Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4128

Appeal PA17-171

Lambton College of Applied Arts and Technology

March 26, 2021

Summary: The college received a four-part access request, under the *Freedom of Information and Protection of Privacy Act*, for video recordings, electronic records, sound recordings and plans. With respect to video recordings, the college issued an interim decision stating a fee estimate of $640. With respect to electronic records, the college granted full access to the responsive records that had been located but stated that some of the requested records were not located. With respect to the sound recordings, the college issued a decision indicating that it did not have custody or control of the responsive records. With respect to plans, the college issued a decision granting access, in part, to these records, relying on the mandatory personal privacy exemption in section 21(1) of the *Act*. The appellant appealed the college's decisions to this office.

During mediation, the appellant raised the issues of improper delegation of authority, reasonable search, fee, fee waiver, and the application of the public interest override in section 23 of the *Act*. He also raised the issue that his rights under the *Canadian Charter of Rights and Freedom* have been infringed and the information at issue is otherwise available in section 64(1) of the *Act*. These issues were added to the appeal. The appellant advised he was no longer seeking access to the information withheld in the plans pursuant to section 21(1).

The appellant also raised the issue of bias against the adjudicator due to her findings in the order of a related appeal with the same institution. As such, this issue was added to the scope of the appeal.

In this order, the adjudicator finds that the head properly delated their authority. She does not find that the appellant's *Charter*'s rights have been infringed upon by the application of the *Act*. She upholds the college's decision with respect to its application of section 49(b) and the fee waiver. She allows the appellant's appeal of the fee in part and finds that the fee of $15.33 is

reasonable. She also finds that the college conducted a reasonable search for responsive records and that the public interest override does not apply.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 2(1) (definition of "personal information"), 21(1), 23, 24, 49(b), 57(4), 62(1) and 64(1*); Canadian Charter of Rights and Freedoms*, Part 1 of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c.11, ss. 2, 7, 11, 12 and 15.

Orders Considered: Orders PO-1688, PO-2154, PO-2899-R, MO-3135, PO-3172, PO-3217, PO-3248, MO-3852, MO-3358, MO-3364, MO-3374, MO-3894 and MO-3900.

OVERVIEW:

[1] The appellant, a former student at Lambton College of Applied Arts and Technology (the college), made an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information about himself:

1. Video recordings (with attachment setting out specified records)
2. Electronic Records (with attachment setting out specified records)
3. Sound Recordings (with attachment setting out one specified record)
4. Plans (with attachment setting out two specified records)

[2] In response to the request, the college advised that it was treating the request as four separate requests.

[3] With respect to the video recordings, the college issued a decision advising of a 30-day extension to process the request. It subsequently issued an interim decision including a fee estimate of $640.00 for searching, severing and preparing for disclosure three of ten requested video recordings. The college indicated that it would "blur" the faces of individuals other than the appellant in the videos to protect their privacy. The college also advised that a search for the seven remaining video recordings did not recover any responsive records.

[4] With respect to the electronic records, the college advised that it was prepared to grant full access to the responsive records that had been located but that some of the requested records were not found.

[5] With respect to the sound recordings, the college issued a decision indicating that it did not have custody or control of the responsive records. The college subsequently advised that it does not keep audio recordings.

[6] With respect to the plans, after notifying an affected party, the college issued a decision granting partial access to the responsive records. The college later clarified with the mediator that it withheld portions of the responsive records pursuant to the mandatory personal privacy exemption at section 21(1) of the *Act*.

[7] The requester, now the appellant, appealed the college's decision on the following issues.

Delegation

[8] During mediation, the appellant raised the issue of the improper delegation of authority under the *Act* by the head of the college. In response to the appellant's concerns, the college provided a copy of a delegation of authority to the appellant and the mediator. As the appellant was not satisfied, the issue of delegation remained at issue in the appeal.

Fee

[9] The college issued a final fee access decision in response to part 1 of the appellant's request, indicating that it was charging a fee of $692.93 for the video clips identified in its index as videos #4, #5, and #6. It stated that the other requested video clips did not exist. The college relied on sections 21(1) and 49(b) of the *Act* to withhold access to the faces of individuals other than the appellant in the video clips.

[10] The college set out its fee as follows:

Type	**Cost**
Search	2 hours @ $30/hour = $60.00
Severing	1 hour at $30/hour = $30.00
Preparation costs (blurring of faces)	8 hours @ $65/hour = $587.60
Flash drive (USB)	$10.00
Shipping by courier	$5.33
Total:	**$692.93**

[11] During mediation, the appellant paid the fee and received a USB key. That USB contained only video clip #6 and did not contain video clips #4 and #5. The appellant asked the college to provide the additional videos or amend its fee.

[12] In response, after a second and subsequent search, the college issued a further final fee decision advising that access to video clips #5 and #6 would be granted in part. Again, the college relied on sections 21(1) and 49(b) to deny access to the faces of individuals in the video footages. The college also noted that access to the record listed as video #4 could not be granted as that video clip does not exist. The college provided a further final fee breakdown for the costs of editing the video clips as follows:

Type	**Cost**

Search	2 hours @ $30/hour = $60.00
Severing	1 hour at $30/hour = $30.00
Preparation costs (blurring of faces)	5 hours @ $65/hour = $367.25
Flash drive	$10.00
Shipping by courier	$5.33
Total:	**$472.58**

[13] The college provided the appellant with a copy of the quote from the third party service provider tasked with the blurring of the video clips #5, #6a and #6b to de-identify faces.

[14] The appellant advised that he continues to appeal the fee.

Fee waiver

[15] Despite paying the fee, the appellant submitted a fee waiver request to the college citing financial hardship. The college denied the fee waiver request.

[16] The appellant appeals the denial of his fee waiver request.

Exemptions

[17] The college confirmed that portions of the video clips were withheld, specifically the faces of individuals in the video clips, pursuant to the personal privacy exemptions at sections 21(1) and 49(b) of the *Act*.

[18] The college's application of sections 21(1) and 49(b) to the video clips remains at issue in this appeal.

[19] The appellant advised, however, that he no longer seeks access to the information withheld in the plans pursuant to section 21(1) of the *Act*. Accordingly, the college's application of section 21(1) to the plans is no longer at issues.

