



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

ORDER P-440

Appeal P-9200348

Sheridan College of Applied Arts and Technology



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ORDER

BACKGROUND:

The Sheridan 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 "the specifics of each and every allegation of improper conduct alleged against the applicant arising out of a complaint made to the College by [a named individual] ...". Specifically, the requester sought access to a letter written by the named individual to the College. The College determined that two records were responsive to the request: an internal College memorandum and a letter written by the named individual. The College transferred the part of the request concerning the letter to the Palmerston Police Service, pursuant to section 25(3)(a) of the Act, on the basis that it has a greater interest in the record. The College denied access to the memorandum, pursuant to section 13(1) of the Act. The requester appealed the decision of the College to deny access to this record, and it is this decision that is the subject of this appeal.

Mediation was unsuccessful, and notice that an inquiry was being conducted to review the College's decision was sent to the appellant, the College, and the named individual (the affected person). Written representations were received from the College and the appellant only.

In its representations, the College indicated that in denying access to the record, it considered the provisions of sections 49(a) and (b) of the Act.

The record at issue in this appeal consists of a two-page memorandum written by an employee of the College to the Chairman of the Faculty of Applied Arts, concerning the affected person's complaint of unethical conduct against the requester.

ISSUES:

The issues arising in this appeal are as follows:

- A. Whether the record contains information that qualifies as "personal information", as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes, whether the discretionary exemption provided by section 49(b) of the Act applies to the record.
- C. Whether the discretionary exemption provided by section 13(1) of the Act applies to the record.
- D. If the answer to Issues A and C is yes, whether the discretionary exemption provided by section 49(a) of the Act applies to the record.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the record contains information that qualifies as "personal information", as defined in section 2(1) of the Act.

Section 2(1) of the Act states, in part, "personal information" means recorded information about an identifiable individual ...".

I have examined the record, and I am of the view that it contains personal information that relates both to the appellant and the affected person.

ISSUE B: If the answer to Issue A is yes, whether the discretionary exemption provided by section 49(b) of the Act applies to the record.

In Issue A, I found that the record contains the personal information of the appellant as well as the affected person. Section 47(1) of the Act gives individuals a general right of access to personal information about themselves in the custody or control of institutions. However, this right of access is not absolute. Section 49(b) provides:

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

where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

Section 49(b) introduces a balancing principle. The College must look at the information and weigh the requester's right of access to his/her own personal information against another individual's right to the protection of his/her personal privacy. If the College determines that the release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 49(b) gives the College the discretion to deny the requester access to the personal information (Order 37).

In my view, where the personal information relates to the requester, the onus should not be on the requester to prove that disclosure of the personal information **would not** constitute an unjustified invasion of the personal privacy of another individual. Since the requester has a right of access to his/her own personal information, the only situation under section 49(b) in which he/she can be denied access to the information is if it can be demonstrated that disclosure of the information **would** constitute an unjustified invasion of another individual's privacy.

Sections 21(2) and (3) of the Act provide guidance in determining if disclosure of personal information would constitute an unjustified invasion of personal privacy. Section 21(2) lists a number of factors to be considered in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. Section 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. In some rare cases, a presumption may be rebutted by a combination of factors under section 21(2), listed or unlisted (Order 20).

The College has stated that section 21(3)(g) applies to the record. This section states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

consists of personal recommendations or evaluations, character references or personnel evaluations;

Any comments in the record which might be seen as "evaluations" would pertain only to the appellant and not the affected person; therefore, this section is not relevant to the balancing consideration, and the presumption does not apply.

In considering whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the affected person in the circumstances of this appeal, I have reviewed the other presumptions listed in section 21(3) and in my view, none apply to the circumstances of this appeal. I have also reviewed the factors listed under section 21(2), and I find that none of the factors which weigh in favour of privacy protection are relevant.

The affected person has made no representations regarding the disclosure of the record.

After carefully considering the contents of the record, the representations of the parties and the provisions of the Act, I am not satisfied that disclosure of the record to the appellant would be an unjustified invasion of the personal privacy of the affected person in the circumstances of this appeal. Accordingly, I find that section 49(b) of the Act does not apply to the record.

ISSUE C: Whether the discretionary exemption provided by section 13(1) of the Act applies to the record.

Section 13(1) of the Act states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

It has been established in several previous orders that advice for the purposes of section 13(1) must contain more than mere information. Generally speaking, "advice" pertains to the submission of a suggested course of action, which will ultimately be accepted or rejected by its recipient in the deliberative process (Orders 118, P-304, P-348 and P-356). "Recommendations" are to be viewed in the same vein (Orders 161, P-248, P-348 and P-356).

I have reviewed the record and, in my opinion, only the first sentence of the second last paragraph on page two qualifies for exemption under section 13(1). This sentence describes a course of action suggested by the author of the record, to her immediate supervisor, who was in a position either to accept or reject the recommendations. The College argues that the recommendations cannot reasonably be severed under section 10(2) of the Act as the "factual information is interwoven with advice and recommendation, as well as personal information, views and opinions." I do not agree. In my view, the part of the record containing the recommendations can reasonably be severed without disclosing information that falls under the exemption.

Section 13(2) provides a number of mandatory exceptions to the section 13(1) exemption. The appellant argues that specifically, the exception under section 13(2)(l) applies to the record. This section states:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

the reasons for a final decision, order or ruling of an officer of the institution made during or at the conclusion of the exercise of discretionary power conferred by or under an enactment or scheme administered by the institution, whether or not the enactment or scheme allows an appeal to be taken against the decision, order or ruling, whether or not the reasons,

- (i) are contained in an internal memorandum of the institution or in a letter addressed by an officer or employee of the institution to a named person, or
- (ii) were given by the officer who made the decision, order or ruling or were incorporated by reference into the decision, order or ruling.

The appellant submits that the record "must contain the reasons for the decision to dismiss the applicant", made under a statutory scheme administered by the College for processing complaints of unethical conduct by students.

Having reviewed the record and the representations of the parties, I find that the record does not contain the reasons for a final decision with respect to the allegations against the appellant. Therefore, I find that section 13(2)(l) is not applicable in the circumstances of this appeal.

ISSUE D: If the answer to Issues A and C is yes, whether the discretionary exemption provided by section 49(a) of the Act applies to the record.

Under Issue A I found that the record contains the personal information of the appellant and under Issue C I found that part of the record qualifies for exemption under section 13(1) of the Act.

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, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information; [emphasis added]

Section 49(a) is a discretionary exemption which allows the College to deny a requester access to information that relates to him/her, if the information qualifies for exemption under one of the sections listed. The College has provided representations regarding its decision to exercise discretion in favour of denying access in the circumstances of this appeal. I have reviewed these representations and find nothing improper in the College's exercise of discretion. Therefore, I find that the first sentence of the second last paragraph on page two of the record is exempt under section 13(1) of the Act.

ORDER:

1. I order the College to disclose the record to the appellant after severing the information which I have found to be exempt within 35 days of the date of this order, but not earlier than the thirtieth (30th) day following the date of this order. I have provided a highlighted copy of the record with the copy of this order which is being forwarded to the College, indicating the portions of the record which contain the exempt information.
2. In order to verify compliance with the provisions of this order, I order the head to provide me with a copy of the record which is disclosed to the appellant pursuant to provision 1, **only** upon my request.

Original signed by: _____
Asfaw Seife
Inquiry Officer

_____ March 31, 1993