Preventative Information Sharing Between Post-secondary Institutions: Privacy, Human Rights & Safety in the Context of Campus Gender-based Violence

From the Courage to Act Unsettled Questions Series

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Land Acknowledgement

This work is taking place on and across the traditional territories of many Indigenous nations. We recognize that gender-based violence is one form of violence caused by colonization that is still used today to marginalize and dispossess Indigenous Peoples from their lands and waters. We must centre this truth in our work to address gender-based violence on campuses and in our communities. We commit to continuing to learn and take an anti-colonial inclusive approach in all our work. One way we are honouring this responsibility is by actively incorporating the Calls for Justice within Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls.

About Possibility Seeds

Courage to Act is a national initiative to address and prevent gender-based violence at Canadian post-secondary institutions. It is led by Possibility Seeds, a social change consultancy dedicated to gender justice, equity, and inclusion. We believe safe, equitable workplaces, organizations and institutions are possible. Learn more about our work at www.possibilityseeds.ca.

We hope this document will be a valuable resource to those seeking to address and prevent campus gender-based violence. As this is an evolving document, it may not capture the full complexity of the subject matter. The information provided does not constitute legal advice, and is not intended to be prescriptive. It should be considered a supplement to existing expertise, experience, and credentials; not a replacement for them.

We encourage readers to seek out training, education, and professional development opportunities in relevant areas to enhance their knowledge and sustained engagement with this work.

Authors:

Deb Eerkes and Britney De Costa

With thanks to our expert panel:

Brenda Austin-Smith, Professor, University of Manitoba, Executive Committee Member, University of Manitoba Faculty Association

Joannie Fogue Mgamgne, Vice President Student Life, University of Alberta Students' Union (2022-2023)

Mary Golab, (former) Information and Privacy Officer, University of Alberta

Lise Gotell, Professor, University of Alberta

Binnie Singh, Assistant Vice Provost, Academic Affairs, University of California, Davis

And everyone else who contributed their expertise to this work.

Graphic Design:

Kitty Rodé with design elements from Michelle Campos Castillo

Phase 3 Courage to Act Project Team:

Farrah Khan (Executive Director), Anoodth Naushan (Project Director), Maya Kotlarenko (Operations Manager), Emily Allan (Communications Manager), Laura Murray (Project Coordinator), Aubrianna Snow (Stakeholder Relations Specialist), Kitty Rodé (Graphic Designer), Leon K (Web Designer), Noémie Veilleux (Francophone Project Coordinator), Jennifer Flood (Education Lead), Amal Elmi (Response and Support Co-Lead), Britney De Costa (Experiential Learning Project Lead & RIA Co-Lead), Andréanne St-Gelais (Experiential Learning Project Coordinator) and Deb Eerkes (RIA Co-Lead).

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Introduction

The final whitepaper from Courage to Act's Reporting, Investigation and Adjudication (RIA) working group picks up a thread from the Unsettled Questions section of *A Comprehensive Guide to Campus GBV Complaints: Strategies for Procedurally Fair, Trauma-Informed Processes to Reduce Harm (the Guide)*. In Chapter 12 of *the Guide*, we discussed information sharing within an institution generally, and with parties to a campus complaint process, specifically. In this whitepaper, we take up another unsettled question: how should post-secondary institutions (PSIs) approach disclosing personal information to other PSIs to prevent potentially foreseeable gender-based violence (GBV)? In other words, is it possible to avoid "passing the problem"? In chapter 15 of *the Guide*, we identified the following as requiring further discussion:

> *In 2017, a professor left the University of Manitoba amid sexual misconduct allegations, and was subsequently awarded $286,000 after students and former students informed his new employer at Berklee College of Music that he had harassed them (Geary, 2020). This and similar situations with both students and faculty have raised questions about whether information should be shared between institutions when an individual leaves or is removed from a PSI as a result of committing GBV.*
>
> *Post-#MeToo, public opinion is evolving on the subject of how we should deal with allegations (proven or not) of sexual misconduct. Some would argue that the right to privacy must be paramount, while others believe that passing the problem on to other institutions without warning is unethical. This is a developing debate; one which may in part be informed by the outcome of legal action surrounding Dr. Julie MacFarlane and her disclosure of information about a previous colleague to his new employer in spite of a non-disclosure agreement (Gollom, 2020). [See "Non-Disclosure Agreements" in chapter 12 of the Guide for a more in-depth discussion.]*
>
> *Also in 2017, the head coach of the University of Saskatchewan Huskies recruited a player to the volleyball team despite knowing that the player had left his previous institution under a cloud of suspicion and was facing criminal charges for sexual assault (Radford, 2018). Given that the coach was aware of the pending charges when he allowed the player to join the team, the university fired him, both for recruiting the student and for failing to inform the university about the allegations of sexual*

