



Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-348

Appeal 900590

Humber College of Applied Arts and Technology



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ORDER

BACKGROUND:

Humber College of Applied Arts and Technology (the institution) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to a report prepared for the President of the institution by a consultant commissioned to review matters pertaining to the School of Social and Community Services at the institution's Lakeshore campus. The institution denied access to the entire record citing sections 17(1)(a), 18(1)(f) and (g), 21 and 49(b) of the Act. The requester appealed the institution's decision.

During the course of the appeal, the institution withdrew its section 49(b) exemption claim, and added section 13(1) as a new exemption.

Mediation of the appeal was unsuccessful, and the matter proceeded to inquiry. Notice that an inquiry was being conducted to review the institution's decision was sent to the institution, the appellant and two individuals who provided the information contained in Appendix III of the record (the affected parties). Written representations were received from all parties.

During the course of the appeal, the scope was narrowed by the appellant to exclude the names of individuals referred to in the record; Appendix II, which consists of the list of individuals interviewed for the report; and Appendix IV, which is a confidential written submission. Therefore, these portions of the record will not be addressed in this order.

The report is divided into a number of sections as set out in the Table of Contents. For the purposes of this order, the parts of the record which remain at issue in this appeal will be discussed as follows:

1. Cover Pages (2 pages)
2. Table of Contents (1 page)
3. Introduction (5 pages)
4. Recommendations and Rationale (16 pages)
5. Conclusion (1 page)
6. Appendix I - Terms of Reference (1 page)
7. Appendix III - Cluster Managers' Task Submission (9 pages)
8. Recommendations Recap (5 pages)

ISSUES:

The issues arising in this appeal are:

- A. Whether the mandatory exemption provided by section 17(1)(a) of the Act applies to the record.
- B. Whether the discretionary exemption provided by sections 18(1)(f) and/or (g) applies to the record.
- C. Whether the discretionary exemption provided by section 13(1) of the Act applies to the record.
- D. Whether the information contained in the record qualifies as "personal information", as defined in section 2(1) of the Act.
- E. If the answer to Issue D is yes, whether the mandatory exemption provided by section 21 of the Act applies to the record.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the mandatory exemption provided by section 17(1)(a) of the Act applies to the record.

The institution submits that disclosure of the record would reveal labour relations information supplied in confidence explicitly and implicitly by faculty, staff, administrators and students.

Section 17(1)(a) of the Act reads as follows:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

In Order 36, former Commissioner Sidney B. Linden established the following three-part test, each part of which must be satisfied in order for a record to be exempt under sections 17(1)(a), (b) or (c):

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; **and**
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of subsection 17(1) will occur.

To satisfy the second part of the test, the information must have been supplied to the institution by a third party which, by definition, is not part of the institution. The institution's faculty and staff are part of the institution and, in my view, do not qualify as third parties for the purposes of section 17. The students are not part of the institution and it could be argued that they are properly considered third parties for the purposes of section 17. However, in my view, the interests of the students are more appropriately addressed under section 21 of the Act. Therefore, in the circumstances of this appeal, I find that the information in the record was not "supplied" to the institution for the purposes of section 17(1) of the Act, and the second part of the test for exemption under this section has not been satisfied.

As stated earlier, failure to meet any one of the three parts of the test will render the section 17 exemption claim invalid. Because I have found that the institution has failed to establish that the information was supplied in confidence to the institution, it is not necessary for me to consider the first or third parts of the test.

ISSUE B: Whether the discretionary exemption provided by sections 18(1)(f) and/or (g) applies to the record.

Sections 18(1)(f) and (g) of the Act read as follows:

A head may refuse to disclose a record that contains,

- (f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;
- (g) information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

The institution submits that the record contains recommendations for plans relating to the management of personnel and administration.

The eighth edition of The Concise Oxford Dictionary defines "plan" as "a formulated and especially detailed method by which a thing is to be done; a design or scheme". In my view, the record cannot properly be considered a "plan". It contains certain recommendations which, if adopted and implemented by the institution, might involve the formulation of a detailed plan, but the record itself is not a plan or a proposed plan. Therefore, in my view, the record does not qualify for exemption under either section 18(1)(f) or (g).

