Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3172

Appeal PA11-528

University of Ottawa

February 28, 2013

Summary: The appellant sought access to videotaped footage and information relating to a specific incident that occurred on university property. The university disclosed some responsive records to the appellant and it relied on the discretionary exemption in section 49(b) to withhold the remaining responsive records, in part and in whole. The appellant asserted additional responsive records exist, and he requested "certified" copies of the records. This order upholds the decision of the university. It finds that the university's search was reasonable and that the withheld records are exempt from disclosure under section 49(b). This order also finds that the university is not obliged to create records that are "certified", 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(1) and 49(b).

Orders and Investigation Reports Considered: P-50, MO-1422, PO-2237, PO-2477 and MO-1570.

BACKGROUND:

[1] The appellant submitted a request to the University of Ottawa (the university) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to a particular incident that occurred at the university.

[2] The university located records responsive to the request, including nine photographs, a security report, and a DVD containing video surveillance footage. The university issued a decision granting complete access to the security report and to four of the photographs. The university relied on the discretionary exemption in section 49(b) (personal privacy) to deny access to the DVD in its entirety, and on the mandatory exemption in section 21 (personal privacy) to deny access, in part, to the remaining five photographs.

[3] The appellant appealed the university's decision to this office.

[4] During mediation, the appellant stated that he believed additional records exist, thereby raising the reasonableness of the university's search as an issue in this appeal. The appellant also asserted that the university should provide him with certified or official copies of the responsive records.

[5] Also during mediation, the university clarified that it relied on the discretionary section 49(b) exemption, in conjunction with the presumptions in sections 21(3)(b) and (d), to deny access to the DVD and parts of the remaining five photographs.

[6] Mediation did not resolve the issues in this appeal, and it was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

[7] The adjudicator sought and received representations from the university and the appellant. These representations were shared in accordance with this office's *Practice Direction 7*.

[8] The appeal was then transferred to me for final disposition.

[9] In this order, I uphold the university's decision and dismiss the appeal.

RECORDS:

[10] The records remaining at issue in this appeal are the DVD that contains video surveillance footage of the location of the incident in question, and the withheld images from the five photographs that were disclosed, in part, to the appellant.

ISSUES:

A. Does the definition of a record in section 2(1) of the *Act* include certified copies of records?

B. Did the university conduct a reasonable search for records?

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

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

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

DISCUSSION:

A. Does the definition of a record in section 2(1) of the *Act* include certified copies of records?

[11] The term "record" is defined in section 2(1) as follows:

> "record" means any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,
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> > (a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and
> >
> > (b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution; ("document")

Representations

[12] In its representations, the university states that Protection Services Security Reports are considered records under the *Act*. It explains that Protection Services Security Reports are stored and managed in a computer software database that allows for the writing of reports, the integration of photos and videos within the reports, and the printing of reports. The university submits that the records it has provided in this appeal are exact duplicates of what is contained in its database, and that there are no other versions of the security report that exist. The university states that it does not "certify" its security reports; however, in order to reassure the appellant, its legal

counsel sent a letter to the appellant enclosing a second copy of the disclosed security report.

[13] In his representations, the appellant raises "security concerns" that he alleges are present in this appeal and relate to the records, and he makes a number of assertions about what the university is required to do under the law, as he sees it.[1] He refutes the university's suggestion that he received an "official copy" of the security report from the university's legal counsel. He asserts that he is entitled to receive "official certified true copies" of the records that are "stamped and signed" as true copies.

Analysis and Findings

[14] The appellant raises concerns about the authenticity of the records in this appeal and asks that the university be required to provide certified copies of the records. I have reviewed the representations of the appellant on this issue, and I do not see any basis for his concern about the authenticity of the records. I also note that the appellant has provided no statutory or legal basis to support his argument that the university must provide certified copies of the records to him.

[15] The term "record" is defined in section 2(1) of the *Act* as "any record of information however recorded." There is no reference in the definition of "record" in section 2(1) to a "certified" or "official" copy. There is also no requirement in the *Act* for an institution to provide a certified copy of a record that is responsive to a request.

[16] In asking that the university be required to provide "certified" copies of the records, the appellant is, in essence, asking the university to create records that do not exist. The university, however, has identified existing records that are responsive to the request. Previous orders of this office have established that an institution is not required to create a record in response to an access request if one does not exist.[2] In accordance with these previous orders, and taking into account the fact that the university has located existing responsive records, I find that the university is not required to create certified copies of the records in this appeal.