Reasonable search

[20] During mediation, the college conducted an additional search for responsive records. The college shared details regarding its search as well as information regarding its record retention schedule and video surveillance procedures with the appellant. The appellant advised that he believes additional responsive records should exist. As a result, the issue of reasonable search was added to the scope of the appeal.

Public interest override

[21] The appellant raised the possible application of the public interest override in section 23 of the *Act* to the records at issue. Accordingly, it was added to the scope of the appeal.

Canadian Charter of Rights and Freedoms

[22] The appellant advised that he believes his rights under the *Canadian Charter of Rights and Freedoms (*the *Charter)* have been violated and requested that it be added as an issue in this appeal.

Information otherwise available

[23] The appellant advised that he was also raising the application of section 64(1) of the *Act* and requested that it be added as an issue in this appeal.

[24] As a mediated resolution could not be reached, the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry under the *Act*.

[25] The adjudicator initially assigned to this appeal invited the college and the appellant to provide representations on the issues in this appeal. She received representations from the college. In accordance with section 7 of this office's *Code of Procedure* and *Practice Direction Number 7*, a copy of the college's representations (in their entirety) was shared with the appellant. The appellant did not submit representations in support of his appeal.[1] The appeal was then transferred to me to continue the inquiry.

[26] Once the appeal was transferred to me, I provided the appellant with an additional opportunity to provide representations in response to the college's representations and the Notice of Inquiry. He did not do so.

[27] Shortly before this order was to be issued, the appellant requested an extension of time to provide representations, stating only "I only need a short period of time for completing my written representations to your office after I complete my final academic term". The appellant has had numerous opportunities over the last two years to provide representations, and his last-minute request for a further extension does not present any ground on which I should grant one. I deny his request.

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[1] The appellant was given multiple opportunities to submit representations in response to a Notice of Inquiry and to the college's representations. The appellant received numerous time extensions to do so, but he chose not to submit representations.

[28] Shortly after I issued the order for Appeal PA17-170[2] (a different appeal involving the same parties), the appellant alleged that I am biased or that there is a reasonable apprehension of bias on my part. As such, I have added it as an issue in this appeal.

[29] In this order, I find that the head of the college properly delegated their authority under the *Act*. I dismiss the appellant's *Charter* claims. I uphold the college's decision with respect to its application of section 49(b) and find that the public interest override does not apply. I allow the appellant's appeal of the fee in part and finds that the fee of $15.33 is reasonable. I uphold the college's decision not to grant a fee waiver. I also find that the college conducted a reasonable search for responsive records.

RECORDS:

[30] The records at issue are video surveillance clips for two specified dates.

[31] The first specified date contains a video clip of the front entrance/reception area of the South Building Main Campus. This clip is identified as video #5 in the college's index.

[32] The second specified date contains a video clip of the bridge entrance near the South Building Main Campus and a video clip of the bridge exterior. Both these video clips are identified as video #6 in the college's index. I will refer to them as video clip #6a and video clip #6b, respectively.

ISSUES:

Preliminary issues:

- Is there bias, or a reasonable apprehension of bias, on my part?
- The appellant's *Charter* claim
- The relevance, if any, of section 64(1) in the circumstances of this appeal

A. Did the head of the college properly delegate authority under section 62(1) in the circumstances of this appeal?

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

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[2] Order PO-4093.

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

D. Did the college exercise its discretion under section 49(b)? If so, should this office uphold the exercise of discretion?

E. Is there a compelling public interest in disclosure of the personal information at issue that clearly outweighs the purpose of the section 49(b) exemption?

F. Should the fee be upheld?

G. Should the fee be waived?

H. Did the college conduct a reasonable search for records?

DISCUSSION:

Preliminary issues:

Is there bias, or a reasonable apprehension of bias, on my part?

[33] The appellant claims that I am biased or there is a reasonable apprehension of bias, on my part.

[34] Shortly after I issued Order PO-4093, the appellant requested a reconsideration of that order and alleged that I was biased. He stated the following in his email of December 8, 2020 to an adjudication review officer:[3]

> … Lambton College arbitrarily denied my right of correction of my own personal information without giving all its reasons for this denial decision to me directly, which is not [an] honorable administrative conduct.
>
> However, this adjudicator turned a blind eye to Lambton College's disrespect for the principles of natural justice and Lambton's violation of my due process right. She failed to meet the standard of fairness in her adjudication of my appeal.
>
> **IPC should immediately suspend her jurisdiction over my remaining appeal PA17-171, and transfer my case to another adjudicator** to ensure that this remaining appeal will be fairly reviewed and disposed of in accordance with the constitutional requirements by an impartial adjudicator. [emphasis in the original]

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[3] Time stamped 11:55 PM.

[35] Subsequently, he sent another email to another adjudication review officer on December 9, 2020[4] again taking issue with my adjudication of Appeal PA17-170.

[36] Then on December 17, 2020[5] he sent the following email to an adjudication review officer:

> …
>
> My appeal **PA17-170** was based on the violation of principles of natural justice and procedural fairness by Lambton College. In my representation made to your office dated August 12th 2019, I referred to almost nothing but this gross violation of procedural fairness by the institution. However, in Adjudicator An's decision letter about my appeal **PA17-170** dated December 8th 2020, she referred to everything but this procedural issue.
>
> Her avoidance of making any reference to this serious issue and her tolerance of the government institution's breach of procedural fairness have made me lose the confidence in her fair adjudication of my remaining appeal PA17-171. Accordingly, **I request IPC to suspend Adjudicator An's jurisdiction over my appeal PA17-171 and to put this appeal on hold for now.**
>
> … When an adjudicator has shown irresponsibility, unfairness or bias at a stage of the appeal proceeding, the Commissioner should promptly reassign the appeal to a competent decision-maker to alleviate anxiety of the appellant.
>
> Part I (Administration) and Part IV (Appeal) of the FIPPA are intended for enhancing people's trust in the independence of the Commissioner's office and in the fairness of the appeal proceeding before the Commissioner. IPCO ought not to have an appeal adjudicated by an individual whose integrity or fairness [to] a party to the appeal does not have trust in. **My trust in Adjudicator An will not be restored unless justice is done to my appeal PA17-170.** [emphasis in the original]

[37] In response, I advised the appellant that I will not place this appeal on hold, nor will this appeal be reassigned to another adjudicator.

