Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3815

Appeal PA16-283-2

University of Toronto

February 23, 2018

Summary: The appellant filed a request under the *Freedom of Information and Protection of Privacy Act* to the University of Toronto for records relating to a complaint made against him to campus police, including subsequent complaints he filed against a campus police officer and other students. The university claims that the records either fall outside the scope of the *Act* by virtue of section 65(6) or qualify for exemption under sections 49(a) and (b) in conjunction with the personal privacy (section 21(1)), law enforcement (sections 14(1)(d) and/or (e)) and danger to safety or health (section 20) provisions. The appellant appealed the university's access decision and the adjudicator upholds the university's decision to withhold the portions of the records relating to the appellant's complaint about a campus police officer under section 65(6)3. The adjudicator also finds that disclosure of the portions of the records which contain the personal information of other individuals would constitute an unjustified invasion of personal privacy under section 49(b). However, the adjudicator finds that the absurd result principle applies to the portions of the records the appellant provided campus police or relate to him solely. The adjudicator also finds that the exemptions claimed in conjunction with section 49(a) do not apply to those remaining portions and orders the university to disclose this information to the appellant. The university's decision is partially upheld.

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", 14(1)(d), 14(1)(e), 20, 21(2)(d), 21(3)(b), 49(a), 49(b), and 65(6)3.

Orders and Investigation Reports Considered: Orders PO-2642 and PO-3474.

OVERVIEW:

[1] The appellant, a former student, filed a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the University of Toronto (the university) for records relating to a complaint made against him to campus police, including complaints he subsequently filed against other students and a campus police officer.

[2] The university located responsive records but denied the appellant access to 46 pages of records on the basis that disclosure of the withheld information would constitute an unjustified invasion of personal privacy under section 49(b) in conjunction with section 21(1). The university also claims that the withheld information in these records qualify for exemption under section 49(a) in conjunction with the law enforcement provisions under sections 14(1)(d) and 14(1)(e) and the danger to safety and health provision under section 20.

[3] The university also located 113 pages and nine video interviews relating to the appellant's complaint about a campus police officer. The university denied the appellant access to these records on the basis that they are excluded from the scope of the *Act* under section 65(6).

[4] The appellant appealed the university's decision to this office and a mediator was assigned to explore settlement with the parties. No mediation was possible and the file was transferred to adjudication in which an adjudicator conducts an inquiry. During adjudication, the parties filed written representations in support of their positions. The university requested that its representations not be shared with the appellant for confidentiality reasons while the appellant had no objections about sharing his representations.

[5] In this order, I find that the records relating to the appellant's complaint about a campus police officer are excluded from the scope of the *Act* under section 65(6). I also find that disclosure of the portions of the records which comprise complaints other individuals made about the appellant would constitute an unjustified invasion of personal privacy under section 49(b). However, I find that the portions of the records which comprise information relating solely to the appellant, including portions of his complaint to campus police that he was being harassed by other students does not qualify for exemption under sections 49(a) or (b). Accordingly, I order the university to disclose this information to the appellant.

RECORDS:

[6] For the purpose of this appeal, I have categorized the records as follows:

1. Campus police records, consisting of 46 pages of occurrence reports, letters, officer's notes and other documents created or provided to campus police during

their investigation into the complaint against the appellant and his subsequent complaint of being harassed by other students; and

2. Professional Standards Complaint records, consisting of 113 pages of correspondence and 9 video recordings created in response to the appellant's complaint about a campus police officer.

ISSUES:

A. Does section 65(6) exclude the professional standards complaint file records from the *Act*?

B. Do the campus police records contain personal information as defined in section 2(1)? Would disclosure of the campus police records constitute an unjustified invasion of personal privacy under section 49(b)?

C. Do the portions of the campus police records not exempt under section 49(b) qualify for exemption under section 49(a) in conjunction with sections 14(1)(d), 14(1)(e) or 20.