B. Did the university conduct a reasonable search for records?

[17] 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

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[1] The appellant's statements in this regard are not helpful to my determination of this issue and I will not refer to them further. The appellant makes similar statements throughout his representations. He also refers repeatedly to a national intelligence body, a specific country, and certain cultural and religious groups that have conspired to harm him over a number of years. In this order, I will deal only with the representations of the appellant that are relevant to the issues.

[2] Orders P-50, MO-1422 and PO-2237.

reasonable search for records as required by section 24.[3] 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.

[18] 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.[4] To be responsive, a record must be "reasonably related" to the request.[5]

[19] 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.[6]

[20] 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.[7]

[21] 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.[8]

Representations

[22] The university submits that it conducted a reasonable search for responsive records as required by section 24 of the *Act.* It explains that the search was conducted by an experienced university employee who is familiar with the information management systems within the university's Protection Services, and their operation. The university asserts that it has searched for all records that are reasonably related to the request.

[23] Regarding its record retention practices, the university explains that its video surveillance system is able to record between five days and two weeks of archived video before it begins recording over the oldest footage. It further explains that when an incident is reported to Protection Services, an employee of Protection Services views the video footage digitally recorded from the surveillance cameras where the alleged incident occurred. Still photos or snap shots can be digitally captured from the video footage and stored digitally, as can portions of the video footage. Accordingly, upon

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[3] Orders P-85, P-221 and PO-1954-I.
[4] Orders P-624 and PO-2559.
[5] Order PO-2554.
[6] Orders M-909, PO-2469 and PO-2592.
[7] Order MO-2185.
[8] Order MO-2246.

receiving a report of an incident, Protection Services views, stores and retains only the portions of the video footage that are relevant to the alleged incident.

[24] With respect to the appellant's assertion that additional video surveillance should exist because there were two cameras in the vicinity during the incident, the university submits that it reviewed the footage from both security cameras in the location of the alleged incident reported by the appellant, and that the most relevant portions of video footage taken from one camera were kept, while snap shots most relevant to the alleged incident were captured from the video footage taken by both cameras. The university also notes that when the appellant submitted his request two years after the incident, the video footage from the security cameras no longer existed and had long since been recorded over.

[25] Along with its representations, the university provides an affidavit from the administrative assistant for the Access to Information and Privacy Office of the university. In the affidavit, the administrative assistant deposes that she received the completed search form from the investigator who conducted the search; this form is attached as an exhibit to the affidavit.

[26] In his representations, the appellant does not directly address this issue. He states that he was told by the university that the video footage from the second camera was not available because it was destroyed two weeks after the date of the incident.

Analysis and Findings

[27] Based on my review of the representations, I find the appellant has not provided me with a reasonable basis for concluding that additional records exist. I am satisfied by the representations of the university that an experienced employee made reasonable efforts to identify and locate responsive records. Furthermore, I accept the university's explanation that it retains only relevant images and video footage regarding a reported incident.

[28] I do note however, that the university did not provide an affidavit from the individual who conducted the search for responsive records, which is what is normally required to establish that a reasonable search was conducted. Instead, the university provided an affidavit from an administrative assistant who received the completed search form from the investigator who performed the search. While an affidavit from the investigator would have been preferable, the lack of such an affidavit in this appeal is not determinative of this issue. I find that the university conducted a reasonable search for records as required by section 24 of the *Act.*

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

[29] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) in part as follows:

> "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

[30] 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.[9]

[31] To qualify as personal information, the information must be about the individual in a personal capacity and it must be reasonable to expect that an individual may be identified if the information is disclosed.[10]

Representations

[32] In its representations, the university submits that the five partially disclosed photographs and the withheld DVD contain images of a number of individuals working in the computer laboratory at the time of the alleged incident. The university states that it is not in a position to obtain these individuals' consent to disclosure of their image as it is unable to ascertain their identity. Nonetheless, the university asserts that the individuals may be identifiable if these records are disclosed. The university also argues that the individuals whose image appears in the DVD have a reasonable expectation that their personal information collected by the video cameras will only be collected and disclosed for legitimate and specific purposes, namely, the protection of the safety and security of individuals in the university facility depicted.

[33] In his representations, the appellant states that the video footage contains images of an individual who attempted to steal his backpack, and that this individual's personal privacy should be disregarded because of the attempted theft. He also asserts that the university should disclose to him the name and address of the alleged thief, or the images of this individual. In respect of other individuals whose images appear in the video, he asserts that the university should have contacted them and sought their

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[9] Order 11.

