

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4231

Appeal PA19-00500

Algonquin College of Applied Arts and Technology

February 2, 2022

Summary: This order resolves an appeal involving the Algonquin College of Applied Arts and Technology (the college) and an individual who made an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for all information relating to him as a student and the college's security services during a certain time period. The college disclosed most responsive records to the appellant, but fully withheld four records from disclosure under the discretionary exemptions at section 49(a) (discretion to refuse requester's own information) read with section 20 (danger to health or safety), and at section 49(b) (personal privacy) of the *Act*. The appellant appealed the college's decision to withhold the records initially located and withheld under those exemptions, and those later located and withheld under the same exemptions. During the inquiry, he also raised the reasonableness of the college's search in relation to a recording, which the college later located and disclosed to him. In this order, the adjudicator upholds the college's decision to withhold the records under section 49(b) and the reasonableness of the college's search, and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2 (definition of personal information), 21(1), 24, and 49(b).

Orders Considered: Orders P-1535, PO-2642, PO-3740 and MO-1453.

OVERVIEW:

[1] The Algonquin College of Applied Arts and Technology (the college) received an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following records:

[...] all information regarding me, [name of requester], and copies of any documents, recordings, emails, notes, or logs containing, or referring to my name and/or my student number [specified number]. The time-frame for the information being requested is [a specified date] until such time as your search is completed. The search for all information should be limited to all members of security at the college and the Department of Security at the college.

[2] The college conducted a search for records responsive to the request, and issued a decision granting access to some records and denying access to others. The college withheld records under the discretionary exemptions at section 49(a) (discretion to refuse requester's own information) read with section 20 (danger to health or safety), and at section 49(b) (personal privacy) of the *Act*.

[3] The requester, now the appellant, appealed the college's decision to the Information and Privacy Commissioner of Ontario (the IPC). A mediator was appointed to explore possible resolution.

[4] During mediation, the college conducted another search for records responsive to the appellant's request, and located additional records. It then issued a revised access decision letter, denying access to the newly located records under sections 49(a) read with section 20, and 49(b) of the *Act*. The appellant informed the mediator that he wanted the appeal to proceed to adjudication so that he could gain access to all of the withheld records.

[5] Since no further mediation was possible, the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct a written inquiry.

[6] The adjudicator initially assigned to this appeal began an inquiry under the *Act* by inviting the college to provide written representations on the facts and issues set out in a Notice of Inquiry. She then invited the appellant to provide representations in response to the non-confidential portion of the college's representations and the Notice of Inquiry. Portions of the college's representations were not shared for confidentiality concerns, under *Practice Direction 7* of the IPC's *Code of Procedure*. The appellant provided representations in response, which included statements about a specific record that had not been provided to the appellant. The adjudicator invited the college to reply to the appellant's representations, including on the issue of the reasonableness of the college's search. The college provided representations and affidavit evidence in response. The appellant was given an opportunity to respond, and provided further representations. The appeal was then transferred to me to continue the adjudication. On my review of the parties' representations, I determined that no further representations were needed and I closed the inquiry.

[7] For the reasons that follow, I uphold the college's access decision and the

reasonableness of its search, and dismiss the appeal.

RECORDS:

[8] There are four records at issue in this appeal: two incident reports (records 1 and 4) and two constables' hand-written notes (records 2 and 3). Each record was withheld, in full, under section 49(b), and section 49(a) read with section 20 of the *Act*. I will not specify the dates of the incident reports or the names of the constables involved in this public order, to minimize the possibility of identification of individuals involved in the incidents.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?
- B. Does the discretionary personal privacy exemption at section 49(b) apply to the information at issue?
- C. Did the college exercise its discretion under sections 49(b)? If so, should the IPC uphold the exercise of discretion?
- D. Did the college conduct a reasonable search for records?

DISCUSSION:

Issue A: Do the records contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

[9] In order to decide which sections of the *Act* may apply to a specific case, the IPC must first decide whether the record contains "personal information," and if so, to whom the personal information relates. For the reasons that follow, I find that the records at issue contain the personal information of the appellant and of other identifiable individuals.

Background information

[10] By way of background, the college states that it has a Security Services program to ensure the security and protection of staff, students, and the college's assets on a 24-hour per day basis. It explains that this security program provides services and consultation about emergency response, criminal investigations, key control, risk assessments, electronic security systems design and application, crime prevention awareness and training, and crisis intervention.