misconduct the player faced. The coach was reinstated by an arbitrator in 2020 (Administrative and Supervisory Personnel Association vs. University of Saskatchewan, 2020); however, in 2021, that decision was brought under judicial review and quashed. The question of whether the coach's recruitment decision should be subject to discipline was sent back to the arbitrator to be reheard. (McAdam, 2021; University of Saskatchewan v Administrative and Supervisory Personnel Association, 2021). [UPDATE: The Saskatchewan Court of Appeal set aside the decision of the chambers judge in 2022 and reinstated the arbitrator's decision to return the coach to his former position. (Administrative and Supervisory Personnel Association vs. University of Saskatchewan, 2022); however, according to a July 22, 2022 statement on the University of Saskatchewan website, "**Brian Gavlas is no longer the coach of the Huskies men's volleyball team, effective July 22, 2022.** After extensive legal proceedings, Mr. Gavlas was reinstated on June 20, 2022. He has now resigned from this position." (University of Saskatchewan, 2022; emphasis in the original)]

These two situations, and others like them, have raised the question of whether individuals with knowledge of these matters have an ethical duty to inform and, if so, to whom? (Eerkes, De Costa & Jafry, 2020)

The #MeToo movement highlighted, among other things, the way that workplaces, corporations and institutions have been complicit in "passing the problem", that is, allowing individuals known to have committed sexual violence to move on to other institutions without warning their new employers. Some would argue that when an institution requires survivors/complainants to sign non-disclosure agreements (NDAs) as part of a resolution of their allegations, the effect becomes more than one of just silencing the survivor; it also perpetuates sexual violence.[1] This orientation emphasizes the right of students and employees to an environment free from GBV. It is necessary and ethical, in this view, to disclose information about instances and investigations of GBV to another institution to avoid "passing the problem." Others argue, conversely, that keeping PSI investigations and

[1] For example, see the work of Can't Buy My Silence—a campaign with a goal to create "legislative and regulatory change that will make NDAs unenforceable for anything other than their original purpose – the prevention of sharing confidential business information ("intellectual property") and trade secrets."

outcomes confidential is non-negotiable under privacy law and necessary to timely and fair resolution of complaints.

In some ways, this debate could be considered the institutional analogue of survivors who choose to report their sexual assaults to the police or their PSI in part to ensure that no one else is subjected to the kind of harm they experienced. Even when they expect no personal benefit, these survivors choose the altruistic approach of reporting as a preventative measure for others.

The difference between survivors reporting as a preventative measure and an institution information-sharing with the same goal lies in the regulatory requirements that govern PSIs. Institutions are subject to information and privacy law, human rights law, occupational health and safety regulations, as well as other internal and external regulations, expectations and commitments that guide their decisions around disclosure of information. Individual employees are subject to these laws when carrying out their duties;[2] however, the individuals who are involved in a complaint are not bound by information and privacy law—although they may be vulnerable to civil litigation (such as defamation claims) and/or may be persuaded to sign NDAs to expedite a resolution of their complaint.

To be clear, it is a laudable goal to prevent potential GBV, whether at one's own institution or elsewhere. In this whitepaper, we examine this regulatory environment and invite readers to adjust both their interpretation of information and privacy law and their understanding of the issue. Institutions are not *passing* a problem, they are *importing* a problem; and despite common misconceptions to the contrary, information and privacy law currently allows for practices that would mitigate the possibility that individuals found in breach of policy at one PSI could simply move to a different one with a clean record. We will provide strategies PSIs can implement to avoid importing a problem, as well as recommendations for reforming outdated privacy laws across the country.

A Note on Scope

Before we dive into this unsettled question, we want to clarify the scope of our discussion. Questions around privacy or confidentiality and information sharing in the context of GBV

[2] Note that being subjected to GBV or committing acts of GBV are not part of an employee's duties and therefore employees who are parties to a complaint are not bound by the same confidentiality constraints as they would be when, for example, administering a complaint or receiving a disclosure.

complaints are plentiful, and there are many unsettled questions to explore. *To be clear, this unsettled question is focused explicitly on sharing information held by one PSI with another PSI.* We are not weighing in on public disclosure by a PSI, nor are we discussing individual public disclosure or questions around NDAs in this paper.

We also need to specify that the information we are discussing is limited to findings or ongoing investigations into sexual violence. We are not considering information about whether a person is alleged to have committed sexual violence where no investigation has occurred, nor are we discussing the outcomes of sexual violence investigations where the person was found not to be in violation of sexual violence/GBV policy. These cases raise questions that go beyond the scope of this paper, and ongoing conversations are needed.

