] Orders M-757, MO-1323 and MO-1378.

the limitations in section 21(4) applied and then it considered the factors at section 21(2).

[52] The parties' representations raise the possible application of the factors in sections 21(2)(a) (public scrutiny), (f) (highly sensitive) and (h) (supplied in confidence). The factor at section 21(2)(a) if it applies, would weigh in favour of disclosure, while the factors at section 21(2)(f) and (h) would weigh in favour of non-disclosure.

Section 21(2)(a): public scrutiny

[53] In determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, section 21(2)(a) requires the university to consider whether releasing the personal information is desirable for the purpose of subjecting the activities of the institution to public scrutiny.

[54] Although the appellant did not specifically address this factor in her representations, she does include an order that deals with the public interest override at section 23 of the *Act*. My assumption is that by including this order, the appellant takes the position that there is a public interest in releasing the record, although she makes no actual comment regarding same. While I reject the suggestion that section 23 applies to this appeal (see below), I decided to also deal with section 21(2)(a) for completeness.

[55] The objective of section 21(2)(a) of the *Act* is to ensure an appropriate degree of scrutiny of government and its agencies by the public. After reviewing the appellant's representations along with the record, I conclude that disclosing the personal information contained in the occurrence report would not result in greater scrutiny of the university. Additionally, I find that the subject matter of the information sought does not suggest a public scrutiny interest.

Section 21(2)(f): highly sensitive

[56] In determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, section 21(2)(f) requires the university to consider whether the personal information is highly sensitive.

[57] The university submits that section 21(2)(f) is relevant to this appeal. It states that the IPC has determined that where disclosure of the information would result in a reasonable expectation of significant personal distress to the affected party the information will be considered highly sensitive.

[58] The university refers to Order P-1535 where Adjudicator Cropley considered the application of section 21(2)(f) to, in part, an incident report which detailed events that transpired during and immediately after a motor vehicle accident between an appellant and an affected party, including a physical confrontation between the parties.

Adjudicator Cropley found that the information in the incident report was highly sensitive within the meaning of section 21(2)(f) based on the volatile and adversarial nature of the relationship between the parties, and the emotional intensity of the situations which was apparent from the record.

[59] The university submits that the details of the incidents described in the current record at issue reveal the volatile and emotionally intense nature of the relationship between the appellant and the affected party. The university states that there were concerns on the part of the affected party of such significance that he sought assistance from University Safety. The university argues that this is evidence that the record contains highly sensitive information and should not be disclosed.

[60] In her representations, the appellant states that the information in the record is not highly sensitive because of the public nature of the event. She states that if there was anything highly sensitive the university would have done its best to ensure that the participants attending the event had been screened before being permitted on site. The appellant's representations seem to relate to an event where she was given a Notice Prohibiting Entry while at the university, however, the record does not relate to the event. In addition, the appellant states that the university did not act in good faith and was overreacting because a number of news article about other incidents that occurred at the university unrelated to the appellant. The appellant also states that there have never been any criminal charges laid against her in relation to any staff at the university.

[61] The affected party made representations in this appeal indicating that his personal information in the record is highly sensitive and supplied in confidence.

[62] In order to assess whether or not information qualifies as "highly sensitive," Senior Adjudicator John Higgins in Order PO-2518 set out an interpretation of section 21(2)(f) as "a reasonable expectation of 'significant' personal distress," This has subsequently been followed by IPC adjudicators.

[63] In the circumstances of this appeal, University Safety conducted an investigation and ultimately served the appellant with a Notice Prohibiting Entry. Also, given that the personal information in the record was provided in the context of a University Safety investigation, as a result of the affected party's reporting of the appellant's behaviour, and considering the affected party's representations, I find that the record is highly sensitive and give this factor significant weight. I rely on the ratio in Order P-1535, set out above, to make this finding, as it is apparent from the record that there was a volatile and adversarial nature to the relationship between the affected party and the appellant.

Section 21(2)(h): supplied in confidence

[64] 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.[28]

[65] In determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, section 21(2)(h) requires the university to consider whether the personal information was supplied in confidence.

[66] The university argues that the information in the record was supplied in confidence and therefore section 21(2)(h) is relevant to this appeal. It states that given the nature of the appellant's past behaviour toward the affected party it was reasonable for the affected party to expect that the details of his request for assistance would be kept confidential and not disclosed to the appellant. The university states that the facts of this case can be distinguished from a harassment investigation, where guarantees of confidentiality are impossible because the respondent must be informed of the allegations against them. In the present case, the university notes that it has not accused the appellant of any misconduct, but has rather documented the affected party's expressed concerns as a measure to protect him from the appellant's actions, pursuant to its obligations under the *OHSA*. In this context, it argues, it is reasonable to withhold the information supplied to the university by the affected party in confidence.

[67] In its reply representations, the university states that its decision to refuse access to the record was not influenced by other events which have occurred at the university in the past.

[68] Given the context within which the personal information was supplied, I find that the affected party had an expectation that the information was supplied in confidence. I give this factor moderate weight.

Conclusion:

[69] I find that two factors favour non-disclosure of the record while no factors favour disclosure. In my assessment, I gave the factor at section 21(2)(a) no weight while giving the two factors that favour non-disclosure significant and moderate weight. In addition, since this record was created in the course of an investigation into a possible violation of law, section 21(3)(b) presumes that disclosure is an unjustified invasion of personal privacy. I therefore find that the record is exempt under section 49(b).

[70] The portion of the record containing the appellant's personal information also includes the personal information of the affected party which is inextricably intertwined. I agree with the university's submission that no portion of the record can be reasonably severed without disclosing the nature of the withheld information. I find that there can

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[28] Order PO-1670.

be no severance to the record without disclosing the personal information of the affected party.