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

DISCUSSION:

A. Does section 65(6) exclude the professional standards complaint file records from the Act?

[7] The university takes the position that the professional standards complaint file records are excluded from the scope of the *Act* under sections 65(6)1 and 3, which state:

> 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:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[8] If section 65(6) applies to the records, and none of the exceptions found in section 65(7) applies, the records are excluded from the scope of the *Act*.

[9] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 1, 2 or 3 of this section, it must be reasonable to conclude that there is "some connection" between them.[1]

[10] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.[2]

[11] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.[3]

[12] If section 65(6) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.[4]

[13] Section 65(6) may apply where the institution that received the request is not the same institution that originally "collected, prepared, maintained or used" the records, even where the original institution is an institution under the *Act*.[5]

[14] 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.[6]

Representations of the parties

[15] In its representations, the university described the records relating to the appellant's complaint about the police officer, as follows:

> The records include detailed investigation materials produced by the external investigator. Materials produced by her include notes from interviews, videos, reasoned analysis, and a report with conclusions.

[16] The university argues that sections 65(6)1 and (3) apply on the basis that the records are a "direct examination and assessment" of a specific individual in the course of their professional duties as a special constable under the *Polices Services Act*. The university advises that the records and the information in them were used to assess the

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[1] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).
[2] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.); see also Order PO-2157.
[3] Order PO-2157.
[4] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.
[5] Orders P-1560 and PO-2106.
[6] Ontario (Ministry of Correctional Services) v. Goodis, cited above.

performance of the constable in question regarding his dealings with the appellant. The university also states:

> The records constitute the communications of the investigator, of then U of T Police Director [name], to and from Toronto Police, and the various communications and interview records (meetings) of the investigator.
>
> The records were used to assess [named constable's] work, and the University had a direct official interest in them, respecting the quality of that work. In particular, the University also had a legal interest in the results of the assessment, as it would be used in the context of [named constable's] employment, possible correction/administrative action with respect to him, and possible proceedings…depending on the outcome.
>
> The outcome was that the complaints were unfounded and no further action was needed in the circumstances.

[17] The appellant takes the position that records relating to the complaint he filed against the officer should be provided to him on the basis that he initiated the complaint. He also states:

> If the general public and the Privacy Commissioner is to have confidence that organizations are investigating misconduct appropriately there must be release of records which clearly detail how complaints were investigated.

Section 65(6)3: matters in which the institution has an interest

[18] For section 65(6)3 to apply, the institution 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.

Parts 1 and 2: collected, prepared, maintained or used … meetings, consultations, discussions or communications

[19] Parts 1 and 2 of the test ask whether the university collected, prepared, maintained or used the records in relation to meetings, consultations, discussions or communications. There appears to be no dispute that the professional standards complaint file records were collected and prepared in response to a complaint the appellant filed with the university which alleged misconduct on the part of a campus police officer. The records consist of the appellant's letter of complaint which was

transferred to Toronto Police's Professional Standards Branch for investigation, who in turn directed the university to conduct an investigation. An independent investigator was retained, who conducted interviews and the records include her emails and correspondence exchanged with the parties during various stages of her investigation. The records also contain her interview notes along with copies of the appellant's videotaped statement and copies of her draft and final investigation report.

[20] Having reviewed the records, I am satisfied that the university collected, prepared, maintained or used these records in meetings, consultations, discussions or communications. Accordingly, I find that the first and second part of the three-part test has been met.

Part 3: Labour relations or employment-related matters in which the institution has an interest

[21] Previous decisions from this office have found that the phrase "labour relations or employment-related matters" has been found to apply in the context of disciplinary proceedings under the *Police Services Act*[7]. There is no dispute that the appellant's complaint amounts to an allegation of police misconduct under Part V of the *Police Services Act*.

[22] Having regard to the circumstances in which the records were created, I am satisfied that the professional standards complaint records relate to labour relations or "employment-related" matters in which the university has an interest. Accordingly, I find that part 3 of the test has been met.