We also recognize that the focus of this discussion is limited in that it does not account for the fact that the vast majority of experiences of GBV go unreported, and therefore strategies and recommendations that speak to information sharing between PSIs only address those cases where a report has been made and investigated. However, while limited in scope, we believe that it is necessary to address this unsettled question as one part of a larger framework to address and prevent GBV at PSIs.

Methodology

To better understand and capture the limitations and opportunities for information sharing between institutions, Courage to Act invited an expert panel with a range of perspectives on the topic to share their knowledge as well as their lived and professional experiences. This methodology mirrored that which was used for previously explored unsettled questions, including those found in Chapter 12 of *the Guide* and the first paper in our Unsettled Questions Series on the role of post-secondary institutions in addressing student-instructor relationships.

For this unsettled question, our panel was made up of five experts, including a student leader, faculty association leader, legal scholar, information and privacy professional, and post-secondary administrator. Panelists were provided with a brief backgrounder outlining the issue and asked to provide written responses to a set of guiding questions to be shared with all panelists ahead of time to prepare for the session. The expert panel participated in an online 90-minute collaborative question and answer session facilitated by Courage to Act's RIA working group.

These responses and the panel discussion provided the foundation on which this whitepaper was written. The expert panel, members of the Courage to Act team, and the Courage to Act Advisory Committee reviewed two drafts of the whitepaper to ensure key points were accurately captured and addressed before publication.

Understanding the Regulatory Landscape

The following section provides an introduction to the primary types of legislation that govern information sharing between PSIs: information and privacy legislation and human rights legislation. Here, we challenge some common misconceptions about what is and is not allowed under the law when it comes to information sharing.

Information and Privacy

The information and privacy laws that apply to Canadian PSIs are legislated at the provincial and territorial level.[3] While each province and territory has its own version of the law, they generally reflect Article 12 of the United Nations' *Universal Declaration of Human Rights* (1948), which protects against arbitrary interference with the right to privacy. Information and privacy laws regulate how PSIs collect, use, share and protect personal information contained in the records in the care or custody of the PSI. In general:

1. PSIs should collect only the personal information necessary to administer their programs and policies.
2. Personal information can only be used for the purpose for which it was collected, or for a purpose consistent with the purpose for which it was collected.
3. Individuals can request access to records containing general or personal information, such as recorded details about an identifiable individual. PSIs decide, on a case-by-case basis, which records and/or information to disclose, guided by their provincial or territorial legislation.
4. When using personal information within a PSI, there are also restrictions on its disclosure. Generally, only the necessary information can be disclosed, and only to those who have a legitimate need to know.

Consider an example of how this might apply to an incident of campus GBV:

> A student discloses an experience of sexual violence to a student advisor shortly before exam week and shares that they are not doing well. The advisor provides the

[3] The Office of the Privacy Commissioner of Canada (OPC) provides a list of provincial and territorial information and privacy laws.

student with a number of options, including requesting academic considerations.[4] As a result, the student requests that their exams be deferred for a period of time. Where this is a feasible request, it necessitates some information to be disclosed to the student's instructors. The instructors receive only that information which is necessary to administer the academic consideration and should not be provided with any details about the disclosure, incident or any other elements related to the matter.

If the student chooses subsequently to make a complaint under the policy, they will be expected to provide a statement to an investigator about the assault, including time, place, who was involved and granular details about what happened. The PSI collects all of this personal information for use in administering the complaint. The information is disclosed only to those who have a legitimate need to know: the respondent, who has a procedural fairness right to respond to the allegations; a decision-maker or tribunal; and potentially an appeal panel. However, it is not to be shared with anyone outside of the process for any other purpose.

Commonly Misunderstood Features of Privacy Law

Information and privacy legislation is quasi-constitutional. In other words, where there is a conflict between information and privacy law and another law, information and privacy law trumps the other law. Unfortunately, information and privacy legislation is commonly misunderstood and its interpretation can vary, not only across a province or territory but within a single institution. Some of the features that tend to be misunderstood include:

- The institution is subject to information and privacy legislation, but individuals are not. Students, for example, are not required to comply with information and privacy law.
- Confidentiality is not the same as secrecy. A PSI cannot administer its policies completely in the dark. Select information must be shared, on a need-to-know basis,

[4] For more on developing academic considerations, see Jafry, Z., Naushan, A., Toledo, E., Khan, F. & Elmi, A. (2022). *Developing Comprehensive Academic Accommodations and Considerations for Students Affected by Gender-Based Violence at Canadian Post-Secondary Institutions*. Courage to Act: Addressing and Preventing Gender-Based Violence at Post-Secondary Institutions in Canada. This document can be accessed in the Courage to Act Knowledge Centre.

with those who have a legitimate need to know in order to run programs and apply policies. In addition, some information must be disclosed to the complainant/survivor in order to meet PSI human rights obligations.