[38] Then on December 24, 2020, the appellant sent the following email to an adjudication review officer:

> …

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[4] Time stamped 11:18 AM.
[5] Time stamped 12:42 AM.

> Subsection 56(1) of the Act expressly prohibits the Commissioner from delegating the power to delegate. It is the duty of the Commissioner to decide whether to re-assign an adjudicator to my appeal. As a delegate, Adjudicator An is not in the position to make such a decision about whether the decision-making power should be delegated to another individual in this case.
>
> I did not provide the detailed reasons for my hold request to Adjudicator An, because I was awaiting [the] Commissioner's response to my request for repealing the delegation of authority to Adjudicator An over my appeal.
>
> …

[39] Subsequently, the appellant sent an email to the Commissioner requesting that this appeal, Appeal PA17-171, be reassigned to another adjudicator.

[40] In early January 2021, an adjudication manager responded to the appellant as follows:

> …
>
> You argue that your appeal should be reassigned because Adjudicator An is biased. It is generally established that a complaint of bias must be made to the adjudicator so the adjudicator may decide whether or not to disqualify herself. If the adjudicator declines to do so it is to be presumed she will give a reason and in that event the question of bias may come before a Court, if necessary. See in this regard the discussion at paragraph 15 of *Mary-Helen Wright Law Corporation* v. *British Columbia (Human Rights Tribunal)*, 2018 BCSC 912; *Envirocon Environmental Services, ULC* v, *Suen*, 2018 BCSC 1367 at paragraph 87 and *Arsenault-Cameron* v. *Prince Edward Island*, 1999 CanLII 641 (SCC). All these decisions are available on Canlii.

[41] In response, the appellant wrote that none of those cases she referred to seem relevant to his case, as the contexts of those cases were completely different from his. In particular, he states the following:[6]

> Whether or not a bias complaint should be made to, or decided by, the same adjudicator who is being complained against by a party to the appeal, it is not relevant in my case, because **my request for recusal** was made **on the basis of breach of legal duty** rather than **on the basis of apprehension of bias**. The Adjudicator An's failure to dispose

[6] In an email dated January 4, 2021 10:24 AM.

> of **the procedural issue** raised by my appeal PA17-170 contravened the requirement in **s. 54(1) of the FIPPA**. [Emphasis in the original.]
>
> IPC has the obligation to immediately remedy such a serious omission without being prompted or asked. However, up to this time, Adjudicator An did nothing to rectify such a gross error, though it has already been brought to her notice through my emails of Tuesday, December 8th 2020 at 22:18 and 23:55 respectively as well as Thursday, December 17th 2020 at 12:42 AM.

[42] Despite the appellant's protestation that he is not raising bias, his earlier correspondence clearly raised the issue. Although the appellant's bias allegation was raised in the context of a reconsideration request regarding Appeal PA17-170, his allegation is framed as a broad allegation that I am impartial. Moreover, he specifically alleged that I will be impartial in my adjudication of this appeal, Appeal PA17-171, and asked that I be removed from the appeal. I have therefore decided to address his bias allegation as a preliminary issue in this appeal.[7]

[43] In administrative law, there is a presumption, in the absence of evidence to the contrary that an administrative decision-maker will act fairly and impartially. The onus of demonstrating bias lies on the person who alleges it and mere suspicion is not enough.[8] A complaint of bias must be made to the adjudicator so that individual may decide whether or not to disqualify himself or herself.[9]

[44] Actual bias need not be proven. The test is whether there exists a "reasonable apprehension of bias." In Order MO-2227, Senior Adjudicator John Higgins addressed an allegation of bias and cited the test set out by the Supreme Court of Canada to establish a "reasonable apprehension of bias." He stated:

> A recent statement of the law by the Supreme Court of Canada concerning allegations of bias against an adjudicator is found in *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259. In that decision, the court stated:
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> In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion, as expressed by de Grandpre J. in *Committee for Justice and Liberty v. National Energy Board*, supra, at p. 394, is the reasonable apprehension of bias:

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[7] I will also address the issue of bias in the appellant's reconsideration request in Appeal PA17-170.

[8] Order MO-1519, which quoted Sarah Blake, *Administrative Law in Canada*, 3rd ed (Butterworth's, 2001) at 106.

[9] *Mary-Helen Wright Law Corporation v British Columbia (Human Rights Tribunal)*, 2018 BCSC 912 at para 15; *Envirocon Environmental Services, ULC v Suen*, 2018 BCSC 1367 at para 87; and *Arsenault-Cameron v. Prince Edward Island*, 1999 CanLII 641 (SCC).

> …the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly.
>
> …
>
> *The grounds for this apprehension must, however, be substantial*, and I … refuse to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience". [emphasis added]

[45] As noted above, the appellant alleges biased or reasonable apprehension of bias on my part due to my not considering his argument that the college did not provide him with reason(s) for its decision on his correction request for Appeal PA17-170.

[46] I have considered the appellant's representations made in his emails of December 8, 2020, December 9, 2020, December 17, 2020, December 24, 2021 and January 4, 2021.

[47] In these circumstances, the appellant has simply stated his disagreement with my order in Appeal PA17-170. However, this is not sufficient to establish any reasonable apprehension of bias in my adjudication of Appeal PA17-171. Without providing any evidence of bias or reasonable apprehension of bias on my part in the adjudication of this appeal, I find that the appellant has not met his burden on this issue. I find that an informed person, viewing this matter realistically and practically, and having thought the matter through, would not reasonably apprehend there has been bias in my adjudication of Appeal PA17-171. As such, I dismiss the appellant's bias allegation with respect to this appeal.[10]

Preliminary issue: The appellant's *Charter* claim

[48] The appellant advised during mediation that he believes his rights under the *Charter* have been violated. As he has not provided any submissions, it is difficult to know which *Charter* rights or freedoms he believes might apply or have been infringed upon in the context of his access request. He also has not provided any evidence or argument to support his claim that his *Charter* rights or freedoms have been violated.

[49] Moreover, section 12 of the IPC's *Code of Procedure* requires that the appellant

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[10] I will address the appellant's allegation and arguments of bias in the context of Appeal PA17-170 in my reconsideration order for that appeal.

provide notice to the IPC and the Attorneys General of Canada and Ontario that he is raising a constitutional question. In this case, the appellant has not provide such notice.