[11] According to the college, the appellant was a student at the college and during that time, he was identified as a "subject of interest" in two separate incidents involving Security Services, both of which were violations of the college's Student Conduct Policy. The college states that, according to its standard practice, these incidents were recorded in separate incident reports. These reports are described as containing accounts of the incidents, recorded by Security Services employees, and as described by the victims, witnesses, and Security Services officers who responded to the incidents.

[12] In response to the appellant's request, the college identified several records, most of which have been fully disclosed to the appellant. As mentioned, the four records at issue are two incident reports and the handwritten notes of two security constables. The college states that record 1 relates to the first incident, and records 2-4 relate to the second. With this background, I turn to the question of whether these records contain personal information, below.

What is "personal information"?

[13] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual."

Recorded information

[14] "Recorded information" is information recorded in any format, such as paper records, electronic records, digital photographs, videos, or maps.¹

About

[15] Information is "about" the individual when it refers to them in their personal capacity, which means that it reveals something of a personal nature about the individual. Generally, information about an individual in their professional, official or business capacity is not considered to be "about" the individual.² See also sections 2(3) and 2(4), which state:

(3) 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.

(4) For greater certainty, subsection (3) 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.

¹ See the definition of "record" in section 2(1).

² Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

[16] In some situations, even if information relates to an individual in a professional, official or business capacity, it may still be "personal information" if it reveals something of a personal nature about the individual.³

Identifiable individual

[17] Information is about an "identifiable individual" if it is reasonable to expect that an individual can be identified from the information either by itself or if combined with other information.⁴

What are some examples of "personal information"?

[18] Section 2(1) of the *Act* gives a list of examples of personal information:

"personal information" means recorded information about an identifiable individual, including,

. . .

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual [. . .],

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, [. . .] of the individual,

(e) the personal opinions or views of the individual except if they relate to another individual,

. . .

(g) the views or opinions of another individual about the individual, and

(h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

[19] The list of examples of personal information under section 2(1) is not a complete list. This means that other kinds of information could also be "personal information."⁵

³ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁴ Order PO-1880, upheld on judicial review in Ontario (Attorney General) v. Pascoe, [2002] O.J. No. 4300 (C.A.).

⁵ Order 11.

Statutory exclusions from the definition of "personal information"

[20] Sections 2(2), (3) and (4) of the *Act* exclude some information from the definition of personal information. Sections 2(3) and (4) are described above. Section 2(2) states that personal information does not include information about an individual who has been dead for more than thirty years.

Whose personal information is in the record?

[21] It is important to know whose personal information is in the record. If the record contains the requester's own personal information, their access rights are greater than if it does not.⁶ Also, if the record contains the personal information of other individuals, one of the personal privacy exemptions might apply.⁷

The parties' positions

The college's position

[22] The college submits that the records contain the personal information of the appellant and that of other identifiable individuals who were students at the college.

[23] The college submits that the records contain the appellant's name, student number, and other personal information about the appellant.

[24] In addition, the college submits that the records contain information about the impact of the appellant's actions on other identifiable students at the college (affected parties) in the form of their accounts of the facts leading up to the incidents, as well as their names, student numbers, and personal contact information (in some cases).

[25] The college relies on Order PO-3740, which was upheld on judicial review,⁸ in support of its position that the affected parties' summary of events includes their views and/or opinions about the events, and that such a summary is itself the personal information of an affected party providing it. The college also points to Order MO-1453 where, the college submits, the adjudicator considered the context in which the record at issue had been created as a relevant factor in determining that the information about the impact of the incident was the personal information of the affected party. Relying on these orders, the college submits that, in this appeal, the information that the affected parties shared with the college came about in the context of these victims or witnesses seeking assistance from the college's Security Services program in addressing the behavior of the appellant and other individuals. The college submits that this context, in and of itself, reveals the views and/or opinions of the affected parties about

⁶ Under sections 47(1) and 49 of the *Act*, a requester has a right of access to their own personal information, and any exemptions from that right are discretionary, meaning that the institution can still choose to disclose the information even if the exemption applies.

⁷ See sections 21(1) and 49(b).

⁸ *Brassard v. Carleton University*, 2018 ONSC 7496.

the impact of the appellant's behavior, since the result was these concerns being brought to Security Services or the appellant being identified as a "subject of interest."

[26] Furthermore, the college explains that the appellant was not the primary "subject of interest" in one of the incidents, but his behavior was ancillary to the complaint that led to the investigation, and that he was incorrectly identified as another student. Therefore, some of the accounts in the associated incident report contain the personal information of another individual with no connection to the incidents (an error was later corrected after statements had been taken).

[27] The college states that if it were to sever the records and only disclose the portions that contain the appellant's personal information, the appellant would be left with records that state nothing more than his name, student number, and contact information.