- PSI policy complaints against individuals are confidential (personal information is not to be shared beyond what is allowed by information and privacy laws), but procedures should be public.

Human Rights

Like information and privacy legislation, human rights laws governing PSIs are enacted by the provinces and territories.[5] Generally, they prohibit discrimination against individuals or groups based on protected grounds. These are delineated in the relevant legislation, but typically include: age, race, ethnicity, religion or creed, disability, gender, gender identity, gender expression, sex, and sexual orientation. Important to this discussion, GBV (including sexual harassment and sexual assault) has been established as a form of discrimination based on the protected ground of gender in that it limits equitable access to the workplace (or educational environment in the case of PSIs) and is therefore prohibited under human rights law.

Like information and privacy legislation, human rights laws are also quasi-constitutional, meaning they take precedence over other laws when they are in conflict (*Tranchemontagne vs. Ontario (Dir. Disability Support Program)*, 2006 at para 33). Any actions or decisions taken by a PSI must comply with both human rights and information and privacy laws; neither one is optional. However, the two can exist in tension. Information and privacy law may require information about a known incident of GBV be kept confidential. However, at the same time, not disclosing information about a known incident of GBV can foster conditions that are discriminatory.

Consider the following example:

> A student reports an incident of sexual violence in which the coordinator of their lab cornered them and touched them sexually without consent. The PSI initiates an investigation, which substantiates the complaint. However, the student is told they are not entitled to know anything beyond that—such as whether the lab coordinator

[5] Overview of Human Rights Codes by Province and Territory in Canada (2018).

was disciplined and the nature of that discipline—because employment matters must be kept confidential.

The student begins to avoid the lab and ultimately stops coming to campus for fear of running into the lab coordinator or being subjected to retaliation. Because the student does not have access to any information about the outcome of their complaint, they continue to understand the educational environment as unsafe for them and therefore they are forced to make a choice between attending a lab where GBV (and potential retaliation) occurs, or choosing not to attend, with all of the cascading academic and other consequences that may follow.

Even if the PSI did all of the right things and carefully considered appropriate discipline, the refusal to share that information with the student complainant has a discriminatory effect. Reassurance from the PSI that the student is safe rings hollow when it is not accompanied by information about measures taken.

The discriminatory effect could be mitigated or ameliorated in this example by informing the student, for example, that the lab coordinator will no longer be working in that lab and has been instructed not to contact them or enter specific buildings the student frequents. There is an argument to be made that the student has a *legitimate need to know* specific information about the outcome of their complaint in order to have equitable access to the educational environment.

The tension between information and privacy legislation and the human right to equitable access to the learning environment is complex enough within a PSI. It becomes especially complex when a PSI has knowledge that a student or employee has been found to have committed GBV and may subsequently move to another PSI.

Occupational Health and Safety

This third relevant area of provincial and territorial law requires PSIs to maintain a safe workplace.[6] Many provinces and territories have explicitly recognized sexual harassment (including sexual assault) as a workplace hazard to be prevented or addressed through corrective action. It has not been easy for PSIs to adapt the principles and procedures they use for chemical spills and loose wiring to psychosocial safety; however, it has become

[6] Canadian Federation of Independent Business (CFIB) list of OHS Compliance by province/territories

clear that the risk and reality of GBV in the workplace is as damaging as threats to physical safety are, and is much more difficult to address in some ways.

In addition to worker safety, PSIs have an obligation to provide a safe educational environment for their students, including preventing and addressing GBV in classrooms, labs, residences and other campus spaces, and at PSI-sponsored or sanctioned social events. PSIs can learn from health and safety protocols to meet this obligation, for example through policies and procedures, preventive education, complaint processes, and other forms of corrective action such as adjustments to physical spaces, social climate, or practices.

Administering legislated safety obligations requires that certain information be collected. It also requires, particularly in the area of psychological and social safety, paying attention to (and avoiding) practices that have a discriminatory effect on the basis of the protected characteristics listed in provincial/territorial human rights laws. We would add that a trauma-informed approach and harm reduction measures, as discussed in *the Guide*, contribute to a safe workplace and educational environment.