[23] As I have found that all three parts of the test in section 65(6)3 has been met, I find that the professional standards complaint records are excluded from the scope of the *Act* and uphold the university's decision to withhold these records from the appellant. The fact that some of these records contain the appellant's information or information he provided the investigator is not relevant in my determination as to whether the records fall within the scope of the *Act*.

[24] Having found that section 65(6)3 applies, it is not necessary for me to determine whether section 65(6)1 applies.

B. Do the campus police records contain personal information as defined in section 2(1)? Would disclosure of the campus police records constitute an unjustified invasion of personal privacy under section 49(b)?

[25] The parties agree that the campus police records contain the personal information of the appellant and other individuals. The term "personal information" is defined in section 2(1). Having reviewed the records, I am satisfied that the records contain identifying information of the appellant and other individuals, such as their name, age, address, views and opinions as defined in paragraphs (a), (d), (e), (g) and

[7] Order MO-1433-F.

(h) of section 2(1).

[26] As the records contain the personal information of the appellant, I will determine whether disclosure to him 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.

[27] Section 49(b) states:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if disclosure would constitute an unjustified invasion of another individual's personal privacy.

[28] 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.

[29] 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.

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

[31] 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).

[32] 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.[8] 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).

[33] 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

[8] Order MO-2954.

that are relevant, even if they are not listed under section 21(2).[9]

[34] The parties have not claimed that any of the exceptions in section 21(1) or exclusions in section 21(4) apply and I find that none apply.

[35] 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. The appellant submits that the factor favouring disclosure at section 21(2)(d) applies. The appellant also argues that the absurd result principle applies in the circumstance of this appeal.

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

[36] 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

[37] The university states:

> The occurrence report and detailed accounts and statements were compiled and are identifiable as part of the [campus police] investigation of the events and threatening behaviours of the appellant.
>
> Investigative tasks were carried out by a special constable in the course of their policing duties.
>
> Although charges were ultimately not laid, the investigative conduct was serious enough to warrant the sanction of the issuance of a Trespass Notice against the appellant.

[38] 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.[10]

[39] Though appellant's submissions did not specifically address this issue, there appears to be no dispute that the records were created as a result of campus police receiving a complaint that the appellant had threatened or harassed other students.

[40] 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

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[9] Order P-239.
[10] Orders P-242 and MO-2235.

possible violation of law, namely a *Criminal Code* offence.

[41] 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

[42] In his submissions, the appellant claims that the factor favouring disclosure at section 21(2)(d) applies. 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;

[43] In his representations, the appellant states:

> The university has described my emails as "threatening" and "harassing" [and] they have mailed me a trespass order over these emails. In this case, I have a right to a fair trial, and the emails (my personal information) are obviously necessary for me to defend myself and prepare for this trial. If Canada is a fair and just society I must have access to these 46 pages of emails and related occurrence reports in order to defend myself. Further, in the event that I ask for judicial inquiry into the unfairness of my trespass order, or a human rights investigation into the trespass order I will obviously need these 46 pages of emails and related records as they are my personal information and are my personal information and are necessary to prepare for trial. There is also the matter of inherent fairness surrounding this issue: The university has disclosed the nature of the complaints, the contents of my emails and the full identity of the complaints to the entire world; how is it fair that I cannot receive a copy of my emails and these complaints.

[44] 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

> (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.[11]

[45] For section 21(2)(d) to be given any consideration, the appellant must establish that all four parts of the test have been met.

[46] I have reviewed the appellant's submissions and am not satisfied that there is sufficient evidence demonstrating that the personal information at issue is required in order for him to prepare for a proceeding or ensure an impartial hearing. The trespass order the university issued against the appellant was issued almost 10 years ago. There is no evidence that the appellant or the university commenced or contemplated proceedings relating to the legality of the trespass order. Given the passage of time, it is highly unlikely either party would be granted standing by the courts to commence any action.