The appellant's position

[28] The appellant's representations broadly speaking, address various aspects of his history as a student at the college and describe his relationships with others, as well as his views about how Security Services handled the alleged incidents. He also submits that it is unfair that accusations are made about him but that he is not allowed to see them. Implicit in these representations is the appellant's position that the records contain personal information relating to him, including views or opinions expressed by others.

[29] The appellant also submits that any records containing the personal information of other individuals may be redacted such that the personal information of others is withheld, while the remainder of the record is disclosed.

Analysis/findings

[30] Based on my review of the records and the representations of the parties, I find that each record contains "personal information," as that term is defined in section 2(1) of the *Act*, relating to the appellant and other identifiable individuals (affected parties), including, but not limited to, students.

[31] The records contain, for example, names, student numbers, contact information, dates of birth, and/or views or opinions of the appellant and/or affected parties. This is the personal information of these identifiable individuals under paragraphs (b), (c), (d), (e), (g), and/or (h), listed above, in the definition of personal information at section 2(1) of the *Act*. I find that it is reasonable to expect that each of these individuals may be identified from the information in the records.

[32] In addition, I am satisfied that this information is about individuals in a personal capacity, even if, in some cases, the information appears in a professional context because, in my view, it is information that reveals some of a personal nature about one

or more affected parties.

[33] I also find that the *fact of* the involvement of any of these individuals in investigations in alleged incidents is itself “personal information” under the introductory wording of the definition of “personal information” (“recorded information about an identifiable individual”). So too is the described impact of incidents on affected parties, and the fact that this impact led to the creation of the records themselves, is itself personal information of the affected parties. Furthermore, I find that personal information of the affected parties in the records is inextricably linked to the personal information of the appellant based on my review of the records and the representations of the parties, in the particular circumstances of this appeal. The college is not required to redact the records and disclose portions where to do so would only reveal the appellant’s name, student number, contact information, and otherwise scattered, meaningless “snippets” of information consisting of the professional information of the Security Services personnel found in the records.⁹

[34] Since each record at issue contains the personal information of the appellant, I must assess any right of access he may have to the personal information withheld belonging to him and other individuals under the discretionary exemptions at section 49(a) and 49(b) of the *Act*. Given my findings, below, that the records are exempt under section 49(b), it is not necessary for me to also consider whether the records are exempt under section 49(a), read with section 20.

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

[35] The college withheld the records under the discretionary personal privacy exemption at section 49(b), and for the reasons that follow, I uphold that decision.

[36] Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides some exemptions from this right.

[37] Under the section 49(b) exemption, if a record contains the personal information of both the requester and another individual, the institution may refuse to disclose the other individual’s personal information to the requester if disclosing that information would be an “unjustified invasion” of the other individual’s personal privacy.

[38] The section 49(b) exemption is discretionary. This means that the institution can decide to disclose another individual’s personal information to a requester even if doing

⁹ See Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)*, (1997), 192 O.A.C. 71 (Div. Ct.).

so would result in an unjustified invasion of the other individual's personal privacy.¹⁰

[39] If disclosing another individual's personal information would not be an unjustified invasion of personal privacy, then the information is not exempt under section 49(b).

[40] Also, the requester's own personal information, standing alone, cannot be exempt under section 49(b) as its disclosure could not, by definition, be an unjustified invasion of another individual's personal privacy.¹¹

Would disclosure be "an unjustified invasion of personal privacy" under section 49(b)?

[41] Sections 21(1) to (4) provide guidance in deciding whether disclosure would be an unjustified invasion of the other individual's personal privacy.

Section 21(1) – do any of the exceptions in sections 21(1)(a) to (e) apply?

[42] If any of the exceptions in section 21(1)(a) to (e) apply, disclosure would not be an unjustified invasion of personal privacy and the information is not exempt from disclosure under section 49(b).

[43] The appellant did not argue that any of these exceptions in section 21(1) apply, and I find no basis for finding that any of them do.

Sections 21(2), (3) and (4)

[44] Sections 21(2), (3) and (4) also help in deciding whether disclosure would or would not be an unjustified invasion of personal privacy under section 49(b).

[45] Section 21(4) lists situations where disclosure would *not* be an unjustified invasion of personal privacy, in which case it is not necessary to decide if any of the factors or presumptions in sections 21(2) or (3) apply. If any of the paragraphs in section 21(4) of the *Act* apply, disclosure of personal information is *not* an unjustified invasion of personal privacy under section 49(b), even if one of the section 21(3) presumptions exists. The parties do not suggest that any of the situations listed in section 21(4) apply, and I find no basis for finding that any are relevant to the circumstances of this appeal.