[71] I also find that the absurd result principle does not apply in this instance. The appellant is not seeking access to her own statement, she was not present when the information was provided to the university and the information in the record is not clearly within the appellant's knowledge. Further, I find that disclosure would be inconsistent with the purpose of the exemption at section 49(b).

D: Does the discretionary exemption at section 49(a) (discretion to refuse one's own information) in conjunction with the section 14(1)(e) exemption apply to the information at issue?

[72] Section 49(a) states:

> 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. [Emphasis added.]

[73] 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.[29]

[74] Section 14(1)(e) states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > (e) endanger the life or physical safety of a law enforcement officer or any other person

[75] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[30]

[76] It is not enough for an institution to take the position that the harms under section 14 are self-evident from the record or that the exemption applies simply

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[29] Order M-352.

[30] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

because of the existence of a continuing law enforcement matter.[31] The institution must provide evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences. [32]

[77] It has been found that a person's subjective fear, while relevant, may not be enough to justify the exemption.[33]

[78] The university submits that while the appellant has not made an overt threat to the life or safety of the affected party, the circumstances which led the affected party to seek assistance from University Safety are significant. Given the sensitivity of the circumstances and the information in the record, the university argues that even a modest risk to the life or safety of the affected party should be considered in determining whether or not the record should be released.

[79] The appellant's representations do not specifically speak to this issue.

Analysis:

[80] In order PO-3662, Adjudicator Steve Faughnan, when examining the application of section 14(1)(e) referred to comments in Order PO-1940, addressing the application of section 20 (danger to safety or health) of the *Act*, where it was stated:

> . . . it is noteworthy to add (in response to the appellant's assertions that he would not physically attack anyone) that a threat to safety as contemplated by section 20 is not restricted to an "actual" physical attack. Where an individual's behaviour is such that the recipient reasonably perceives it as a "threat" to his or her safety, the requirements of this section have been satisfied. As the Court of Appeal found in *Ontario (Ministry of Labour)*:
>
> > It is difficult, if not impossible, to establish as a matter of probabilities that a person's life or safety will be endangered by the release of a potentially inflammatory record. Where there is a reasonable basis for believing that a person's safety will be endangered by disclosing a record, the holder of that record properly invokes [sections] 14(1)(e) or 20 to refuse disclosure.

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[31] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

[32] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

[33] Order PO-2003.

[81] Also, Adjudicator Faughnan referred to the Supreme Court of Canada which reviewed the requisite standard of proof for establishing exemption under section 14 in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner).*[34] The line of authority on this issue is summarized as follows:

> Order 188 articulated the principle that establishing one of the exemptions in section 14 of the *Act* requires that the expectation of one of the enumerated harms coming to pass, should a record be disclosed, not be fanciful, imaginary or contrived, but rather one that is based on reason. This requirement that the expectation of harm must be based on reason means that there must be some logical connection between disclosure and the potential harm which the ministry seeks to avoid by applying the exemption. More recently, the Supreme Court of Canada has affirmed that the evidence must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. The sufficiency of the evidence is context and consequence-dependent.

[82] From a review of the record at issue in this appeal, there is clear evidence that the affected party perceived the appellant's behaviour toward him as a threat to his safety. Ultimately, it resulted in his attending University Safety and reporting the incidents. After considering the representations of the parties including those of the affected party, I find that the section 49(a) exemption applies in conjunction with section 14(1)(e) to the information in the record for which it is claimed.

E: Did the institution exercise its discretion under section 49(a) or 49(b)? If so, should this office uphold the exercise of discretion?

[83] The section 49(a) and 49(b) 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.

[84] 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.

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[34] 2014 SCC 31 (CanLII) at paras. 52-54.

[85] The university states that it exercised its discretion in responding to the current request in good faith. It considered all relevant considerations, and did not consider irrelevant considerations.

[86] Regarding the application of sections 49(a) and 49(b), the university states that it withheld the record pursuant to these exemptions as it determined that it was necessary to do so in order to prevent an unjustified invasion of the affected party's privacy and the withheld information was highly sensitive and provided in confidence.

[87] The university submits that it properly exercised its discretion in the present case.

[88] In this case, I am satisfied that the university properly exercised its discretion in choosing to withhold the record under sections 49(a) and 49(b). The representations of the university demonstrate that it took relevant factors into account when exercising its discretion and did not consider irrelevant factors. The university indicates that in making its decision on access, it took into account considerations including the appellant's right of access to her own information, that the information was collected in the course of an investigation into a possible law enforcement matter, the belief of the affected party that he was giving his personal information with an expectation of confidentiality and that any release of the affected party's personal information could expose him to further attention from the appellant.

[89] I uphold the university's exercise of discretion.

[90] Lastly, as indicated above, the appellant included some IPC Orders with her representations, one of which dealt with the public interest override at section 23 of the Act.[35] Although she included this order, she makes no comment on the public interest override in her actual representations. However, for completeness, I will deal with that issue.

[91] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[36] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public

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[35] MO-1850.

[36] Orders P-984 and PO-2607.

opinion or to make political choices.[37]

[92] Based on my review of the record and the parties' representations, I have reached the conclusion that the circumstances of this case are not sufficient to invoke the application of section 23. I find that any interest in the record is of a private nature and not a public interest for the purposes of section 23.

ORDER:

The appeal is dismissed.

Original Signed by: June 23, 2017
Alec Fadel
Adjudicator

[37] Orders P-984 and PO-2556.