[47] Having regard to the evidence presented by the parties, I find that part 4 of the test in section 21(2)(d) has not been met. Accordingly, even if I found that parts 1, 2 and 3 of the test were met, the factor at section 21(2)(d) could not apply to the circumstances of this appeal as there is insufficient evidence demonstrating that part 4 of the test has been met. As a result, I find that the factor at section 21(2)(d) has no application to the circumstances of this appeal.

[48] 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 consider whether the factors favouring privacy protection at sections 21(2)(e), 21(2)(f), 21(2)(h) and 21(2)(i) also apply. I am also satisfied that no other unlisted factor applies.

Absurd Result

[49] The absurd result principle holds that in instances where the requester originally supplied the information, or the requester is otherwise aware of it, the information may not be exempt under section 38(b), because to withhold it would be absurd and inconsistent with the purpose of this exemption.[12]

[50] Throughout his submissions, the appellant questions the fairness of the university's decision to withhold access to records which contain his information, in particular the details of the complainant's complaint to campus police which he advises contains copies of emails he allegedly sent to her. The appellant also questions the university's decision to withhold the records given that campus police disclosed the details of the complaint to his father and to "the university community". In support of his position, the appellant provided an undated letter signed by his father. The appellant also advises that campus police subsequently provided a copy of the trespass order addressed to himself to his father.

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[11] 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.).
[12] Orders M-444 and MO-1323.

[51] The appellant also submits that campus police "gave details of my emails" to a staff member who, in turn, telephoned his physician and "told him the details of the emails/complaints against me including the identity of the complainant, and the specific content of the emails". In support of this allegation, the appellant provided a copy of a medical report with his representations. I have reviewed the report and note that it contains a reference set out in quotation marks of the alleged threat contained in one of the emails the appellant sent to the complainant. The report also identifies two students by their first names.

[52] Finally, the appellant submits that the university disclosed details of the complaint and identified the complainants in court records. In support of this position, the appellant provided copies of a Statement of Defence and List of Proposed Witnesses filed by the university in response to his small claims court application. I have reviewed these documents and it appears that the appellant commenced a court action against the university for breach of privacy and that the complainants are identified, by their full names, in the court documents. The court documents also contain a brief summation of the threat it is alleged the appellant made.

[53] The university takes the position that the absurd result principle should not apply to the circumstances of this appeal given the sensitive nature of the information at issue.

[54] Where the requester originally supplied the information or the requester is otherwise aware of it, the information may be found not exempt under section 49(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption.[13]

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

- the requester sought access to his or her own witness statement[14]
- the requester was present when the information was provided to the institution[15]
- the information is clearly within the requester's knowledge[16]

[56] If disclosure is inconsistent with the purpose of the exemption, the absurd result principal may not apply, even if the information was supplied by the requester or is within the requester's knowledge [Orders M-757, MO-1323, MO-1378].

[57] Based on my review of the records, it appears that sometime after campus police received a complaint about the appellant, the appellant filed his own complaint about being harassed in one of his classes. The appellant allowed the officer taking his complaint to access his email account and print emails he exchanged with one of the

[13] Orders M-444, MO-1323.
[14] Orders M-444, M-451.
[15] Orders M-444, P-1414.
[16] Orders MO-1196, PO-1679, MO-1755.

students he alleged was harassing him along with an email exchange between himself and his professor. The emails were printed and attached to the officer's report.

[58] I find that the absurd result principle applies to the following portions of the records which relate to:

- the complaint the appellant filed with campus police about being harassed by other students, but for the copies of the email exchange between the appellant and another student relating to this complaint;
- a copy of an email the appellant sent to his professor and the professor's response;
- campus police's communication to the appellant and staff about the trespass warrant and class scheduling; and
- police information forms and the medical report the appellant provided campus police.

[59] In my view, it would be absurd to withhold the portions of the records created as a result of the appellant attending campus police's office to file a complaint that he was being harassed in to one of his classes. This would include copies of the email exchanged between the appellant and his professor printed by the officer and other police forms completed by the officer. It would also include the portions of the records which address administrative matters such as the appellant's class schedule and the trespass order. Finally, I find that it would be absurd to withhold from the appellant a copy of the medical report he provided police.