[46] Otherwise, in deciding whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 49(b), the decision-maker¹² must consider and weigh the factors and presumptions in sections

¹⁰ See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's exercise of discretion under section 49(b).

¹¹ Order PO-2560.

¹² The institution or, on appeal, the IPC.

21(2) and (3) and balance the interests of the parties.¹³

Section 21(3) - is disclosure presumed to be an unjustified invasion of personal privacy?

[47] Sections 21(3)(a) to (h) list several situations in which disclosing personal information is presumed to be an unjustified invasion of personal privacy under section 49(b).

[48] The college submits that section 21(3)(b) applies.

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

[49] This presumption requires only that there be an investigation into a *possible* violation of law.¹⁴ So, even if criminal proceedings were never started against the individual, section 21(3)(b) may still apply.¹⁵

[50] The presumption can apply to different types of investigations, including those relating to by-law enforcement,¹⁶ and enforcement of environmental laws,¹⁷ occupational health and safety laws,¹⁸ or the Ontario *Human Rights Code*.¹⁹

[51] The presumption does not apply if the records were created after the completion of an investigation into a possible violation of law.²⁰

[52] Here, the college submits that in Order PO-3740, "the IPC noted that a record created in the context of an investigation by a university security department was created during an investigation into a possible violation of law, therefore s. 21(3)(b) applied and the disclosure was presumed to be an unjustified invasion of privacy." The college submits that the same circumstances are present in this appeal, and that section 21(3)(b) applies "such that the records cannot be disclosed without violating the personal privacy of the affected parties."

[53] The appellant did not address section 21(3)(b) in his representations.

[54] Based on my review of the records and the college's representations, I find that the personal information at issue was compiled and is it identifiable as part of an investigation into a possible violation of law, relating to two incidents that the college's Security Services personnel investigated. Therefore, the presumption at section

¹³ Order MO-2954.

¹⁴ Orders P-242 and MO-2235.

¹⁵ The presumption can also apply to records created as part of a law enforcement investigation where charges were laid but subsequently withdrawn (Orders MO-2213, PO-1849 and PO-2608).

¹⁶ Order MO-2147.

¹⁷ Order PO-1706.

¹⁸ Order PO-2716.

¹⁹ Orders PO-2201, PO-2419, PO-2480, PO-2572 and PO-2638.

²⁰ Orders M-734, M-841, M-1086, PO-1819 and MO-2019.

21(3)(b) applies.

Section 21(2): Do any factors in section 21(2) help in deciding if disclosure would be an unjustified invasion of personal privacy?

[55] Section 21(2) lists several factors that may be relevant to determining whether disclosure of personal information would be an unjustified invasion of personal privacy.²¹ Some of the factors weigh in favour of disclosure, while others weigh against disclosure.

[56] The list of factors under section 21(2) is not a complete list. The institution must also consider any other circumstances that are relevant, even if these circumstances are not listed under section 21(2).²²

[57] Each of the first four factors, found in sections 21(2)(a) to (d), if established, would tend to support disclosure of the personal information in question, while the remaining five factors found in sections 21(2) (e) to (i), if established, would tend to support non-disclosure of that information.

[58] In this appeal, the appellant does not raise any of the listed factors favouring disclosure at section 21(2), and the college submits that the factors supporting non-disclosure at sections 21(2)(f) and 21(2)(h) apply. However, I will consider the appellant's representations about the purpose of his access request, in the circumstances, as the appellant raising an unlisted factor, which I will discuss below.

Other factors or relevant circumstances

[59] Other considerations (besides the ones listed in sections 21(2)(a) to (i)) must be considered under section 21(2) if they are relevant. These may include inherent fairness issues.²³

[60] The appellant states that he seeks the information withheld because he was being "victimized by college staff" due to a specified medical condition that he says he suffers from, in that the college staff knew of this condition and used it against him. He alleges that college staff actively sought out other students to give negative statements against him and that he had no history of problems with the college except those that he says were made up (and untrue).

[61] Based on my review of the appellant's representations and the records, I am prepared to accept the appellant's statement that he suffers from the specified medical condition at face value, and appreciate that the condition he describes may have been a contributing factor to his involvement in the incidents that gave rise to the records in

²¹ Order P-239.

²² Order P-99.

²³ Orders M-82, PO-1731, PO-1750, PO-1767 and P-1014.

the first place. However, I am not persuaded that that sufficiently establishes his allegations of unfairness towards him by the college, so I give this factor low weight.

[62] I now turn to the factors claimed by the college, not in favour of disclosure, found at sections 21(2)(f) and 21(2)(h) of the *Act*.