[50] Accordingly, from the circumstances in this appeal, I find that I have insufficient evidence before me to even entertain the Charter violation claim, let alone conclude that the appellant's *Charter* rights have been infringed upon by the application of the *Act*. As a result, I dismiss the appellant's *Charter* claim.

Preliminary issue: The relevance, if any, of section 64(1) in the circumstances of this appeal

[51] The appellant raised the application of section 64(1).

[52] Sections 64(1) and (2) state:

> (1) This Act does not impose limitation on the information otherwise available by law to a party to litigation.
>
> (2) This Act does not affect the power of a court or a tribunal to compel a witness to testify or compel the production of a document.

[53] These sections work in conjunction with each other to ensure that the prohibitions against disclosure in the *Act* do not act as a barrier to prevent personal information from being available for use as evidence in a proceeding before a court or tribunal where, but for the provisions of the *Act*, such information would otherwise be available.

[54] Section 64(1) neither creates a substantive right of access nor does it result in a finding that information is exempt under the *Act*.

[55] In this case, as noted above, the appellant has not provided any submissions regarding the application of this section. As such, I decline to comment further on the application of this section to the circumstances in this appeal.

Issue A: Did the head of the college properly delegate authority in the circumstances of this appeal?

[56] The appellant claims that the head of the college did not properly delegate their authority to the named Manager, Talent Acquisition and Labour Relations (the manager) who responded to the appellant's access request under the *Act*.

[57] Under Regulation 460, the head of colleges of applied arts and technology is the Chair of the Board. The college acknowledges that the Chair of the Board of Governors (Board Chair) is responsible for delegating authority to officers of the college to respond to access requests.

[58] Prior to May 2017, the President and Chief Executive Officer (CEO) of the college delegated his authority to the manager. The college and the manager erroneously

thought that the power to delegate authority was properly provided by the college's President and CEO. However, once it became apparent that the Board Chair was required to delegate this authority, the college took immediate step to ensure that the manager was properly delegated.

[59] The college submits that to ensure there would be no issues with respect to delegation in this matter, the manager reassessed the appellant's access requests after obtaining delegated authority from the Board Chair. It explains that the manager then re-issued the decision letters she had previously sent to the appellant regarding his access requests.

[60] The college relies on Order MO-3434-I for the principle that in situations where an individual has made a decision regarding an access request without delegated authority, this office has remedied the situation by ordering the institution to provide a supplemental decision following the proper delegation of authority. As such, the college submits that, in the event it is deemed that the manager did not have delegated authority to make the initial decision, the appropriate remedy to issue a new decision has already been done.

[61] The provisions of the *Act* relating to designations as "head" and to delegations of authority by a head, are as follows:

> 2(1) "head", in respect of an institution, means,
>
> > …
> >
> > (b) in the case of any other institution, the person designated as head of that institution in the regulations;
>
> 62(1) A head may in writing delegate a power or duty granted or vested in the head to an officer or officers of the institution or another institution subject to such limitations, restrictions, conditions and requirements as the head may set out in the delegation.

[62] I accept that pursuant to the Board Chair's delegation of authority, signed on May 17, 2017, and enclosed with the college's representations, the Board Chair properly delegated their authority under the *Act* to the CEO and to the manager.

[63] Although the college's initial decisions were issued without delegated authority, I find that this defect was cured by the subsequent proper delegation followed by a reissuance of the access decisions. Accordingly, I find that this issue has been properly addressed by the college.

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

[64] In order to determine whether section 49(b) of the *Act* applies to the images of the individuals in the video clips other than the appellant, it is necessary to decide

whether the records contain "personal information" and, if so, to whom it relates.

[65] The relevant paragraphs of the definition of "personal information" in section 2(1) are the following:

> "personal information" means recorded information about an identifiable individual, including,
>
> > (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
> >
> > (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

[66] 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.[11]

[67] Sections 2(2.1) and (2.2) also relate to the definition of personal information. These sections state:

> (2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[68] 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.[12]

[69] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[13]

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[11] Order 11.
[12] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[13] Orders P-1409, R-980015, PO-2225 and MO-2344.

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

[71] The college submits that the records contain the personal information of the appellant and several other individuals. It submits that much of the personal information in the records is about individuals in a personal capacity, such as students or visitors to the college.

[72] In addition, the college submits that some of the video clips include the personal information of individuals in their place of work. With respect to these individuals, it submits that the information reveals something of a personal nature as it is capable of portraying their race, color, age and/or sex.

[73] In the alternative, the college submits that if it is determined that the video clips do not include the personal information of its employees, it is still justified in blurring their faces when disclosing the video clips. Each of the video clips contain several individuals including the appellant, other students and employees of the college. The college submits that it would be impractical and highly inefficient for it to go through each video clip and try to identify which individuals were employees and which individuals were students. As a result, it submits that, to ensure that the personal information of students and visitors was not disclosed, all individuals' faces were blurred except for those of the appellant.

[74] On my review of the records, I find that they contain images of identifiable individuals and the appellant. Previous decisions from this office have found that clips from video surveillance cameras contains the "personal information" of the individuals appearing in the videos in their personal capacity.[15] With respect to video clip #5, the video clip simultaneously shows the appellant walking in or around the front entrance/reception area of the college with various individuals walking in or around this area. With respect to video clip #6a, the video clip simultaneously shows the appellant speaking to an individual at the bridge entrance with some individuals walking in and out of the South Building Main Campus while the video clip #6b shows the appellant and other individuals at the bridge exterior. In my view, these video clips contain the personal information of both the appellant and other identifiable individuals.

[75] Moreover, it is unclear from the records that any of the identifiable individuals are college employees, except for the individual the appellant is speaking to in video clip #6a. Although this individual is a college employee, I find that her image is her personal information as it reveals something of a personal nature about her in this

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

[15] See *Privacy and Video Surveillance in Mass Transit Systems: A Special Investigation Report - Privacy Investigation Report* MC07-68; Privacy Complaint Reports MC10-2, MC13-46 and MC13-60 and Orders MO-1570, PO-3510, MO-3238, and MO-3349.

context. I am unable to state anything further without disclosing personal information about this individual. Absent any clear evidence that any of these identifiable individuals are appearing in the video clips in their professional capacity, I find that all these individuals' images are their personal information.

[76] Having found that the records contain the personal information of the appellant and other individuals, I will now determine whether the discretionary exemption in section 49(b) applies to the personal information (the individuals' faces) the college withheld from disclosure.