[60] However, I find that the absurd result principle does not apply to the remaining records at issue. These records deal with campus police's investigation into complaints that the appellant was threatening and/or harassing other students. Though it appears that the complainants are identified by name in court records along with a summation of the complaint, the appellant has adduced insufficient evidence to demonstrate that the specifics of the information campus police gathered during its investigation is clearly within his knowledge. Furthermore, it is clear that the appellant was not present when other individuals provided their information and evidence to campus police. In addition, I note that the records before me do not contain copies of the actual emails the appellant allegedly sent which initiated the complaint and contained a threat. With respect to the emails the officer printed from the appellant's email account, there is insufficient evidence to establish that the appellant is clearly aware of the contents of these emails, including the other student's email address.

[61] Finally, though I note that some portions of these records refer to the appellant, I find that these portions cannot be reasonably severed from the portions of the records which contain the personal information of other identifiable individuals. Accordingly, I find that disclosure of the portion of the records comprising of complaints made against the appellant, including the emails he exchanged with another student 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. Do the portions of the campus police records not exempt under section 49(b) qualify for exemption under section 49(a) in conjunction with sections 14(1)(d), 14(1)(e) or 20?

[62] 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.

[63] 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. In this case, the university relies on 49(a) in conjunction with sections 14(d)(confidential source of information) and (e)(endanger life or safety).

[64] The only information remaining at issue are the portions of the records which relate to the appellant's complaint, including information he provided police including copy of a medical report. Given that this information does not contain information provided by any complainant, I find that section 49(a) in conjunction with section 14(1)(d)[17] cannot apply.

14(1)(e): life or physical safety

[65] 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

[66] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[18]

[67] 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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[17] Section 14(1)(d) states "A head may refuse to disclose a record where the disclosure could reasonably be expected to disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source."

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

because of the existence of a continuing law enforcement matter.[19] The institution must provide detailed and convincing 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.[20]

[68] In its representations, the university submits that dislcosure of the entire contents of its complaint file records could reasonably be expected to endanger the life or physical safety of the complainants, the appellant himself or the campus police officer he filed a complaint about. In support of this position, the university provided confidential representations and referred to Orders PO-1940, PO-2642 and PO-3474. The university argues that in these decisions, this office has found that the threat to safety and harm is not restricted to demonstrations of physical attacks or violence. The evidence presented by the university indicates that the appellant was not physically violent towards other students and co-operated with campus police's investigation. The university also advises that it issues trespass notices "only after careful consideration [and] always for the purpose of addressing significant safety concerns".

[69] Most of the university's submissions, including its confidential submissions, address concerns it has about the potential for harm to the complainants. In my view, the university provided sufficient evidence to establish a reasonable basis that endangerment to the life or physical safety of the individuals who filed complaints against the appellant may occur. In my view, this conclusion is supported by the records themselves and I agree with previous decisions from this office that a threat to safety is not restricted to an actual physical attack. However, I already found that this information qualifies for exemption under section 49(b).

[70] The information remaining at issue does not contain information the complainants provided campus police. Instead, this information consists of the information the appellant provided campus police when he attended their offices to make a complaint of his own. In response, campus police opened a complaint file and a staff member got involved to offer assistance to the appellant. The records also capture campus police's communications to the appellant about the trespass order and include copies of the trespass order and a medical report. In my view, the university failed to adduce sufficient evidence to establish that disclosure of this information to the appellant could reasonably be expected to endanger the life or physical safety of the officer in question or the appellant himself.

[71] In making my decision, I took into account that the content of the information at issue is similar to the information the appellant details in his submissions and is reflected in court documents he attached his representations. A summation of the complaint and the identities of the complainants are also found in the independent

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

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

investigator's report which was provided to the appellant. This is not a case where it would appear that disclosure of records through a freedom of information request would place information in a requester's possession which could trigger fresh interest in the matter. Based on the submissions of the appellant, I am satisfied that he has a clear understanding of the chronology of the events and recalls the nature of his complaints and the complaints made against him. In addition, I note that despite the fact that the appellant commenced a court action against the police, filed a professional standards complaint and filed a privacy complaint with this office *after* the issuance of the trespass order I was not presented with evidence suggesting that there was a concern of safety during those proceedings.