21(2)(f): the personal information is highly sensitive

[63] This section is intended to weigh against disclosure when the evidence shows that the personal information is highly sensitive. To be considered “highly sensitive,” there must be a reasonable expectation of significant personal distress if the information is disclosed.²⁴ For example, personal information about witnesses, complainants or suspects in a police investigation may be considered highly sensitive.²⁵

[64] After noting these principles about section 21(2)(f), the college submits that the records at issue contain information about the appellant, including his behaviour and its impact on the affected parties. The college submits that information about the personal impact of an incident on an affected party is the highly sensitive personal information of that affected party. The college also submits that the context in which the records were created further reveals information about the impact of the appellant’s behaviour on the affected parties, and that all of this information reveals the affected parties’ perceptions and concerns, and can reasonably be expected to cause them significant personal distress if it is disclosed.

[65] In support of its position, the college points to Order P-1535, where the IPC considered whether section 21(2)(f) applied to an incident report detailing events that happened during and immediately after a motor vehicle accident, between the appellant and the affected party. These events included a physical confrontation between the parties. The college notes that the adjudicator in P-1535 found that the information in the incident report was highly sensitive within the meaning of section 21(2)(f), based on the volatile and adversarial nature of the relationship between the parties, and the emotional intensity of the situation, and that this was apparent from the records. The college submits that similar reasoning should be applied to the records in this appeal because the details of the incidents described in the records reveal the intense nature of the interactions between the parties. The college states that the appellant’s behaviour as described in the record is “emotionally charged and gave rise to concerns on the part of the affected parties of significance such that they sought assistance Security Services,” and as a result, the records contain highly sensitive information and should not be disclosed.

[66] Having reviewed the records at issue, I find the college’s submissions on section 21(2)(f) to be very persuasive. I agree with the college that the reasoning in Order P-1535 is relevant to this appeal, and I adopt it here. Based on my review of the records,

²⁴ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

²⁵ Order MO-2980.

I find that section 21(2)(f) applies to the records. I find that the personal information in each record is inherently highly sensitive in the circumstances, and that it would be reasonable to expect that any of the affected parties would suffer significant personal distress if the records were to be disclosed. In my view, the factor at section 21(2)(f) carries significant weight in considering whether the exemption at section 49(b) applies.

21(2)(h): the personal information was supplied in confidence

[67] This section weighs against disclosure if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. This requires an *objective* assessment of whether the expectation of confidentiality is "reasonable."²⁶

[68] The college submitted both confidential and non-confidential representations in support of its view that the factor at section 21(2)(h) applies.

[69] The college points out the principle mentioned above, that to assess whether section 21(2)(h) applies, an objective assessment of the reasonableness of any expectation of confidentiality is needed.

[70] It then argues that given the nature of the appellant's behaviour, it was reasonable for the affected parties to expect that the details of their request for assistance from the college's Security Services would be kept confidential and not disclosed to the appellant, beyond what was reasonably required to investigate the incidents.

[71] The college also states that the Security Services co-ordinator assured the affected parties that the information would not be released, and that two of the records (the incident reports) are marked confidential.

[72] In addition, the college provided further detailed evidence in its confidential representations, which I cannot set out in this order.

[73] For all of these reasons, the college submits that the affected parties had a reasonable expectation that the information that they were supplying would remain confidential, especially given the sensitive nature of the information disclose to Security Services.

[74] Taking into consideration each of the points made by the college, in light of the sensitive nature of the records themselves, I find that the college has established that the affected parties had a reasonable, objective expectation of confidentiality. As a result, I find that section 21(2)(h) is relevant in the circumstances and weighs against disclosing the records.

²⁶ Order PO-1670.

Weighing the presumptions and factors

[75] As mentioned, in determining whether disclosure of the affected parties' personal information would constitute an unjustified invasion of personal privacy, I have considered the factors and presumptions at sections 21(2) and 21(3) of the *Act*, and an unlisted factor (inherent fairness), in the circumstances of this appeal. I have found that the presumption at section 21(3)(b) applies, which weighs significantly against disclosure, and that likewise, sections 21(2)(f) and 21(2)(h) are significantly relevant factors in the circumstances. I find that the presumption at section 21(3)(b) and the factors at sections 21(2)(f) and 21(2)(h) outweigh the unlisted factor that I have considered.

[76] Therefore, weighing the factors and presumptions, and taking into account the interests of the parties, I find that disclosure of the records at issue would be an unjustified invasion of personal privacy of the identifiable individuals whose personal information is contained in the records. Therefore, I find that the responsive records are exempt from disclosure under the personal privacy exemption at section 49(b), subject to my review of the absurd result principle, and the exercise of the discretion of the college.