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

[77] Since I found that the records contain the personal information of the appellant, section 47(1) of the *Act* applies to the appellant's access request. Section 47(1) gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

[78] Under section 49(b), where a record contains personal information of both the appellant 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 appellant.[16]

[79] 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).

[80] 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.[17] 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).

[81] 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.[18] 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

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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 38(b).
[17] Order MO-2954.
[18] Order P-239.

under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2).[19]

Analysis and findings

[82] The college claims that the personal information at issue falls within the scope of the factor at section 21(2)(h) and the presumption at section 21(3)(d).

[83] Sections 21(2)(h) and 21(3)(d) read:

> (2) 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,
>
> > (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > (d) relates to employment or educational history;

[84] With respect to the factor in section 21(2)(h), the college submits that the individuals who are the subjects in the video footages are entitled to trust that the information collected will be used for the limited purpose of ensuring the security of the facility and will not enter the public domain.

[85] The college notes that its Video Surveillance Policy identifies that information obtained through video surveillance is used exclusively for security and law enforcement purposes and will only be used for purposes relating to safety of individuals and security of buildings and property. The college submits that individuals attending the college are entitled to rely on this policy for any usage of the video footage.

[86] The college also relies on Order MO-3238, where Adjudicator Steven Faughnan found that passengers on the TTC bus have a reasonable expectation that the surveillance recordings in which they appear will not be used for any purpose beyond bus safety and security.

[87] For the factor in section 21(2)(h) to apply both the individual supplying the information and the recipient must have an expectation that the information will be treated confidentially, and that expectation must be reasonable in the circumstances. Thus, section 21(2)(h) requires an objective assessment of the reasonableness of any

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[19] Order P-99.

confidentiality expectation.[20]

[88] In my view, in the circumstances of this appeal, the identifiable individuals have a reasonable expectation that the surveillance video clips in which they appear will not be used for any purpose beyond safety and security. As such, I find that this is a significant factor weighing against disclosure of the personal information of identifiable individuals that is contained in the video clips.

[89] With respect to the possible application of the presumption in section 21(3)(d), I am not satisfied that disclosure of the individuals' faces would constitute disclosure of personal information related to educational history. Past orders of this office have addressed the application of this presumption against disclosure and have determined that, to qualify as "employment or educational history," the information must contain some significant part of the history of the person's employment or education. What is or is not significant must be determined based on the facts of each case.[21] In this case, simply due to the facts that the video surveillance clips are of an educational institution and some of the individuals in the videos are students does not make this presumption applicable in the circumstances. As such, I do not accept that the section 21(3)(d) presumption applies to the personal information at issue.

[90] As mentioned above, the appellant did not provide any representations.

[91] On my review of the listed factors in section 21(2), which favour disclosure, I do not find that any of them applies in this appeal. Clearly disclosure of the individual's faces do not subject the activities of the Government of Ontario and its agencies to public scrutiny, promote public health and safety, nor promote informed choice in the purchase of goods or services (especially as there are no purchase of goods or services in this matter). Although the factor in section 21(2)(d) (fair determination of rights) may apply, absent any evidence or submissions from the appellant to the contrary, I am unable to determine whether this factor does apply. As well, on my review, I do not find that any unlisted factors, which favour disclosure, applies.

[92] Since I find that there are no factors favouring disclosure (listed and unlisted) that would outweigh the factor in section 21(2)(h) (which favours privacy protection under the *Act*), I find that disclosure of the personal information in the record would be an unjustified invasion of the individuals' personal privacy and thus section 49(b) applies to it.

Issue D: Did the college exercise its discretion under section 49(b)? If so, should this office uphold the exercise of discretion?

[93] The section 49(b) exemption is discretionary, and permits an institution to

[20] Order PO-1670.
[21] Order M-609, MO-1343.

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.

[94] 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.

[95] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[22] This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

[96] The college submits that it properly exercised its discretion. In coming to its decision to release the video clips with the faces of individuals blurred, the college submits that it was mindful of the following factors:

- information should be available to the public
- individuals should have a right of access to their own personal information
- the privacy of individuals should be protected

[97] The college also submits that it weighed the rights of the appellant with the rights of the other individuals in the video clips and determined that the best course of action was to provide the video clips with the faces of the other individuals blurred.

[98] In addition, it submits that its exercise of discretion was for no improper purpose and was based on the consideration of the rights of the other individuals in the video clips.

[99] Based on my review of the college's representations and the records, I find that the college properly exercised its discretion. I find that the college took into account the above-noted three factors. It also appears that the college took into consideration the access rights of the appellant and the privacy rights of the other identifiable individuals. I am satisfied that the college did not act in bad faith or for an improper purpose in exercising its discretion. I am also satisfied from my review of the college's representations that the college took into account the fact that the records contain the personal information of the appellant. Accordingly, I uphold the college's exercise of

[22] Order MO-1573.

discretion in deciding to blur the faces of the other individuals in the video clips pursuant to section 49(b).

Issue E: Is there a compelling public interest in disclosure of the personal information at issue that clearly outweighs the purpose of the section 49(b) exemption?

[100] The appellant takes the position that there is a compelling public interest in the disclosure of the faces of the other individuals in the video clips. I have found that this personal information qualifies for exemption under section 49(b). As a result, I will consider the possible application of section 23 of the *Act* to the personal information.

[101] Section 23 states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, **21** and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[102] Here, the personal privacy exemption under which the ministry withheld information is section 49(b), not section 21. In Order P-541,[23] the adjudicator found that although the public interest override provision in section 23 does not refer to the exemptions in sections 49(a) and (b), they should be read in. She stated:

> In my view, where an institution has properly exercised its discretion under section 49(b) of the *Act* … an appellant should be able to raise the application of section 23 in the same manner as an individual who is applying for access to the personal information of another individual in which the personal information is considered under section 21. Were this not to be the case, an individual could theoretically have a lesser right of access to his or her own personal information than would the "stranger" …

[103] I agree with this reasoning and will now consider whether section 23 operates to override the section 49(b) exemption in this case.