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

consent to disclosure, and that alternatively, their faces should be blurred or hidden. The appellant also states that his own personal information is contained in the records.

Analysis and Findings

[34] Based on my review of the representations of the parties and the records themselves, I find that they contain information that qualifies as the personal information of the appellant and a number of other individuals. Specifically, they contain information relating to the race, national or ethnic origin, colour and sex of a number of individuals including the appellant, which qualifies as personal information under paragraph (a) of section 2(1) of the *Act.* The records also contain images of the appellant and other individuals that pinpoint the locations, movements and activities of the appellant and these individuals at certain times on a specific day. Previous orders of this office have found that images of individuals contained in photographs and video footage qualify as the personal information of those individuals.[11] I adopt this approach here. I also agree with the representations of the university that while these individuals may not be identifiable to the university, they may still be identifiable to the appellant, or to other individuals.

[35] Having found that the records contain the personal information of the appellant and others, I will now consider whether the discretionary exemption in section 49(b) applies to the withheld DVD and the withheld portions of the five photographs at issue in this appeal.

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

[36] Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

[37] If the information falls within the scope of section 49(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his own personal information against the other individuals' right to protection of their privacy.

[38] Sections 21(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold under section 49(b) is met.

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[11] Orders PO-2477 and MO-1570.

[39] If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 49(b). If a presumption under section 21(3) applies to records which are claimed to be exempt under section 49(b), this office can:

> . . .consider the criteria mentioned in s.21(3)(b) in determining, under s.49(b), whether disclosure . . . would constitute an unjustified invasion of [a third party's] personal privacy.[12]

[40] The university claims that the presumptions in sections 21(3)(b) and (d) apply. These sections state:

> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
> >
> > (d) relates to employment or educational history;

[41] Even if no criminal proceedings were commenced against any individuals, the presumption in section 21(3)(b) may still apply. Section 21(3)(b) only requires that there be an investigation into a possible violation of law[13] and it can apply to a variety of investigations. Section 21(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law.[14]

[42] Information which reveals the dates on which former employees are eligible for early retirement, the start and end dates of employment, the number of years of service, the last day worked, the dates upon which the period of notice commenced and terminated, the date of earliest retirement, entitlement to and the number of sick leave and annual leave days used and restrictive covenants in which individuals agree not to engage in certain work for a specified duration has been found to fall within the section 21(3)(d) presumption.[15]

[43] Section 21(2) lists various factors that may be relevant in determining whether the unjustified invasion of personal privacy threshold under section 49(b) is met.[16] The

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[12] *Grant v. Cropley,* [2001] O.J. 749 (Div. Ct.).
[13] Orders P-242 and MO-2235.
[14] Orders M-734, M-841, M-1086, PO-1819 and PO-2019.
[15] Orders M-173, P-1348, MO-1332, PO-1885 and PO-2050. See also Orders PO-2598, MO-2174 and MO-2344.
[16] Order P-239.

list of factors under section 21(2) is not exhaustive, and the institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2).[17]

Representations

[44] As noted above, the university submits that the records qualify for exemption under section 49(b), because their disclosure would constitute a presumed unjustified invasion of personal privacy under sections 21(3)(b) and (d). The university states that the records were compiled as part of an investigation into a possible violation of law, and that the video footage was prepared for the police. The university also states that the records relate to the employment and/or educational history of the individuals whose image appears in the records.

[45] In his representations, the appellant asserts that none of the presumptions under section 21(3) applies to the records. The appellant argues that section 21(3)(b) does not apply because the records were created after the completion of the investigation into a possible violation of law. The appellant relies on Order PO-1819 to support his assertion. The appellant states that the security report, which he considers false because it found that no violation of law had occurred, was created after the investigation was completed. The appellant also argues that section 21(3)(d) does not apply because there was no instruction or activity at the time of the incident that could qualify as educational history.

[46] The appellant further submits that the factors in sections 21(2)(b), (d) and (e) apply and weigh in favour of disclosure of the records. The appellant argues that access to the personal information in the record may promote public health and safety as contemplated by section 21(2)(b), since it would provide evidence of wrongdoing by the university security staff that could be used by others who have had similar issues, or by provincial authorities who may want to prosecute the university security staff. In respect of the factor in section 21(2)(d), the appellant states that disclosure is relevant to a fair determination of his rights in a specified legal proceeding. Finally, the appellant asserts that the alleged thief may suffer pecuniary or other harm, as contemplated by the factor in section 21(2)(e), because of the attempted theft.