Absurd result – withholding the records would not be absurd in the circumstances of this appeal

[77] An institution might not be able to rely on the section 49(b) exemption in cases where the requester originally supplied the information in the record, or is otherwise aware of the information contained in the record. In this situation, withholding the information might be absurd and inconsistent with the purpose of the exemption.²⁷

[78] For example, the "absurd result" principle has been applied when:

- the requester sought access to their own witness statement²⁸;
- the requester was present when the information was provided to the institution²⁹; and
- the information was or is clearly within the requester's knowledge³⁰.

[79] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply.³¹

[80] The college submits that it would not be absurd to withhold the information in

²⁷ Orders M-444 and MO-1323.

²⁸ Orders M-444 and M-451.

²⁹ Orders M-444 and P-1414.

³⁰ Orders MO-1196, PO-1679 and MO-1755.

³¹ Orders M-757, MO-1323 and MO-1378.

the circumstances.

[81] More specifically, the college acknowledges that the appellant is likely aware of the details of the incidents described in the records, but submits that withholding the records would not result in an absurd result, in keeping with the reasoning in other IPC orders. The college submits that the IPC has a history of accepting that a sensitive record can be withheld under section 49, even where portions of the record are within the appellant's knowledge. For example, in Order PO-2642, the records at issue contained the personal information of the requester and other identifiable individuals, relating, in part, to concerns about personal safety that had been brought to the attention of campus security. In that order, the adjudicator found that while much of the information was within the appellant's knowledge, none of the information was supplied to the university by the appellant and that he was not aware of specific information contained in the records. The adjudicator also considered the sensitive nature of the information in the records in that appeal. The college argues that the same approach should be taken in this appeal due to the similar considerations (such as sensitivity of the record and the appellant's lack of specific knowledge of the contents of the records). The college also argues that the fact that the sensitive information was provided with a reasonable expectation of confidentiality is also relevant.

[82] I am persuaded to accept the college's submission that it would not be absurd to withhold the records at issue, and that the reasoning in Order PO-2642 is relevant and persuasive in considering the records at issue in this appeal. As mentioned, I have found that the records contain personal information that is highly sensitive in nature, and that there was indeed a reasonable expectation of confidentiality on the part of the affected parties who supplied information to the college. I accept the college's acknowledgement that the appellant is likely aware of the details of the incidents described, but I also have an insufficient basis for finding that he knows the specific contents of these sensitive records, including portions of the records relating to him. In the particular circumstances of this appeal, in part due to concerns expressed by the college in its confidential representations which I cannot detail in this public order, I accept that severance of the records would not reasonably be possible, and I find that it would not be absurd to withhold the records from disclosure.

[83] For these reasons, subject to my consideration of the college's exercise of discretion, I find that the records are exempt under section 49(b) of the *Act* because to disclose them would be an unjustifiable invasion of the personal privacy of the affected parties.

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

[84] The college submits that it exercised its discretion under section 49(b) and that the IPC should uphold that exercise of discretion. For the reasons that follow, I agree.

[85] The section 49(b) exemption is discretionary (the institution “may” refuse to disclose), meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[86] In addition, the IPC 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; or
- it fails to take into account relevant considerations.

[87] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.³² The IPC cannot, however, substitute its own discretion for that of the institution.³³

What considerations are relevant to the exercise of discretion?

[88] Some examples of relevant considerations are listed below. However, not all of these will necessarily be relevant, and additional considerations may be relevant:³⁴

- the purposes of the *Act*, including the principles that: information should be available to the public, individuals should have a right of access to their own personal information, exemptions from the right of access should be limited and specific, and the privacy of individuals should be protected,
- the wording of the exemption and the interests it seeks to protect,
- whether the requester is seeking his or her own personal information,
- whether the requester has a sympathetic or compelling need to receive the information,
- whether the requester is an individual or an organization,
- the relationship between the requester and any affected persons,
- whether disclosure will increase public confidence in the operation of the institution,

³² Order MO-1573.

³³ Section 54(2).

³⁴ Orders P-344 and MO-1573.

- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person,
- the age of the information, and
- the historic practice of the institution with respect to similar information.

[89] The appellant's representations do not address the question of factors that the college considered in exercising its discretion. He repeatedly mentions "bad faith," but in the context of his views about the reasonableness of the college's search (which is a separate issue from any right of access he may have to the four records at issue).

