

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-4574

Appeal PA21-00636

St. Lawrence College of Applied Arts and Technology

November 22, 2024

**Summary:** A former student at a college made a request under the *Freedom of Information and Protection of Privacy Act* for information related to an investigation into his behaviour conducted by the college. The college disclosed some records and disclosed additional records during the inquiry. The adjudicator finds that some of the information is protected by solicitor-client privilege and that disclosing additional information would be an unjustified invasion of personal privacy. He upholds the college's decision.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, RSO 199, c F.31, sections 2(1), 19, 49(a), and 49(b).

**Orders Considered:** Orders MO-4213, PO-4459, P-1603, and M-1080.

### OVERVIEW:

[1] St. Lawrence College of Applied Arts and Technology (the college), received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

“All personal information relating to [the requester], including all recordings and writings, in paper or in electronic form, of any sort whatsoever, including any investigations, papers, letters, memorandums, telephone messages, investigation notes, post-it notes and computer docketts and recordings. In terms of the means of access with regard to:

1. Writings, please provide photocopies; and,
2. Recordings stored on the computer, please provide copies on a computer disc or USB.

[2] The request was later clarified to be for information related to certain interactions the appellant had with the college, specifically information in two categories: "... information arising since students began to complain to the college about him" and "... information showing the college may have been aware of his disabilities."

[3] The college located responsive records and granted partial access to them. Information in the records was withheld under section 49(a) read with section 19 (solicitor-client privilege) and section 49(b) (personal privacy) of the *Act*.<sup>1</sup> The requester (now the appellant), through his legal counsel, appealed the decision to the Information and Privacy Commissioner of Ontario (IPC).

[4] During mediation, the appellant continued to seek access to the withheld information, and the college maintained that the information was exempt from disclosure. The appellant also stated that he required additional information about the redacted records.

[5] No further mediation was possible, and the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry. The adjudicator initially assigned to the appeal sought and received the college's representations. The file was reassigned to another adjudicator, who sought and received representations from the appellant.

[6] The file was then assigned to me to complete the inquiry. I reviewed the parties' representations and determined that I should seek further representations from the college on whether additional portions of the records at issue could be disclosed to the appellant. The college agreed to disclose additional portions and the appellant, after receiving the additional disclosure, confirmed that he continued to seek access to the remainder of the withheld information.

[7] For the reasons that follow, I uphold the college's decision following the additional disclosure and dismiss the appeal.

## **RECORDS:**

[8] There are 199 pages of records at issue, consisting of 46 pages of emails, a 30-page investigation report, and a 123-page appendix to the investigation report. Partial

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<sup>1</sup> The college initially claimed sections 19 and 21(1) of the *Act*, but since the records at issue contain the appellant's personal information, it was later clarified that the appropriate exemptions are section 49(a) read with section 19, and section 49(b).

access to the records was provided, with redactions present throughout the records.

## **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 exemption at section 49(a), allowing an institution to refuse access to a requester’s own personal information, read with the section 19 exemption for solicitor-client privilege, apply to the records?
- C. Does the discretionary personal privacy exemption at section 49(b) apply to the records?
- D. Did the college exercise its discretion under sections 49(a) and (b)? If so, should the IPC uphold the exercise of discretion?

## **DISCUSSION:**

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

[9] Before I consider the exemptions claimed by the college, I must first determine whether the records contain “personal information” and if so, whether the personal information belongs to the appellant, other identifiable individuals, or both. “Personal information” is defined in section 2(1) of the *Act* as “recorded information about an identifiable individual.”

[10] 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. 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.<sup>2</sup> Section 2(1) of the *Act* gives a list of examples of personal information.

[11] The parties do not dispute, and I find, that all of the records contain the personal information of the appellant and other individuals. Reviewing the records, it is clear that they contain information from which the appellant and other parties could be identified, such as names, email addresses, and other contact information. Having found that the records contain the personal information of the appellant and other individuals, I will consider the application of the solicitor-client privilege exemption (section 49(a), read

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<sup>2</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

with section 19) and the personal privacy exemption at section 49(b).