ISSUE C: Whether the discretionary exemption provided by section 13(1) of the Act applies to the record.

The institution submits that section 13(1) applies to the entire record. Section 13(1) of the Act reads:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

At page 4 of Order 118, Commissioner Linden stated:

In my view, "advice", for the purposes of subsection 13(1) of the Act, must contain more than mere information. Generally speaking, advice pertains to the submission of a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

In my view, "recommendations" are to be viewed in the same vein [Orders 161 and P-248].

The Cover Pages for the report and the Table of Contents identify and set out the structure of the report in general terms. In my view, disclosure of this information would not reveal advice or recommendations, and the Cover Pages and Table of Contents do not qualify for exemption under section 13.

The Introduction and Conclusion introduce and provide some explanation of the report, and put the recommendations into perspective. The information contained in the Introduction and Conclusion does not purport to suggest one course of action or another, and therefore does not qualify for exemption under section 13.

In my view, the Recommendations and Recommendations Recap portions of the record clearly qualify for exemption under section 13(1) of the Act. I also find that the rationale behind the recommendations is sufficiently linked to the recommendations themselves to satisfy the section 13(1) requirements.

The institution's representations do not address whether or how disclosure of the Terms of Reference for the report would reveal advice or recommendations. Having reviewed this portion of the record, I find that it provides the parameters for the consultant's review, and outlines issues and concerns which were widely known within the College community. In my view, the Terms of Reference provide the framework for the preparation of advice and recommendations, but do not themselves contain or reveal advice and recommendations within the meaning of section 13.

I find that Appendix III is more appropriately considered under section 21.

In summary, I find that only the Recommendations and Rationale and Recommendations Recap sections of the record meet the requirements of section 13(1).

Section 13(2) of the Act lists certain exceptions to the 13(1) exemption. Specifically, section 13(2)(f) states:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

a report or study on the performance or efficiency of an institution, whether the report or study is of a general nature or is in respect of a particular program or policy;

The institution submits that the record does not involve a report or study on the performance or efficiency of a program. It states that operational and program reviews are prepared, and that these reviews specifically deal with the performance and efficiency of various institution programs in light of student enrolment, competitiveness, budgetary concerns and proposals for changes to the programs. In comparison, the institution submits, the record does not involve an institution study of performance or efficiency of any of the five programs offered by the School of Social and Community Services, and therefore section 13(2)(f) does not apply.

I do not agree with the institution's position. The record involves the study of a number of issues and concerns pertaining to student satisfaction, confidentiality, professionalism, professional relationships, conflict resolution and leadership. The record sets out the consultant's advice and recommendations for dealing with these issues. These corrective recommendations are aimed at enabling the institution to deal efficiently with existing and future issues and concerns, and assisting the President to improve administrative operations. In my view, the record satisfies the requirements of the section 13(2)(f) exception, thereby precluding the institution from denying access to the record under section 13(1) of the Act.

ISSUE D: Whether the information contained in the record qualifies as "personal Information", as defined in section 2(1) of the Act.

Section 2(1) of the Act reads, in part:

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

- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (e) the personal opinions or views of the individual except where they relate to another individual,
- (g) the views or opinions of another individual about the individual, and

In her representations, the appellant agrees to the severance of all names from the record.

Even with the names severed, I still find that the remaining information in Appendix III consists of the personal views and opinions of certain individuals, who would be identifiable by virtue of the nature of the information provided, and therefore falls within the definition of personal information under section 2(1).

The parts of the Recommendations and Rationale sections which deal with leadership and the first two recommendations which deal with staffing, contain the personal information of certain identifiable individuals, as do all but the last two paragraphs of the rationale for the staffing recommendations. These portions of the record satisfy the requirements of either paragraphs (e) or (g) of the definition of personal information.

I find that none of the personal information contained in the record is the personal information of the appellant.