[90] In denying access to the records, the college submits that it exercised its discretion under section 49(b) of the *Act*. The college states that it considered only relevant factors in this exercise and that it did not consider any irrelevant or improper factors, at all times acting in good faith and in furtherance of its duties under the *Act*. More specifically, the college considered the following factors, which it determined were relevant in the circumstances, in weighing the interests in favour of disclosure with those against disclosure:

- the appellant's interest in receiving the records,
- the public interest in transparency and access to information,
- the need to protect the privacy of the affected parties for the reasons it described in its representations,
- the potential harm from disclosure (the college determined that this far outweighed any public interest in the release of the records to the appellant), and
- the college's obligation to protect the health and safety of its students (which the college determined was a factor that weighed in favour of withholding the records).

[91] Based on my review of the parties' representations, and having reviewed the records themselves, I find that all of the factors mentioned by the college are relevant considerations in the circumstances. I also observe that the college fully disclosed most of the responsive records to the appellant (eleven out of the fifteen), which supports a finding that the college exercised its discretion to consider the appellant's interest in obtaining his personal information and disclosing as much of that as possible without disclosing information that is exempt. Given my review of the records, I accept that it was reasonable for the college to conclude that any potential harm from disclosure far outweighed any interest in disclosure, especially in light of the college's obligation to protect the health and safety of its students. As a result, I am satisfied that the college considered relevant, not irrelevant factors, in exercising its discretion, and that it acted

in good faith, not bad faith. Therefore, I uphold the college's exercise of discretion under section 49(b) of the *Act*.

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

[92] The appellant's initial representations addressed the college's search for records, and the adjudicator previously assigned to this appeal invited representations on the issue of the reasonableness of the college's search, as well as an affidavit from the college. As I will explain below, I uphold the reasonableness of the college's search for responsive records.

[93] If a requester claims that additional records exist beyond those found by the institution, the issue is whether the institution has conducted a reasonable search for records as required by section 24 of the *Act*.³⁵ If the IPC is satisfied that the search carried out was reasonable in the circumstances, it will uphold the institution's decision. Otherwise, it may order the institution to conduct another search for records.

[94] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist.³⁶

[95] The *Act* does not require the institution to prove with certainty that further records do not exist. However, the institution must provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records;³⁷ that is, records that are "reasonably related" to the request.³⁸

[96] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.³⁹ The IPC will order a further search if the institution does not provide enough evidence to show that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.⁴⁰

The representations of the parties

The appellant's initial representations

[97] The appellant submits that the college was acting in bad faith in relation to its search for records.

[98] He states that at a specified time and date, two named college Security Services

³⁵ Orders P-85, P-221 and PO-1954-I.

³⁶ Order MO-2246.

³⁷ Orders P-624 and PO-2559.

³⁸ Order PO-2554.

³⁹ Orders M-909, PO-2469 and PO-2592.

⁴⁰ Order MO-2185.

personnel made video and audio recordings of him during what he describes as "an interrogation where they made false accusations of [him]." He states that that particular meeting was part of what prompted him to file the access request in the first place. He also states that he "find[s] it quite interesting that it [the recording] did not come up when they searched through their records," though he notes that the two security personnel informed him that they were recording him and that they would keep it for their records. He asks, therefore, why the recording did not come up in the college's search.

The college's reply

[99] In response to the appellant's representations about the search conducted, the college submits that its search was fulsome and conducted in good faith.

[100] The college explains that after it received the appellant's access to information request, it tasked its coordinator of security investigations with performing a search for reports and e-mails relating to the appellant. Along with its representations, the college provided an affidavit from the coordinator of security investigations about the search efforts.

[101] The college states that the coordinator of security investigations searched the security reports and his local drive, and gave copies of the security reports and copies of the handwritten notes taken by the college's security guards to the college's risk manager. His affidavit specifies that he searched the college's security reports tool, named Perspective, from which he pulled complete copies of any security reports relating to the appellant, but that when he searched his local drive, he found no records relating to the appellant. He also states that he searched all file types.

[102] The coordinator of security investigations explains that he then asked the college's Information Technology Services (IT) to run a scan of all emails between the appellant and the college's Investigations and Security personnel. IT searched the server for the appellant's name and student number, during a specified time period, consistent with that mentioned in the request. Copies of these emails were also provided to the college's risk manager.

[103] The college states that the recording mentioned by the appellant in his representations was not located during the (initial) search.