**Issue B: Does the discretionary exemption at section 49(a), allowing an institution to refuse access to a requester's own personal information, read with the section 19 exemption for solicitor- client privilege, apply to the records?**

[12] 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 general right of access to one's own personal information.

[13] Section 49(a) of the *Act* reads:

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

where section 12, 13, 14, 14.1, 14.2, 15, 15.1, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

[14] The discretionary nature of section 49(a) ("may" refuse to disclose) recognizes the special nature of requests for one's own personal information and the desire of the Legislature to give institutions the power to grant requesters access to their own personal information.<sup>3</sup>

[15] In this case, the college relies on section 49(a) read with section 19(a).

[16] Section 19 exempts certain records from disclosure, either because they are subject to solicitor-client privilege or because they were prepared by or for legal counsel for an institution. Section 19(a) states:

A head may refuse to disclose a record,

(a) that is subject to solicitor-client privilege

[17] Section 19 contains three different exemptions, which the IPC has referred to in previous decisions as making up two "branches." The branch relied on by the college, found in section 19(a), ("subject to solicitor-client privilege") is based on common law solicitor-client communication privilege.

[18] The rationale for the common law solicitor-client communication privilege is to ensure that a client may freely confide in their lawyer on a legal matter.<sup>4</sup> This privilege protects direct communications of a confidential nature between lawyer and client, or their agents or employees, made for the purpose of obtaining or giving legal advice.<sup>5</sup> The

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<sup>3</sup> Order M-352.

<sup>4</sup> Orders PO-2441, MO-2166 and MO-1925.

<sup>5</sup> *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

privilege covers not only the legal advice itself and the request for advice, but also communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given.<sup>6</sup>

[19] Confidentiality is an essential component of solicitor-client communication privilege. The institution must demonstrate that the communication was made in confidence, either expressly or by implication.<sup>7</sup>

### ***Representations***

[20] The college has claimed section 49(a), read with section 19(a), for some redactions in a series of emails between college staff. It submits that while the email exchange only involves college staff, the communications relate to a discussion about specific information for review by external legal counsel. It states that these privileged communications were not waived, and the section 19(a) exemption therefore applies.

[21] In response, the appellant states that he is not seeking information compiled exclusively for the college's external legal counsel, but is seeking information related to the investigation underlying the request. He also states that he is seeking information related to communications between a college committee and the college's external legal counsel as it pertains to the investigation, stating that the college committee had a duty to act independently of the college in the matter underlying the request. He also states that the college's external legal counsel should have recused himself from advising the appeals committee, as his representation of the college placed him in a conflict of interest.

### ***Analysis and finding***

[22] The information for which the college has claimed solicitor-client privilege is communications between college staff where questions for legal counsel are discussed. In response to the college's representations on solicitor-client privilege, the appellant raised concerns about how the college handled the investigation and potential conflicts of interest with the college's external legal counsel. These concerns are outside the scope of this appeal. Considering the nature of the information at issue it is, on its face, information that was compiled by college staff for the purposes of seeking legal advice on the matter underlying the request. As the college noted in its representations, the external legal counsel is not copied on these emails. However, I accept its submission that the information was created for the purpose of obtaining legal advice on a specific issue, and it is therefore protected by solicitor-client communication privilege at common

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<sup>6</sup> *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.); *Canada (Ministry of Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104.

<sup>7</sup> *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

law.<sup>8</sup>

**Issue C: Does the discretionary personal privacy exemption at section 49(b) apply to the records?**

[23] 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.

[24] 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 so would result in an unjustified invasion of other individual's personal privacy.<sup>9</sup>

[25] 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). Additionally, 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.<sup>10</sup>

[26] Sections 21(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy under section 49(b). Section 21(2) provides a list of factors for the college to consider in making this determination, while section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Neither the college or appellant have claimed that any of the section 21(3) presumptions apply to this appeal, and in reviewing the records, I find that none of them are applicable.