The Cover Pages, Table of Contents, Introduction, Conclusion, Terms of Reference, and the Recommendations and Rationale sections which deal with student satisfaction, the code of ethics and the human rights office, and the last two paragraphs of the rationale and the last ten recommendations dealing with staffing do not contain personal information of any identifiable individual. Because I have found that no other exemptions apply to these parts of the record, I order that they be disclosed.

ISSUE E: If the answer to Issue D is yes, whether the mandatory exemption provided by section 21 of the Act applies to the record.

Having found that the information in Appendix III and certain parts of the Recommendations and Rationale sections of the record qualify as personal information of individuals other than the

appellant, section 21 of the Act prohibits the disclosure of this personal information to any person other than the individual to whom it relates, except in certain circumstances. One such circumstance is contained in section 21(1)(f) of the Act which reads as follows:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 21(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would constitute invasion of personal privacy. The institution cites section 21(3)(g) of the Act as the basis for denying access to this personal information. This section reads as follows:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

consists of personal recommendations or evaluations character references or personnel evaluations;

In their representations, both affected parties indicate that the information contained in Appendix III consists of their personal evaluation of problems within the institution, and recommendations for solutions. Both affected parties stress that they participated in the review on the basis of assurances of confidentiality provided by the President in a public meeting and by the consultant during interviews. Correspondence provided by the institution with its representations confirms this expectation of confidentiality.

The institution submits that parts of the Recommendations and Rationale sections which contain personal information satisfy the requirements of section 21(3)(g), because they review and make recommendations about the job performance of identifiable individuals.

Having reviewed these portions of the record, I agree that disclosure would constitute a presumed unjustified invasion of personal privacy under section 21(3)(g) of the Act.

Once it is determined that the requirements for a presumed unjustified invasion of personal privacy under section 21(3) have been established, I must consider whether any other provisions of the Act come into play to rebut this presumption. Section 21(4) outlines a number of circumstances which, if they exist, could operate to rebut a presumption under section 21(3). In my view, none of the circumstances outlined in section 21(4) are present in this appeal.

In Order 20, Commissioner Linden stated that "... a combination of the circumstances set out in subsection 21(2) might be so compelling as to outweigh a presumption under subsection 21(3). However, in my view such a case would be extremely unusual".

The appellant makes a number of submissions relating to accountability of the institution to its students, including specific issues concerning sexual harassment and discrimination and the promotion of informed choice in the purchase of goods and services. She raises sections 21(2)(a), (b) and (c) as relevant considerations in favour of releasing this personal information. These sections read as follows:

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,

- (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
- (b) access to the personal information may promote public health and safety;
- (c) access to the personal information will promote informed choice in the purchase of goods and services;

In my view, the concerns raised by the appellant have been adequately addressed through the disclosure of the parts of the record which do not satisfy the requirements of section 21(3)(g). As far as the remaining parts of the record are concerned, I am not satisfied that concerns regarding public scrutiny, public health and safety, and informed consumer choice are sufficient to outweigh the presumed unjustified invasion of the personal privacy. Accordingly, I uphold the head's decision to withhold the information contained in Appendix III, the parts of the Recommendations and Rationale sections which deal with leadership, and the first two recommendations and all but the final two paragraphs of the rationale which deal with staffing.

ORDER:

1. I uphold the head's decision not to disclose the Recommendations and Rationale sections of the report which deal with leadership (pages six to nine inclusive); portions of the Recommendations and Rationale sections which deal with staffing (the first two recommendations on page 13 and all but the final two paragraphs of the rationale); portions of the Recommendations Recap section (the recommendations which deal with leadership and the first two recommendations which deal with staffing); and Appendix III (Cluster Managers' Task Submission).

2. I order the head to disclose to the appellant the balance of the record, subject to the severance of any reference to an individual's name, within 35 days following the date of this order and **not** earlier than the thirtieth day following the date of this order.
3. The institution is further ordered to advise me in writing within five days of the date on which disclosure was made. The notice should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.
4. In order to verify compliance with the provisions of this order, I order the head to provide me with a copy of the portion of the record which is disclosed to the requester pursuant to Provision 2, upon request.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

August 31, 1992