Analysis and Findings

[47] I accept the university's representations that the records at issue in this appeal were compiled and are identifiable as part of an investigation into a possible violation of law. The records demonstrate that the appellant reported an alleged theft to the university, and in response, the university investigated the incident. In investigating the alleged theft, the university reviewed the existing video surveillance footage, and

[17] Order P-99.

retained the portion of the footage that showed the appellant's interaction with the alleged thief. The university also captured images from the video footage recorded from the two cameras in the area, and retained these as part of its investigation. The security report prepared by the university confirms that the video footage on the DVD was prepared for the police. For these reasons, I find that disclosure of the withheld information in the records is presumed to constitute an unjustified invasion of personal privacy as set out in section 21(3)(b), and that this personal information is, accordingly, exempt under section 49(b).

[48] With respect to the possible application of the presumption in section 21(3)(d), I am not satisfied by the representations of the university that disclosure of the withheld information would constitute disclosure of personal information related to educational history. On this issue, I agree with the appellant and find that the section 21(3)(d) presumption does not apply to the records.

[49] I now turn to my consideration of the factors in sections 21(2)(b), (d) and (e) raised by the appellant, and their potential relevance in determining whether disclosure of the records would constitute an unjustified invasion of personal privacy.

[50] The factor in section 21(2)(b) applies in situations where access to the personal information at issue may promote public health and safety. The appellant raises this factor because he is not satisfied with the actions of the university security staff following his report of an attempted theft. He is also dissatisfied that the police, who were called in by the security staff to review the incident, decided not to investigate the alleged theft further. Despite the appellant's personal concerns about how the incident was investigated, there is no public health and safety concern present in this appeal that would be promoted by disclosure of the withheld information in the records. Accordingly, I find that the factor in section 21(2)(b) is not relevant.

[51] For section 21(2)(d) to apply, the appellant must establish that:

(1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and

(2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and

(3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and

(4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing[18]

[52] The appellant asserts that he requires the records for a related civil proceeding. While he has provided extensive representations, the appellant has not satisfied any of the four elements required to establish that section 21(2)(d) applies. As such, I find that the factor in section 21(2)(d) is not applicable.

[53] With respect to the factor in section 21(2)(e) raised by the appellant, I note that this factor, if found to apply, weighs in favour of privacy protection and the withholding of the information at issue. I find that this factor does apply.

[54] For the reasons above, I find that the records remaining at issue qualify for exemption under section 49(b), in conjunction with the presumption in section 21(3)(b), and that the only factor applicable, section 21(2)(e), weighs in favour of privacy protection.

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

[55] The section 49(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[56] 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.

[57] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[19] This office may not, however, substitute its own discretion for that of the institution.[20]

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[18] Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).
[19] Order MO-1573.
[20] Section 54(2).

[58] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[21]

- 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
    - 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
- 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
- the historic practice of the institution with respect to similar information.

Representations

[59] The university submits that it has properly exercised its discretion under section 49(b). It explains that in exercising its discretion, it considered the purpose of the *Act* and the fact that the appellant was seeking access to his personal information. The

[21] Orders P-344 and MO-1573.

university also states that it took into account the fact that the records contain the personal information of other individuals and that in the circumstances, disclosure of this personal information is presumed to constitute an unjustified invasion of personal privacy. Finally, the university states that it disclosed as much of the appellant's personal information contained in the records as it reasonably could. With respect to the withheld information, the university states that it constitutes personal information of other individuals that cannot be reasonably severed, and that cannot be disclosed without the consent of these other individuals.

[60] The appellant asserts that in withholding information on the alleged thief, the university exercised its discretion in bad faith and for an improper purpose, and it failed to take into account relevant considerations. The appellant does not provide further details on this issue.

Analysis and Findings

[61] I find that the university properly exercised its discretion under section 49(b) and took only relevant considerations into account. Disclosure of the withheld information is presumed to constitute an unjustified invasion of privacy of other identifiable individuals, as the information was compiled in the course of a law enforcement investigation. I find that the university disclosed as much of the appellant's personal information in the records to the appellant as it could, including the complete security report which provides details of what is contained in the DVD. I conclude that the appellant's right of access to his own information does not outweigh the privacy rights of the individuals that appear in the withheld records.

ORDER:

I uphold the decision of the university and dismiss this appeal.

Original signed by: February 28, 2013
Stella Ball
Adjudicator