[104] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[105] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, this office will review the

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[23] Followed in Orders PO-2246, PO-2409 and PO-3073, among others.

records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[24]

Compelling public interest

[106] 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.[25] 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 opinion or to make political choices.[26]

[107] A public interest does not exist where the interests being advanced are essentially private in nature.[27] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[28]

[108] The word "compelling" has been defined in previous orders as "rousing strong interest or attention."[29]

[109] A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation[30]
- the integrity of the criminal justice system has been called into question[31]
- public safety issues relating to the operation of nuclear facilities have been raised[32]
- disclosure would shed light on the safe operation of petrochemical facilities[33] or the province's ability to prepare for a nuclear emergency[34]

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[24] Order P-244.
[25] Orders P-984 and PO-2607.
[26] Orders P-984 and PO-2556.
[27] Orders P-12, P-347 and P-1439.
[28] Order MO-1564.
[29] Order P-984.
[30] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).
[31] Order PO-1779.
[32] Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.) and Order PO-1805.
[33] Order P-1175.

- the records contain information about contributions to municipal election campaigns[35]

[110] A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations[36]

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations[37]

- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding[38]

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter[39]

- the records do not respond to the applicable public interest raised by appellant[40]

Analysis and findings

[111] As noted above, for section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the portions of the records to which section 21(1) has been found to apply. Second, this interest must clearly outweigh the purpose of the exemption for which the information was withheld.

[112] I will first consider whether there is a compelling public interest in disclosure of the exempted personal information. If so, I will go on to consider whether this interest clearly outweighs the purpose of the exemption.

[113] In determining whether a compelling public interest in the disclosure of the exempted personal information exists, I must consider whether the interest being advanced is a public or private interest. As mentioned above, a public interest does not exist where the interest being advanced are essentially private in nature.

[114] The college submits that the appellant's interest in the video clips is completely private in nature. As such, it submits that there is no basis to conclude that there is a public interest in disclose of the exempted personal information.

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[34] Order P-901.
[35] *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.
[36] Orders P-123/124, P-391 and M-539.
[37] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[38] Orders M-249 and M-317.
[39] Order P-613.
[40] Orders MO-1994 and PO-2607.

[115] On my review of the records, I do not find that there is a public interest being advanced. I agree with the college's submissions that the appellant's interest in the exempted personal information is essentially private in nature. The video clips are from video surveillance taken around the college involving the appellant and other students, or visitors. The appellant did not provide representations and I have no evidence to suggest that these recorded images relate to a public interest. Instead, because the records contain images mostly of the appellant, I find that any interest the appellant would have in the withheld information would be private.

[116] Further, on my review of the records, no public interest in the disclosure of the images of other individuals is evident to me. I am not convinced that there is a relationship between the withheld information in the records at issue and the *Act*'s central purpose of shedding light on the operations of government. In this circumstance, I cannot see how the exempted personal information would possibly shed any light on the operations of the college.

[117] Although the appellant may have a compelling private interest in seeking access to the exempted personal information in the records, I find that there is no compelling public interest in disclosure, as required by section 23. Therefore, I find that the public interest override in section 23 does not apply to the exempted personal information in the records.

Issue F: Should the fee be upheld?

[118] Section 57(1) requires an institution to charge fees for requests under the *Act*. That section reads:

> A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,
>
> > (a) the costs of every hour of manual search required to locate a record;
> >
> > (b) the costs of preparing the record for disclosure;
> >
> > (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
> >
> > (d) shipping costs; and
> >
> > (e) any other costs incurred in responding to a request for access to a record.

[119] More specific provisions regarding fees for access to records are found in sections 6.1, 7 and 9 of Regulation 460. Those sections read, in part:

> 6.1 The following are the fees that shall be charged for the purposes of subsection 57(1) of the Act for access to personal information about the individual making the request for access:
>
> 1. For photocopies and computer printouts, 20 cents per page.
>
> 2. For records provided on CD-ROMs, $10 for each CD-ROM.
>
> 3. For developing a computer program or other method of producing the personal information requested from machine readable records, $15 for each 15 minutes spent by any person.
>
> 4. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the personal information requested if those costs are specified in an invoice that the institution has received.
>
> 7. (1) If a head gives a person an estimate of an amount payable under the Act and the estimate is $100 or more, the head may require the person to pay a deposit equal to 50 per cent of the estimate before the head takes any further steps to respond to the request.
>
> (2) A head shall refund any amount paid under subsection (1) that is subsequently waived.
>
> 9. If a person is required to pay a fee for access to a record, the head may require the person to do so before giving the person access to the record.

[120] Where the fee for access to a record exceeds $25, an institution must provide the requester with a fee estimate.[41] Where the fee is $100 or more, the fee estimate may be based on either the actual work done by the institution to respond to the request, or a review of a representative sample of the records and/or the advice of an individual who is familiar with the type and content of the records.[42]

[121] The purpose of a fee estimate is to give the requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access.[43] The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees.[44]

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[41] See section 57(3) of the *Act*.
[42] Order MO-1699.
[43] Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.
[44] Order MO-1520-I.

[122] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.[45]

[123] This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 460.

[124] In its representations, the college submits that its fee estimate and final fee are reasonable and should be upheld. It explains that the college had an existing contract with a specific company, who was contracted to handle any matter related to its video surveillance system. As a result, the college submits that it did not solicit quotes for the facial blurring service and was obligated to utilize the services of this specific company based on the pre-existing contract.

[125] After receiving a quote from the specific company, the college issued an interim decision, which include a fee estimate of $640. This estimate included fees for two hours for search, one hour to sever the records and eight hours required by the specific company for facial blurring. In accordance with section 7(1) of the Regulation, the college requested a 50% deposit and received the amount of $320 from the appellant.

[126] The college then issued a further revised decision as its previous estimates did not include shipping costs and the cost of a flash drive.

[127] The college explains that before a final fee was provided, the appellant contacted the manager and advised that that he had not specifically requested that the college engage the company to edit the video clips and that he should not be charged for that work.

[128] As a result, the college explains that it contacted the specific company and requested a revised quote which would only reflect the work done on the video clips requested. This resulted in the specified company's quote being modified to reflect only five hours of work as opposed to the eight hours originally estimated. Consequently, the college's final fee is the following:

Process	**Rate**	**Time**	**Fee**
Search cost	$30/hour	2 hours	$60.00
Severing records	$30/hour	1 hour	$30.00
Blurring faces	$65/hour plus tax	5 hours	$367.25
Flash drive		1 unit	$10.00

[45] Orders P-81 and MO-1614.