Preventative Information Collection

Purpose of Collecting Information about GBV

All of the above relates to information sharing within an institution. The calculus changes for sharing or disclosing records to entities outside of the institution. The principles of information and privacy law set out the general circumstances under which PSIs can collect, use and disclose personal information, both within and between institutions. Therefore, in order to understand when a PSI has the authority to collect or use information about findings or investigations into GBV, and under what circumstances a PSI is permitted to disclose this information requested by another PSI, the expert panel first needed to define the purpose of collecting this information from a person's previous institution. The panel identified three main goals of collecting personal information of this nature:

1. **To avoid endangering the community where they are unaware that GBV has taken place.** This goal helps to frame the purpose under one of the legislated allowances for collecting personal information: that it is necessary and relates to an operating program of the public body. It is rooted in the PSI's responsibility to maintain a safe and violence-free educational environment under occupational health and safety legislation (where applicable) and the human rights argument that not disclosing information about a known incident of GBV can foster conditions that are discriminatory.
2. **To keep accountability for campus safety where it belongs: with the institution.** The panel also noted that collecting this information is a preventative measure to support a safe working and learning environment. One panelist discussed institutional responses when students raised concerns about an incoming community member. A common response to those students was an "unless someone makes a formal complaint, we're not going to do anything about it" attitude that shifts the responsibility for institutional safety onto students. The same can be said for institutional responses when faculty or staff raise concerns about incoming individuals. When the PSI collects this information itself, it puts the responsibility back on the institution to make an informed decision about the individuals it brings into the community.

3. **To foster accountability and to support persons who have caused harm to not continue to cause harm.** Finally, panelists identified that PSIs can collect this information as a means of promoting accountability in persons who have caused harm.. The goal would be to provide an opportunity for that person to demonstrate what they have done to address their behaviour and how they are working to integrate back into a post-secondary community.

Importantly, the expert panel was very clear that the purpose of collecting information about incidents of GBV is not, and should not be, to prevent a person who has caused harm from accessing future employment or education, but rather to contribute to a larger culture of consent and safety at and around PSIs.

Collecting information for the purpose of preventing GBV in the institution should be clearly understood as permissible. The PSI needs information to meet its legal obligations, particularly those that require PSIs to provide a safe working and educational environment, free from GBV. However, a PSI's purpose in collecting information is to use and disclose it to administer *its own* policies and programs, not to aid in that administration at another PSI. Volunteering information to another institution about disciplinary investigations and findings is not compliant with a PSI's obligations under information and privacy law. Instead, we must shift the orientation of this discussion to that which is permissible: the collection of information to avoid importing a problem.

From Passing to Importing the Problem

When we considered the panelists' discussion about why information sharing of this nature is important to them, and examined what is permissible under information and privacy law, we were able to shift our thinking away from what we commonly understand to be "passing the problem"—which puts the onus on one institution to protect another—to a more accurate framing of "importing the problem" —which leaves the responsibility with institutions to protect themselves. While PSIs must collect, use and disclose information to meet their own human rights and safety obligations, it is difficult to imagine a legitimate argument for doing so in order to assist another institution in administering its programs. Going back to the PSI's responsibility to maintain a safe and violence-free educational environment, how can PSIs protect against importing the problem? They must do so within the confines of the law and in a way that aligns with principles of accountability and broader efforts to address GBV on a more systemic level.

Strategies

Beginning with an understanding that information sharing and privacy is not as restrictive as we often believe it is and that it actually includes allowances for the collection of personal information, the expert panel identified three approaches that PSIs can take to protect against importing the problem and meet their safety and human rights responsibilities:

1. Take a consent-based approach.
2. Recognize the authority to collect.
3. Be clear on how the information will be used.

1. Take a consent-based approach

The most straightforward way to approach this issue is for PSIs to take a consent-based approach in its hiring and admissions processes. A consent-based approach involves asking the candidate, in the case of hiring, or applicant, in the case of student admissions, to provide consent to the hiring or admitting institution to collect information about their disciplinary record related to GBV from their previous institution. This approach avoids difficulties that may arise depending on how the institution holding the information

interprets its authority to disclose it. Under provincial and territorial information and privacy legislation, PSIs are permitted to disclose personal information about an individual when that individual has consented to the information being shared (see Appendix). There are multiple ways to take a consent-based approach, depending on whether it is applied during the hiring or student admission process.

In the case of hiring, there are two models that can be followed, either together or separately. The first is to implement a "reference-check" style approach. Here, candidates would be asked for permission for the hiring institution to collect information from their previous institution about whether they have been found to have violated any sexual violence policy or are currently subject to an ongoing investigation. This can be done in the form of a "release" that is included in the employee application whereby an applicant consents to the release of this information from their previous institution to the hiring institution. The hiring institution then has permission to seek this information for all applicants, but can choose to request the information for top or final candidates, similar to when a criminal record check is requested.