[72] Having regard to the above, I find that section 49(a) in conjunction with section 14(1)(e) does not apply to the remaining information at issue. I will now consider the university's claims that this information qualifies for exemption under section 49(a) in conjunction with section 20 (Danger to safety and health).

Section 20: Danger to safety or health

[73] Section 20 states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

[74] For this exemption to apply, the institution must provide detailed and convincing 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.[21]

[75] An individual's subjective fear, while relevant, may not be enough to justify the exemption.[22] The term "individual" is not necessarily confined to a particular identified individual, and may include any member of an identifiable group or organization.[23]

[76] As stated above, most of university's submissions identified concerns for the potential for harm to the complainants if the complaint file records were disclosed to the appellant. The university submits that the circumstances in Orders PO-2642 and PO-3474 are similar to those in this appeal. In those cases, this office found that section 20 applied to deny the records to the requester. In Order PO-2642, Queen's University granted a requester partial access to records relating to a trespass notice issued against him. In that order Adjudicator Catherine Corban stated:

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[21]Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner), 2014 SCC 31 (CanLII) at paras. 52-4.
[22] Order PO-2003.
[23] Order PO-1817-R.

> [B]ased on the representations submitted by the University and the affected parties, as well as on a review of the records themselves, I accept that the appellant has engaged in persistent and harassing behaviour towards the affected parties. [A]lthough there is no evidence before me that the appellant has been physically violent towards the affected parties or any other individuals, from their confidential representations, it is clear that the affected parties perceive that disclosure of this information could reasonably be expected to seriously threaten their health or safety.

[77] In Order PO-3474, Carleton University denied a requester access to security reports and surveillance video relating to an incident involving the requester. In that order Adjudicator Diane Smith found that the exemption under section 20 applied and stated:

> The university provided both confidential and non-confidential representations on this issue. In its non-confidential representations, it states that disclosure of the records would be expected to seriously threaten the safety and health of not only members of the university community, but also the appellant himself. It states further that the appellant, a former student of the university, was banned from campus during this appeal process based on the incidents that are described in the requested records.
>
> …
>
> Based on my review of the records and the university's confidential and non-confidential representations, and in the absence of representations from the appellant, I find that disclosure of the records could reasonably be expected to seriously threaten the safety of individuals within the university community. The records concern these individuals' interaction with the appellant and the university has provided detailed and convincing evidence in its confidential representations, as supported by the records, that the test in section 20 of the Act has been met.

[78] Having regard to the representations of the university and the records themselves, I find that section 20 has no application to the information remaining at issue. In making my decision, I considered the university's evidence and the records and apply the same reasoning in finding that section 14(1)(e) also did not apply. Namely, that there is insufficient evidence to establish that disclosure of information relating to the complaint the appellant filed on his own could reasonably be expected to threaten the safety or health of the officer in question or the appellant himself.

[79] In addition, I find that the circumstances in this appeal differ from those in Orders PO-2642 and Order PO-3474. I note that in Order PO-2642, the adjudicator was presented with evidence that the perceived harm was connected to the actual information at issue. In that case, the actual information at issue was the same

information which was relied upon to obtain the trespass order against the requester. In the case before me, the university's evidence falls short of establishing a connection between the actual information at issue and perceived threat to the officer in question or appellant's health and safety. In addition, unlike the case in Order PO-3474, the records do not support the university's claim that section 20 applies. In Order PO-3474, the adjudicator found that the records themselves contain the same expressions of concerns of health and safety the university relies upon to support its submission that section 20 applied and states that the "records concern these individuals' interaction with the appellant" and that the requester "was banned from campus during [the] appeal process based on the incidents that are described in the requested records".