[27] Additionally, sections 21(1) and 21(4) set out certain types of information whose disclosure is not an unjustified invasion of personal privacy. Neither the college or appellant claimed that these sections apply to this appeal, and I find that none of the exceptions or situations described in sections 21(1) and (4) are applicable.

[28] Section 21(2) provides a list of factors for the college to consider in determining if disclosure would be an unjustified invasion of personal privacy. In their representations, the college and the appellant have relied on or discussed the factors in sections

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<sup>8</sup> See, for example, Order PO-1631 where confidential communications from one ministry official to another containing instructions to seek advice from counsel on a particular issue were found to qualify for solicitor-client communication privilege.

<sup>9</sup> See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's exercise of discretion under section 49(b).

<sup>10</sup> Order PO-2560.

21(2)(d),<sup>11</sup> (f), and (h):

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,

(d) the personal information is relevant to a fair determination of rights affecting the person who made the request

(f) the personal information is highly sensitive

(h) the personal information has been supplied by the individual to whom the information relates in confidence

[29] In determining whether the disclosure of the withheld information in the report would be an unjustified invasion of personal privacy under section 49(b), therefore, I will consider and weigh the relevant factors and section 21(2) and balance the interests of the parties.<sup>12</sup>

### ***Representations***

[30] The college submits that disclosing the withheld portions of the records would be an unjustified invasion of personal privacy of individuals other than the appellant. It explains that the records clearly contain personal and highly sensitive information surrounding the investigation into the appellant's behaviour, specifically information about individuals who had complained to the college about the appellant. It submits that this engages the section 21(2)(f) factor for highly sensitive information.

[31] Referencing the section 21(2)(h) factor, the college submits that the withheld information in the records, particularly the investigation report, was supplied in confidence. It states that information from the complainants was taken under the assurance that the answers would remain confidential, and notes that this is specifically stated in the investigation report. It states that there was never any intention for the statements to be made public.

[32] Additionally, the college submits that the serious nature of the complainants' statements regarding the appellant's behaviour further emphasize the sensitivity of the information. It explains that due to the nature of the allegations, the records must remain confidential to ensure that victims in similar situations can come forward to authorities without fear of retribution, and states that disclosure would hinder the ability of victims to have their complaints heard and addressed.

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<sup>11</sup> The appellant cited section 21(2)(b), but in the context of his representations this was clearly a typographical error, as 21(2)(b) relates to the promotion of public health and safety, while the appellant provided representations on the fair determination of his rights.

<sup>12</sup> Order MO-2954.

[33] In response, the appellant's lawyer submits that the information at issue is relevant to the fair determination of the appellant's rights. He states that the appellant has complained to the Ontario Ombudsman about the college's decision to expel him, and in order to demonstrate how the college acted "illegally and unfairly," he requires the records at issue.

### ***Analysis and finding***

[34] As stated above, at issue in this appeal is whether disclosure of the individuals' information would be an unjustified invasion of their personal privacy under section 49(b). The factors raised by the parties are discussed below.

#### *21(2)(d): Fair determination of rights*

[35] The appellant raised this factor. The IPC uses a four-part test to decide whether this factor applies. For it to apply, all four parts of the test must be met:

1. Is the right in question a right existing in the law, as opposed to a non-legal right based solely on moral or ethical grounds?
2. Is the right related to a legal proceeding that is ongoing or might be brought, as opposed to one that has already been completed?
3. Is the personal information significant to the determination of the right in question?
4. Is the personal information required in order to prepare for the proceeding or to ensure an impartial hearing?<sup>13</sup>

[36] The appellant did not provide specific representations on the four-part test, but generally stated that he required the withheld portions of the records in order to show that the college acted illegally and unfairly, in the context of a complaint to the Ontario Ombudsman.