The second model is to take an "affirmation" or "self-disclosure" style approach. Here, candidates are asked to affirm that they have not been found to be in violation of an institutional sexual violence policy, and that they are not currently under investigation. This can be done when a candidate is signing a tentative offer letter, for example. A "self-disclosure" approach puts the onus on the candidate, and, in keeping with the goal of accountability, can be a precursor to providing the candidate with an opportunity to reflect on the harm they have caused and demonstrate the steps they have taken to change their behaviour.

For student admissions, we recommend taking an "affirmation" or "self-disclosure" style approach rather than a "reference-check" style approach. Recognizing the sheer volume of student admissions as compared to institutional staff and resources, asking a student to self-disclose is a more feasible approach. Here, an applicant can be asked to affirm that they have not been found to be in violation of an institutional sexual violence policy, and that they are not currently under investigation when they accept their offer of admission.

In all cases, it is important to restrict the information being requested to only what is necessary for the administration of the institution's policies and programs—in this case,

policies and programs related to GBV prevention. Beginning by identifying whether a person has been found to have violated a sexual violence policy or is currently under investigation provides the hiring or admitting institution with enough information to determine what their next steps might be. A person who has violated a sexual violence policy or is currently under investigation should not be automatically disqualified, but the information gathered should be part of the institution's decision making process.

Some general tips and guidelines for developing and implementing a consent-based approach include:

- Expanding the information you gather to include not only sexual violence, but all forms of harassment and discrimination. For example, UC Davis—see below—expanded its information gathering to "reflec[t] how people with multiple marginalized identities often experience sexual harassment in combination with other forms of harassment and/or discrimination" (Harton & Benya, 2022, *UC Davis*);
- Recognizing the breadth of roles or positions that this would be most applicable to, (e.g., residence and dining staff are commonly in contact with first-year students), and considering how this may apply when these positions are contracted out and the institution is not responsible for hiring practices;
- Starting with a pilot program and getting buy-in from leadership and staff; and
- Limiting the process to what is reasonable workload-wise so it is not burdensome for the staff responsible for carrying it out. (For example, UC Davis—see below—started with its tenure-track hiring, then expanded to a broader faculty pool after the success of the first pilot.)

Promising Practice

One promising practice we can learn from comes from the U.S., specifically from the University of California, Davis (UC Davis) and the University of Wisconsin System (UW System), where there are now innovative policies in place that include sexual harassment reference checks during the hiring process.

University of California, Davis[7]

In 2018, UC Davis developed a policy requiring "all individuals applying for a tenured (or equivalent) faculty position to include with their application materials a signed release stating that if they are the top candidate, UC Davis may contact all their prior university employers and conduct a reference check" (Harton & Benya, 2022, *UC Davis*). The reference check includes "any history of substantiated academic misconduct found following a formal investigation, including a finding of sexual harassment/sexual violence, in the course of the applicant's research/scholarship, teaching/mentoring, or university/public service" (Harton & Benya, 2022, UC Davis). This is supplemented by a requirement for final candidates to affirm "they have not been disciplined in the last 5 years and are not currently the subject of an investigation" in their tentative offer (Harton & Benya, 2022, *UC Davis*).

Notably, candidates who have findings of sexual misconduct are not automatically disqualified under the UC Davis policy. Candidates are given an opportunity to provide additional information regarding their history, which is then considered by a panel of administrators who determine whether to disqualify the candidate based on this information. One of the interesting results of this program is that it seems that candidates with a history of GBV complaints have been self-selective, opting not to apply for the positions that require these reference checks.

[7] To learn more about the UC Davis policy, including "description and case examples, historical background on the development of the policy, processes used to develop it, initial feedback on the policy and how concerns were handled, preliminary ideas for evaluation of the practice introduced by the policy, and suggestions for other organizations considering implementing similar practices," see: Harton & Benya, 2022, *UC Davis*.

University of Wisconsin System[8]

In 2018, the UW System also developed a policy to create "a systematic, coordinated framework for documenting, sharing, and responding to findings of sexual misconduct within the hiring and reference check processes for full-time faculty and staff across multiple UW System institutions and state agencies" (Harton & Benya, 2022, *UW System*). The policy requires all institutions in the UW System to: "(1) request information about sexual misconduct from both job candidates and their references during the hiring process…[including] violations, open investigations, and instances in which candidates left their previous position(s) while being actively investigated;… and (2) consistently disclose violations of sexual misconduct policies to hiring institutions that contact a UW institution for a reference check" (Harton & Benya, 2022, *UW System*).

Like UC Davis, the UW System policy does not automatically disqualify candidates who have findings of sexual misconduct against them. Instead, this information is considered as one part of the hiring process.