[104] However, the college explains that while responding to the Reply Notice of Inquiry (sent by the previous adjudicator to the college after the previous adjudicator considered the appellant's initial representations), the college enlisted the assistance of the Security Systems Service coordinator to review the archival footage from its decommissioned Digital Video Recorder (DVR). When the coordinator returned from leave, he reviewed the archival footage and a copy of the recording was located. The affidavit evidence of the coordinator of security investigations also provides further

details about this, explaining that the meeting referenced by the appellant occurred in his old office, which had video equipment that has since been decommissioned. After initially searching the DVR himself and not being able to find any record of conversation with the appellant, he states in his affidavit that he asked the Security Systems Service Coordinator to search the DVR upon his return from a month of leave. The coordinator did so, and was able to locate a copy of the recording in the DVR's archives.

[105] The college then issued a revised decision letter and disclosed a copy of the recording to the appellant, and submits that it acted in good faith in carrying out a search for responsive records.

The appellant's sur-reply

[106] In reply to the college's representations and affidavit evidence, the appellant maintains that the college was acting in bad faith. He submits that the representations and affidavit are "misleading at best."

[107] The appellant submits that the college ignored what he states is the fact that those interviewing him took notes, and that these notes were not disclosed to him. He says that in the meeting, the named Security Services personnel "had notes/took notes" on him and what he said. He asserts that the notes belonging to one of the personnel can clearly be seen on camera in the video, and that the other individual was out of sight. He states that "[t]hese notes as well as any of their meeting, summary, or other notes were never provided" to him.

[108] The appellant also submits that the college left out the timeline involved. He states that he filed his request six days after the meeting in question when he was recorded and that he does not believe that in that time, the college lost the video in their old DVR system. He indicates that he does not believe that the security personnel who interviewed him would have forgotten that they had just recorded a video that would have been responsive to the request, recorded just six days before the request. Given this timeline, he submits that the fact that the college only produced the video after he presented evidence of its existence two years later (through the inquiry conducted by the IPC) is unacceptable. He submits that the recording should have been logged and provided from the outset.

[109] The appellant states that he does not doubt that the coordinator of security investigations searched the DVR system, but submits that he did not do so initially, and that the coordinator who later found the record did not initially search the DVR system either. He submits that this was only done after the IPC asked the college to provide a sworn affidavit in relation to its search.

[110] In light of the above, the appellant submits that the college acted, and continues to act, in bad faith in relation to its search. He submits that the onus was on the college to do a complete and thorough search, and submits that they failed to do so.

Analysis/findings

[111] Having considered the parties' representations and the college's affidavit evidence, I am satisfied that the college carried out a search that was reasonable in the circumstances and therefore, I will not order the college to conduct another search for records.

[112] As discussed, a reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request. I find that the college's coordinator of security investigations tasked with searching for responsive records is an experienced employee knowledgeable in the subject matter of the request. I find that he also turned to others within the college, namely the IT service and the Security Services coordinator, to provide further assistance with the search, and that these were also college employees knowledgeable about the locations and means of searching for responsive records. I accept that the coordinator of security investigations searched for responsive records in locations, including electronic locations, where records responsive to the request would reasonably be expected to be located, in the circumstances. In particular, I note the coordinator of security investigations' search of the security reports tool named Perspective, in addition to his search of more common places, such as emails.

[113] I acknowledge, as the college did, that the college did not initially identify the recording as a responsive record. However, I find that the college has provided sufficient evidence to reasonably explain why that was the case. I am not persuaded that the location of this record after the appellant brought it to the attention of the previous adjudicator is a sufficient basis to find that there is a reasonable basis for ordering a further search, especially since the record in question has already been disclosed to the appellant.

[114] I also acknowledge the appellant's position that the video shows notes that were not provided to him. However, I find that this statement is insufficient evidence to establish the contents (and relevance) of those notes, or to undermine the sufficiency of the evidence provided by the college about the reasonableness of its search (the experience level of the employees involved, the locations searched, and the search terms and date range used). I find that the appellant has not sufficiently provided a reasonable basis to challenge the college's evidence of the steps that it did take, such that I can accept that a further search should be ordered. Furthermore, as mentioned, the *Act* does not require the college to prove with certainty that further records do not exist. The college was required to provide enough evidence to show that it made a reasonable effort to identify and locate records that are reasonably related to the request.

[115] For the reasons set out above, I find that the college has provided enough evidence to show that it made a reasonable effort to identify and locate responsive

records, and as a result, I uphold its search as reasonable.

[116] In conclusion, I uphold both the college's decision to withhold the records under the personal privacy exemption at section 49(b) and the reasonableness of its search, and I dismiss the appeal.

ORDER:

I uphold the college's access decision and the reasonableness of its search, and dismiss the appeal.

Original Signed by: _____
Marian Sami
Adjudicator

February 2, 2022 _____