[37] On its face, the appellant's reasons for requesting the information, while generally unspecified, would satisfy the first two parts of the test. While the rights afforded to an individual may vary depending on the context of an investigation, it is clear that the general right to be treated fairly in a college investigation prior to expulsion exists in law. Additionally, although the appellant did not provide specific information about the nature of the Ombudsman complaint or its progress, it also appears to be the case that the Ombudsman complaint has not been completed, satisfying the second part of the test.

[38] However, I find that the appellant has not demonstrated that the personal information at issue is significant to the determination of the right in question. The

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<sup>13</sup> See Oder PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).



appellant did not explain why the information was required in his representations, and after reviewing the records, it is not clear to me how the withheld information would assist in the Ombudsman complaint. This is particularly true in light of the additional disclosure that the appellant received during the inquiry, where the remainder of the withheld information generally consists of the names of the complainants and their specific statements during the college's investigation.

[39] Even without considering the additional disclosure made by the college during the inquiry, I find that the appellant has not adequately explained how the withheld information would be required to proceed with the Ombudsman complaint. While it has generally been found in previous decisions, such as Orders MO-4213 and PO-4459, that requesters are entitled to utilize the most cost-efficient means of accessing information, it must still be demonstrated that the information at issue is significant for the determination of the right in question and required to prepare for the proceeding or to ensure an impartial hearing.

[40] Here, while the appellant has stated that he would like the Ombudsman to review the complaint and he requires the information to demonstrate to the Ombudsman that the college acted "illegally and unfairly," he has not explained why the information he already received prior to the inquiry is insufficient for this purpose. This is particularly the case for the withheld information in the emails, consisting of the names of complainants and some specific statements by them. Based on the appellant's representations, his concern is with how the college treated him in the expulsion process, and it is not clear how the names of the parties or the few redacted statements being released would provide information on the college's expulsion process.

[41] Even for the investigation report, which the appellant only received minimal portions of prior to the inquiry, it has not been explained why the withheld information would otherwise be inaccessible through the Ombudsman complaint process, which the appellant has already initiated.<sup>14</sup> This is in contrast to the situation in, for example, Order PO-4459, where the information at issue was required to start a court proceeding. Here, any information that is required for the Ombudsman complaint process could generally be accessed through that process, and it is not clear why the withheld information would need to be accessed through the *Act*. In these circumstances, I find that parts three and four of the test have not been met, and the section 21(2)(d) factor does not apply.

*21(2)(f): Highly sensitive information*

[42] The college submits that the information at issue is highly sensitive, and the appellant did not dispute this in his representations. This factor 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

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<sup>14</sup> The *Ombudsman Act* R.S.O. 1990, Chapter O.6 provides that Ombudsman staff can request documentation from public sector bodies as part of the investigation process.

significant personal distress if the information is disclosed.<sup>15</sup> For example, personal information about witnesses, complainants or suspects in a police investigation may be considered highly sensitive.<sup>16</sup>

[43] In addition to information about witnesses and complainants in police investigations being highly sensitive, it has also been found in previous decisions, such as Orders P-1603, and M-1080, that information related to concerns raised in the educational context is highly sensitive. However, I note that the information here does not relate to a law enforcement investigation or an investigation into the conduct of a staff member within a school, as was the case in the above orders.

[44] The information in the present appeal relates to an investigation conducted by the college into the behaviour of a student towards other students. While there are some differences between the investigation underlying the request and a law enforcement investigation or an investigation into teacher conduct, given that the information relates to concerns about serious misconduct raised by students at the college, I generally agree that it can be considered to be highly sensitive in the context of 21(2)(f), favouring withholding the information. However, considering that this particular appeal relates to concerns about an administrative investigation into students' complaints against another student in the context of a college disciplinary proceeding, I give this factor less weight than in the context of a law enforcement investigation or an investigation into the conduct of a teacher.