2. Recognize the existing authority to collect, use & disclose

A second, and critical, strategy for PSIs is to recognize their authority to collect and use personal information or, in the case of institutions holding the information, the authority to disclose it, by applying the principles of information and privacy legislation to the specific case at hand. Remember that institutions are subject to information and privacy legislation, but individuals are not. Confidentiality is not the same as secrecy; and while individual complaints are confidential, procedures should be public.

When it comes to information sharing, we often turn all of our attention, fairly, to protecting the privacy of the individual. This is an important consideration, but it must be balanced with an equally important principle of freedom of information. Remember that information and privacy legislation allows records containing personal information to be collected, including identifiable information, under certain conditions, one of which is that

[8] To learn more about the UW System policy, including "description and case examples, historical background on the development of the policy, processes used to develop it, initial feedback on the policy and how concerns were handled, preliminary ideas for evaluation of the practice introduced by the policy, and suggestions for other organizations considering implementing similar practices," see: Harton & Benya, 2022, *UW System*.

it is necessary and relates to an operating program of the public body (see Appendix). In the case of information about findings of sexual violence, there is a clear connection to the operating program of the PSI, which has a legislated responsibility to provide a safe working and learning environment under occupational health and safety and human rights laws. Once the authority to collect the information is established, it is then the responsibility of the PSI holding the information to decide, on a case-by-case basis, which records to disclose, guided by its provincial or territorial legislation. Where the law allows disclosure, the PSI holding the information can work within the applicable guidelines to provide the information to the requesting PSI.

Additionally, a balance can only be struck when the information being shared is limited to the necessary information and is shared exclusively with those who have a legitimate need to know. Institutions should ask themselves: "What is the least amount of information needed to make our decision?" Collecting only this information allows the PSI to make an informed decision about how they wish to proceed with a hiring or admissions process.

Finally, it is important that the PSI releasing the information is clear about how they have applied information and privacy principles to the case at hand. We recommend keeping a record that documents the criteria that were considered when collecting or disclosing the information, along with details about how the criteria were applied to the specific case. It may also be useful for PSIs to develop internal guidelines that outline the interpretation of information and privacy laws that allow for the collection, use and disclosure of information about findings and investigations into GBV. This would allow for consistent application of the law.

3. Be clear on how the information collected will be used

We note that in both the UC Davis and UW System examples above, self-disclosure or information disclosed about a prior finding or current investigation does not lead to automatic disqualification. When a receiving PSI learns that a candidate/applicant is under investigation or has been found to be in violation of GBV policy, the next step should be further discussion with the candidate/applicant. Campus GBV policies are broad and include a spectrum of behaviours, from unacceptable comments to violent sexual assaults. It would be both unfair and ill-advised to presume a finding under campus policy always arose from the latter, or implied that the individual is dangerous. A candidate/applicant

should have the opportunity to provide more information about what happened and how they may have learned from the experience. Supportive accountability measures might be part of the individual's supervision, for example, during their probationary period. The fight against GBV requires making space for accountability, changing attitudes, learning, and personal and social growth.

Recommendation for Change

While PSIs have access to many possible actions within the existing confines of the law that would allow them to live up to their responsibility to maintain a safe and violence-free educational environment and to support others to do the same, the expert panel identified a need for amendments to the legislative environment to better support the goal.

Information and privacy laws are written to balance freedom of information and protection of privacy, yet in practice we see little attention paid to freedom of information. Additionally, given that both information and privacy law and human rights law are quasi-constitutional, information and privacy law should incorporate human rights considerations and a recognition that decisions under information and privacy law can be discriminatory. We also note that, in many provinces and territories, information and privacy legislation was written over three decades ago, in a time and context that looks very different than where we are today. Therefore, we recommend that provincial and territorial information and privacy laws be revisited to determine what amendments need to be made in the context of GBV at PSIs. For example, **we recommend amendments to information and privacy laws that allow for disclosure in cases where not disclosing has a discriminatory effect or introduces barriers to participation based on a protected ground.** Such amendments would not only help PSIs avoid passing and importing the problem, they would also help reconcile information and privacy legislation with human rights obligations.

Conclusion

In returning to the basic principles of collection and use of personal information, and disclosure of records containing personal information, it becomes clear that PSIs are able to do so in order to administer GBV prevention and response programs, including their GBV policies, under current legislation. We have outlined a number of strategies for PSIs to employ, including taking a consent-based approach to the gathering of information about GBV violations from applicants.

We have shifted the orientation of the debate from the notion that a PSI must share information to protect the community at another institution to the reality that a PSI is responsible for collecting information to protect its own community. Most of the tools necessary to do that exist under current legislation, but require a consistent understanding and application of the regulatory requirements.