Shipping			$5.33
Total			**$472.58**

[129] The college submits that the appellant was reimbursed approximately $220 and was provided with the video clips requested.

[130] In addition, the college submits that this office has held that costs specified in a quote for services are "costs specified in an invoice" for the purposes of the *Act*'s fee estimate provisions. It relies on Orders MO-2595, MO-2764 and PO-3466.

[131] Finally, the college submits that once the work was completed, it added the invoice to the fees and provided it to the appellant to confirm the cost.

[132] In determining whether to uphold a fee, my responsibility under section 57(3) of the *Act* is to ensure that the fee is reasonable. The burden of establishing the reasonableness of the fee rests with the college. To discharge this burden, the college must provide me with detailed information as to how the fee have been calculated in accordance with the provisions of the *Act*, and produce sufficient evidence to support its claim.

[133] For the reasons that follow, I uphold the college's fee in part. I reduce the fee to $15.33 on the basis that they must be calculated and charged under section 6.1 of the Regulation.

[134] Unlike the fees permitted under section 6 of the Regulation, section 6.1 does not allow an institution to charge an appellant fees for manually searching a record or preparing a record for disclosure. As such, I find that the college is not permitted to charge a fee of $60.00 for searching.

[135] With respect to severing, section 6.1 of the Regulation also does not permit an institution to charge fees for severing a record where the record contains the appellant's personal information. It is undisputed that the video clips contain the appellant's personal information. As such, the fee of $30.00 for severing the records is not permitted.

[136] As stated above, the college utilized a specific company to do the facial blurring of all the individuals' faces excluding the appellant in the video clips. This specific company submitted an invoice of $367.25 for its service.

[137] In my view, the purpose of facial blurring is to remove the individual's face, or to render the individual unidentifiable to the viewer. As such, I would characterize facial blurring as severing.

[138] In Order MO-3852, Adjudicator Marian Sami stated the following about severing records under section 6.1 of Regulation 823 (the municipal equivalent of section 6.1 of the Regulation):

> … This office has repeatedly held that when a fee estimate is based on an invoiced cost, costs can only be upheld for activities that the institution would have been allowed to charge under the *Act*, if performed by the institution's employees.[46] Applying this principle, since the TTC would not be allowed to charge the appellant for costs related to its own employees severing records containing the appellant's personal information, the $120 portion of the fee estimate relating to redacting faces is likewise, not permitted.

[139] I agree with the above reasoning, and similarly here, I find that the college is not permitted to include the $367.25 portion of the fee relating to severing faces, as it would not be allowed to charge the appellant for costs related to its own employees severing records containing the appellant's personal information.

[140] Finally, I find that the fee for the shipping cost and flash drive is permitted under section 57(1)(d) of the *Act* and section 6.1(2) of the Regulation respectively. As such, I uphold those fees.

[141] In sum, I uphold the college's fee, in part. As I found that the *Act* does not permit the college to charge a fee for search and severing of the records, I do not uphold those fees. As such, I will order the college to reimburse the appellant $457.25.

Issue G: Should the fee be waived?

[142] Section 57(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. Section 8 of Regulation 460 sets out additional matters for a head to consider in deciding whether to waive a fee. Those provisions state:

> 57. (4) A head shall waive the payment of all or any part of an amount required to be paid under subsection (1) if, in the head's opinion, it is fair and equitable to do so after considering,
>
> > (a) the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);
> >
> > (b) whether the payment will cause a financial hardship for the person requesting the record;
> >
> > (c) whether dissemination of the record will benefit public health or safety; and
> >
> > (d) any other matter prescribed by the regulations.

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[46] Orders P-1536, PO-2214, M-1090, and MO-2154.

> 8. The following are prescribed as matters for a head to consider in deciding whether to waive all or part of a payment required to be made under the Act:
>
> > 1. Whether the person requesting access to the record is given access to it.
> >
> > 2. If the amount of a payment would be $5 or less, whether the amount of the payment is too small to justify requiring payment.

[143] The fee provisions in the *Act* establish a user-pay principle which is founded on the premise that requesters pay the prescribed fees associated with processing a request unless it is fair and equitable that they not do so. The fees referred to in section 57(1) and outlined in section 6 of Regulation 460 are mandatory unless the requester can present a persuasive argument that a fee waiver is justified on the basis that it is fair and equitable to grant it or the *Act* requires the institution to waive the fees.[47]

[144] A requester must first ask the institution for a fee waiver, and provide detailed information to support the request, before this office will consider whether a fee waiver should be granted. This office may review the institution's decision to deny a request for a fee waiver, in whole or in part, and may uphold or modify the institution's decision.[48]

[145] The institution or this office may decide that only a portion of the fee should be waived.[49]

Representations

[146] The college submits that the factors listed in the *Act* and the Regulation do not support granting the appellant a fee waiver.

[147] With respect to financial hardship, the college submits that the appellant did not provide any financial information to establish that payment of the fee would cause him a financial hardship.

[148] With respect to the remaining factors set out in the *Act* and the Regulation, the college submits that the appellant has not satisfied any of them. It submits that the records do not relate to public health or safety. The college also submits that the appellant has been granted access to the records. It finally submits that the fee estimate is well in excess of the minimum $5 threshold.

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[47] Order PO-2726.
[48] Orders M-914, P-474, P-1393 and PO-1953-F.
[49] Order MO-1243.

[149] As stated above, the appellant did not provide any representations. As such, it is difficult to understand how paying the fee would cause him financial hardship or if he relies on any of the other factors at section 57(4) for his fee waiver request. However, in the college's decision letter responding to his fee waiver request,[50] the college sets out his submission as follows:

> Because of the…, I was denied job. I have no income at this time. The payment can cause me financial hardship. Under section 57(4) of the *Act*, I would like to request Lambton College to waive those fees.

Analysis and findings

[150] For a fee waiver to be granted under section 57(4), I must consider whether any waiver would be "fair and equitable" in the circumstances.[51] Factors that must be considered in deciding whether it would be fair and equitable to waive the fees include:

- actual cost in comparison to the fee[52]
- financial hardship[53]
- public health or safety[54]
- any other matter prescribed in the regulation

[151] As noted above, the appellant's request for fee waiver to the college is based primarily on the "financial hardship" factor at section 57(4)(b) for a fee waiver.