*21(2)(h): Information supplied in confidence*

[45] The college referenced this factor in its representations, and the appellant did not dispute that it applied. This factor applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 21(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.<sup>17</sup>

[46] As the college submits, the investigation report explicitly states that each interviewee signed a confidentiality agreement prior to being interviewed, showing there was an expectation of confidentiality for the parties whose information is in the report, and I therefore find that the section 21(2)(h) factor applies to this information.

[47] However, for the information contained in the emails, much of which was disclosed to the appellant prior to the inquiry, with only the names and some statements withheld, I do not agree that it was supplied with as strong of an expectation of confidentiality to the college by the complainants. While there may have been some general understanding that the information would be kept confidential, in the absence of an explicit confidentiality statement (as was present in the report), I find that even if the section

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<sup>15</sup> Orders PO-2518, PO-2617, MO-2262 and MO-2344.

<sup>16</sup> Order MO-2980.

<sup>17</sup> Order PO-1670.

21(2)(h) factor applied to the withheld information in the emails, it should be given less weight.

*Balancing the factors and severances*

[48] I have considered and weighed the representations of the parties, the factors discussed above, and the access and privacy rights of the appellant and the other individuals referenced in the records. While I found that the section 21(2)(f) factor should only be given minimal weight due to the context of the investigation, and I found that the withheld information in the emails was not supplied with a strong expectation of confidentiality, as I found that the section 21(2)(d) factor does not apply to the withheld information, I find that the information at issue should be withheld. The information at issue, being related to the college's investigation into the appellant's behaviour and partially supplied in confidence, is generally sensitive, favouring withholding the information. In the absence of an explanation as to why the information is needed for the fair determination of the appellant's rights, I find that its disclosure would be an unjustified invasion of the personal privacy of the other individuals in the records.

[49] During the inquiry, I noted that while the emails were disclosed with only limited redactions, almost the entirety of the investigation report was withheld. I asked that the college consider if there was any information in the report that could be severed pursuant to section 10(2) of the *Act*, and the college issued a new decision. Having reviewed the information that remained withheld following the new decision, I am satisfied that the college has properly disclosed the information in accordance with section 10(2) of the *Act*.

[50] Considering all of the above, I uphold the decision of the college, subject to my review of its exercise of discretion, below.

**Issue D: Did the college exercise its discretion under sections 49(a) and (b)? If so, should the IPC uphold the exercise of discretion?**

[51] The sections 49(a) and (b) exemptions are discretionary and permit an institution to disclose information, despite the fact that it could withhold it. Having found that the withheld information in the records is exempt from disclosure under these sections, I must next determine if the college properly exercised its discretion in withholding the information. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so. The IPC may find that an 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.

[52] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>18</sup> The IPC may not, however, substitute its own discretion for that of the institution.<sup>19</sup>

[53] The college submits that it properly exercised its discretion to withhold the information, noting the sensitive nature of the information withheld under section 49(b) and the importance of protecting information that they claimed is legally privileged. It references the importance of student complainants being able to bring concerns forward without fear of reprisal, and the importance of organizations and individuals to freely communicate with their legal counsel about these issues.

[54] The appellant did not provide specific representations on the college's exercise of discretion.

[55] I have reviewed the considerations relied upon by the college and I find that it properly exercised its discretion in response to the access request. Based on its overall representations, and particularly its additional disclosure during the inquiry, it is clear that it considered the purposes of the *Act* and sought to balance the appellant's interest in accessing the full records with the protection of the privacy of other individuals when making its access decision.

[56] I find that the college did not exercise its discretion to withhold the information for any improper purpose or in bad faith, and that there is no evidence that it failed to take relevant factors into account or that they considered irrelevant factors. Accordingly, I uphold the college's exercise of discretion in denying access to the withheld information.

**ORDER:**

I dismiss the appeal.

Original Signed by: \_\_\_\_\_

Chris Anzenberger  
Adjudicator

November 22, 2024 \_\_\_\_\_

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<sup>18</sup> Order MO-1573.

<sup>19</sup> Section 43(2) of the *Act*.