To be clear, this approach is not a panacea. It is limited to cases in which a complaint was received and investigated. The vast majority of instances of GBV go unreported and unaddressed and would therefore not be mitigated with these recommendations. Even where a PSI collected the information about an investigation or finding and put in place appropriate mitigation or accountability measures, there would be no guarantee that an individual would not cause future harm. This approach is only one in a broad range of actions a PSI can take to prevent GBV on its campus and must be augmented with broader attention to the social, physical and institutional factors that allow GBV to occur. A singular focus on individual behaviour will not prevent future GBV.

Finally, we noted the tendency for PSIs to apply information and privacy principles without consideration for the human rights implications. This can be a difficult balance and one that is not immediately apparent in most current information and privacy laws. We recommend that provincial and territorial governments consider amending these laws to acknowledge the potentially discriminatory effect of decisions made under privacy law, and allow for or require disclosure when this is the case.

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Appendix

Relevant Sections of Provincial and Territorial Information & Privacy Law

British Columbia	Freedom of Information and Protection of Privacy Act	Authority to Collect	Section 26
		Consent to Collect	Section 26(d)(i)
		Authority to Use	Section 32
		Consent to Use	Section 32(b)
		Authority to Disclose	Section 33
		Consent to Disclose	Section 33(2)(c)
Alberta	Freedom of Information and Protection of Privacy Act	Authority to Collect	Section 33
		Consent to Collect	–
		Authority to Use	Section 39
		Consent to Use	Section 39(1)(b)
		Authority to Disclose	Section 40
		Consent to Disclose	Section 40(1)(d)
Saskatchewan	Local Authority Freedom of Information and Protection of Privacy Act	Authority to Collect	Section 24
		Consent to Collect	–
		Authority to Use	Section 27
		Consent to Use	Section 27
		Authority to Disclose	Section 28
		Consent to Disclose	Section 28
Manitoba	Freedom of Information and Protection of Privacy Act	Authority to Collect	Section 36
		Consent to Collect	–

		Authority to Use	Section 43
		Consent to Use	Section 43(b)
		Authority to Disclose	Section 44(1)
		Consent to Disclose	44(1)(b)
Ontario	Freedom of Information and Protection of Privacy Act	Authority to Collect	Section 38
		Consent to Collect	–
		Authority to Use	Section 41(1)
		Consent to Use	Section 41(1)(a)
		Authority to Disclose	Section 42(1)
		Consent to Disclose	Section 42(1)(b)
Quebec	An Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information	Authority to Collect	Section 64
		Consent to Collect	–
		Authority to Use	Section 65(1)
		Consent to Use	Section 65(1)
		Authority to Disclose	Section 59
		Consent to Disclose	Section 53(1); Section 59
Newfoundland	Access to Information and Protection of Privacy Act	Authority to Collect	Section 61
		Consent to Collect	Section 62(1)(a)(i)
		Authority to Use	Section 66
		Consent to Use	Section 66(1)(b)
		Authority to Disclose	Section 68
		Consent to Disclose	Section 68(1)(b)

New Brunswick	Right to Information and Protection of Privacy Act	Authority to Collect	Section 37
		Consent to Collect	–
		Authority to Use	Section 44
		Consent to Use	Section 44 (b)
		Authority to Disclose	Section 46(1)
		Consent to Disclose	Section 46(1)(a)
Nova Scotia	Freedom of Information and Protection of Privacy Act	Authority to Collect	Section 24
		Consent to Collect	–
		Authority to Use	Section 26
		Consent to Use	Section 26(b)
		Authority to Disclose	Section 27
		Consent to Disclose	Section 27(b)
Prince Edward Island	Freedom of Information and Protection of Privacy Act	Authority to Collect	Section 31
		Consent to Collect	–
		Authority to Use	Section 36(1)
		Consent to Use	Section 36(1)(b)
		Authority to Disclose	Section 37(1)
		Consent to Disclose	Section 37(1)(c)
Nunavut	Access to Information and Protection of Privacy Act	Authority to Collect	Section 40
		Consent to Collect	–
		Authority to Use	Section 43
		Consent to Use	Section 43(b)

		Authority to Disclose	Section 48
		Consent to Disclose	Section 48(b)
Northwest Territories	Access to Information and Protection of Privacy Act	Authority to Collect	Section 40
		Consent to Collect	–
		Authority to Use	Section 43
		Consent to Use	Section 43(b)
		Authority to Disclose	Section 48
		Consent to Disclose	Section 48(b)
Yukon	Access to Information and Protection of Privacy Act	Authority to Collect	Section 15
		Consent to Collect	Section 15(2)(a)
		Authority to Use	Section 21
		Consent to Use	Section 21(e)
		Authority to Disclose	Section 25
		Consent to Disclose	Section 25(d)