[80] Having regard to the above, I also find that section 49(a) in conjunction with section 20 does not apply to the remaining information at issue.

[81] Accordingly, I will order the university to disclose this information to the appellant. For the sake of clarity, a copy of the records containing the information to be disclosed to the appellant has been provided with the university's copy of the records.

Other Issue

[82] The university's representations mark the first time it relies on the discretionary exemption at section 49(d) to withhold the campus police records from the appellant. Section 49(d) states:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > that is medical information where the disclosure could reasonably be expected to prejudice the mental or physical health of the individual

[83] As mentioned above, the appellant provided campus police with a copy of a medical report during their investigation into his complaint that he was being harassed in one of his classes. In addition, the appellant provided campus police with historic information which may contain medical information. This information was provided by the appellant to the police and is recorded in the notes and reports created by the investigating officers. The university states that "[s]ome of the information in the records is medical, while much is not, and other portions may or may not be seen as medical in nature". The university takes the position that disclosure of this information to the appellant could reasonably be expected to prejudice his medical or physical health.

[84] I have reviewed the records and find that the university's submissions fail to establish a clear and direct link between the disclosure of the records and alleged harm to the appellant. In any event, the documentation the appellant submitted along with his representations demonstrate that he is aware of the chronology of events and the medical care he received. In addition, I note that the professional standards

investigation report, which was provided to the appellant, regarding his complaint about a campus police officer also describes the medical care he received.

[85] Based on my review of the parties submissions, I am satisfied that the appellant is already aware of any medical information which may be contained in the records that relates to him. Accordingly, I find that there is insufficient evidence to establish the harm contemplated in section 49(d).

[86] Given that section 49(d) does not apply in the circumstances of this appeal, it is not necessary for me to also determine whether the university should be allowed to claim a new discretionary exemption outside the 35-day period.

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

[87] 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.

[88] 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.

[89] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[24] This office may not, however, substitute its own discretion for that of the institution.[25]

[90] The information I found qualifies for exemption under section 49(b) in conjunction with section 21(1)(personal privacy) consists of the information other individuals provided campus police during their investigation of complaints about the appellant. Also included are the emails he exchanged with another student printed by a campus police officer with his permission. The university submits that it properly exercised its discretion to deny the appellant access to this information and took into account relevant factors. Though the university acknowledges that the information contains the appellant's information it submits that the records also contain "sensitive personal information of the other individuals and this information is contextually intertwined throughout the record".

[91] The appellant's representations did not specifically address this issue but he takes the position that he is entitled to access the records on the basis that they contain

[24] Order MO-1573.
[25] Section 54(2).

his personal information or is comprised of email messages he sent to another individual. In his representations, the appellant states:

> The idea that a person would make a complaint to police about an email I sent them, and wish that such a complaint remain confidential is absurd. I created the email, and I know who I sent it to, and this any such complaint by default cannot ever be confidential.

[92] Having regard to the submissions of the parties, I am satisfied that the university balanced the principle that individuals should have a right of access to their own personal information with the principle that the privacy of individuals should be protected. I also find that the university considered the sensitive nature of the information at issue with the fact that it was compiled as part of a campus police investigation. I am also satisfied that the university did not exercise its discretion in bad faith or for an improper purpose.

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

ORDER:

1. I uphold the university's decision to withhold the professional standards records under section 65(6)3.

2. I uphold the university's decision to withhold the portions of the complaint file records I found exempt under section 49(b).

3. I order the university to disclose the portions of the complaint file records I found not exempt under sections 49(a) or (b) to the appellant by **March 23, 2018** but not before **March 16, 2018**. For the sake of clarity, in the copy of the records enclosed with the order sent to the university, I have highlighted the portions of the records which **should not** be disclosed to the appellant.

4. In order to verify compliance with order provision 3, I reserve the right to require a copy of the records disclosed by the university to be provided to me.

Original Signed By
Jennifer James
Adjudicator

February 23, 2018