[152] Based on my review of the college submission and the appellant's request to the college, I find that the appellant has not established that payment of $15.33[55] will cause him financial hardship. The appellant did not provide any evidence, such as income (or lack thereof), expenses, assets and liabilities, to the college nor to this office. As such, I do not have a fulsome picture of his financial circumstances except for his bald statement that he has no income. As a result, I find that the appellant has not established that paying the fee would cause him financial hardship.

[153] The appellant does not raise or rely on any of the other factors in section 57(4) of the *Act*, and I find that none apply in favour of a fee waiver. For example, there is no evidence to demonstrate that the dissemination of the records will benefit public health

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[50] College's decision letter of June 19, 2017, attached as Exhibit "7" to the Affidavit of the manager.
[51] See *Mann v. Ontario (Ministry of the Environment)*, 2017 ONSC 1056.
[52] Section 57(4)(a) of the *Act*.
[53] Section 57(4)(b) of the *Act*.
[54] Section 57(4)(c) of the *Act*.
[55] This is a revised fee amount due to my above finding that the college is not permitted to charge for severing and searching for records.

or safety.

Other considerations

[154] Other relevant factors must also be considered when deciding whether or not a fee waiver is "fair and equitable," including:

- the manner in which the institution responded to the request;
- whether the institution worked constructively with the requester to narrow and/or clarify the request;
- whether the institution provided any records to the requester free of charge;
- whether the requester worked constructively with the institution to narrow the scope of the request;
- whether the request involves a large number of records;
- whether the requester has advanced a compromise solution which would reduce costs; and
- whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution.[56]

[155] With respect to other relevant factors, the college submits that it has at all times worked constructively with the appellant to try and provide him with all of the information he requested. It also submits that it has engaged with a mediator and the appellant in an effort to provide access to any and all information that he requested. Despite these efforts, the college submits that the appellant has continued to ask for records not included in his original request and raised new issues throughout the process. As such, the college has been forced to incur expenses well beyond those that it has charged as a fee in order to produce the records requested.

[156] On my review of the records and the relevant factors listed above, I am not satisfied that it would be fair and equitable for the college to grant the appellant a fee waiver based on any of the considerations listed above or any other relevant consideration. I note that the request involved a large number of records and, in particular, a number of different type of records.

[157] In addition, I accept the college's submissions that a fee waiver would shift an unreasonable burden of the cost from the appellant to the college. In my view, the appellant has not provided any sufficiently persuasive explanation for why the college

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[56] Orders M-166, M-408 and PO-1953-F.

ought to bear the full cost of processing his request while he should bear none. I also accept the college's submissions that it has been forced to incur expenses beyond those that it has charged as a fee in order to produce the records requested. I accept the college's submissions that the appellant has continued to ask for records not included in his original request. I am also not satisfied that this is an appropriate case to order a partial fee waiver.

Issue H: Did the college conduct a reasonable search for records?

[158] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24.[57] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[159] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[58] To be responsive, a record must be "reasonably related" to the request.[59]

[160] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[60]

[161] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[61]

[162] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[62]

[163] The college submits that it conducted a diligent, thorough and complete search in response to the appellant's request. In support of its assertion, the college attached an affidavit sworn by the manager, who has been actively involved in responding to the appellant's access request.

[164] With respect to the sound recordings, the affiant states that she had a meeting

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[57] Orders P-85, P-221 and PO-1954-I.
[58] Orders P-624 and PO-2559.
[59] Order PO-2554.
[60] Orders M-909, PO-2469 and PO-2592.
[61] Order MO-2185.
[62] Order MO-2246.

with employees in the IT and Facilities Management department in February 2017 to determine if the sound recordings could be located. During this meeting, she was advised that the college did not record any telephone calls or conferences and, therefore, the sound recordings requested did not exist.

[165] With respect to the plans, the affiant states, after notifying an affected party about their personal information in them, the college provided partial access to the plans.

[166] With respect to the electronic recordings, the affiant states that she contacted all college employees named in the access request, in addition to other employees who may have relevant emails. She advised that she requested the employees to provide the specific records identified in the access request and provided guidance to the individuals on steps to take in searching their emails (which included ensuring that they searched any and all of their devices). The affiant also advised that once the employees provided her with the emails that were located, she followed up with the IT department and asked them to conduct a search for any remaining emails that the employees were unable to find. She states that the IT department conducted a broad sweep and a forensic search but were unable to locate any further records. She finally notes that the IT manager advised that the college did not have any offsite storage areas that needed to be searched.

[167] The affiant advised that, after receiving the decision letter about the emails, the appellant contacted her and identified several email records that he thought existed but were not provided to him. She advised that she followed up with several employees and confirmed that these records did not exist and/or were not part of his access request.

[168] With respect to the video recordings, the affiant advised that she consulted with the Facilities Management Department, as they are the custodian of the college's video records. The Facilities Management Department informed her that college's Video Surveillance Procedure outlines that video recordings are only retained for a period of between 7 and 14 days, unless used for one of the identified purposes of safety or investigation. She advised that she informed the appellant that the majority of the video clips requested were destroyed in accordance with the Video Surveillance Policy. The affiant advised that the only reason why the two video clips were available (to be identified as responsive records) was because they were retained as per the college's retention policy. The policy requires the video clips to be retained for one year as they were used for investigative and evidentiary purposes with respect to a hearing involving the appellant.

[169] Based on my review of the college's evidence, I find that the college has conducted a reasonable search for responsive records relating to the appellant's request. I note that the college determined that no clarification of the appellant's request was required, prior to conducting its search. I find that the appellant has not provided me with a reasonable basis for concluding that additional records exist. As stated above, although the *Act* does not require the college to prove with absolute certainty that further records do not exist, I am satisfied in this circumstances that none

exist. In the circumstances, I am also satisfied that the college provided sufficient evidence to demonstrate that it made a reasonable and concerted effort to address the appellant's request and locate all records reasonably related to the request. Therefore, I uphold the college's search for responsive records.

ORDER:

1. I uphold the college's application of section 49(b).
2. I otherwise uphold the college's fee, in part, and fee waiver.
3. I finally uphold the college's search.
4. I order the college to reimburse the appellant $457.25 as a result of my findings on the fee issue.

Original Signed by: March 26, 2021

Lan An
Adjudicator