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

ORDER P-1610

Appeal P_9800064

Ministry of Education and Training

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NATURE OF THE APPEAL:

The Ministry of Education and Training (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) from a student at a named institute (the Institute) registered under the Private Vocational Schools Act. The request was for a copy of the curriculum content/syllabus/outline the Ministry used as the basis of approving the Institute's registered massage therapy program. The request was subsequently expanded to include the entire file relating to the Institute's application for program approval.

The Ministry located a four-page record responsive to the initial request, and 44 pages of additional records responsive to the expanded request. The Ministry determined that the interests of the Institute might be affected, and requested submissions from it before deciding whether to disclose any of these records.

Following the receipt of submissions from the Institute, the Ministry disclosed a four-page record entitled "Request for New Program Approval Form", and denied access to all other records on the basis of one or more of the following exemption claims contained in the Act:

- section 17(1) (third party information)
- section 21(1) (invasion of privacy)

The requester (now the appellant) appealed the denial of access.

As part of the mediation process, the Ministry identified an additional 337 pages of records it felt were responsive to the request, and denied access to all of them on the basis of these same two exemption claims.

A Notice of Inquiry was sent to the Ministry, the appellant and the Institute. Representations were received from the Institute only. The Institute also referred to its January 19, 1998 and February 25, 1998 letters to the Ministry which set out its objections to disclosure.

PRELIMINARY MATTER:

SCOPE OF RESPONSIVE RECORDS

I carefully reviewed the appellant's original and expanded requests, together with her letter of appeal. I also examined the records which were initially deemed responsive (i.e. the four-page record and the additional 44 pages of records), as well as the records which were subsequently identified during mediation.

Many of this latter group of records do not relate to the operation of the Institute, but rather to the operation of a named hairdressing school by the Institute's parent company. In addition, some records which refer to the Institute are documents that do not relate to the approval of the program in which the appellant is registered.

The appellant has made it clear that she is seeking information relating to the curriculum for the specific program that she is enrolled in. In her letter of appeal she states:

> As a student paying tuition of ($X), I believe I am entitled to a proper outline of the curriculum of what my school will be teaching me over the course duration.

In my view, the records responsive to the appellant's request are documents which comprise the Institute's "Application for New Course/Programme". These records include the "Request for New Program/Course Approval" form which has been disclosed to the appellant; the four-page record found to be responsive to the initial request (Appendix E); the additional 44 pages identified in response to the expanded request (Appendices A, B, C, D, G, H, Z1, Z2, and Z3); and the 99-page Appendix F which was identified as being responsive during mediation.

In my view, all other records identified during the course of mediation fall outside the scope of the appellant's initial and expanded request, for the reasons outlined above. If, after receiving this order, the appellant still wishes to pursue access to these records, she may do so by contacting this office.

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including information relating to the education or employment history of the individual; the address or telephone number of the individual; and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

I find that the only personal information found among the various records is contained in Appendix A, and consists of letters of attestation and resumes from two consultants involved in the development of the Institute's application for program approval, and two letters of reference for one of these consultants. This personal information is found on pages 2-17 of Appendix A.

All personal information is that of the two consultants and not the appellant.

INVASION OF PRIVACY

As previously stated, neither the Ministry nor the appellant submitted representations is response to the Notice of Inquiry.

Section 21(1) is a mandatory exemption claim, which requires the Ministry to deny access to personal information unless certain circumstances listed in section 21(1) are present. The only circumstance with potential application in the circumstances of this appeal is section 21(1)(f), which provides that:

> 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.

In the absence of any evidence to show that disclosure of the personal information of the two consultants would not be an unjustified invasion of their personal privacy, I find that it would. Much of the personal information falls within the scope of either section 21(3)(d) (employment or educational history) or section 21(3)(g) (personal recommendations or evaluations), where disclosure is presumed to constitute an unjustified invasion of personal privacy. The rest is highly sensitive personal information (section 21(2)(f)) which, in the absence of any evidence to the contrary, would also fail to satisfy the requirements of the section 21(1)(f) exception.

Therefore, I find that all of the personal information of the two consultants contained in Appendix A is exempt from disclosure under section 21(1).

THIRD PARTY INFORMATION

The Ministry has relied on section 17(1) as the basis for denying access to all records which do not contain personal information. These remaining records and portions of records can be described as follows:

Appendix A	-	table of contents (page 1)
Appendix B (6 pages)	-	title, salary range, working conditions of graduates; and a job description for a registered massage therapist
Appendix C (8 pages)	-	employment potential, target groups, survey of registered massage therapy programs, advertising strategy and opportunities for employment. This is research information commissioned by the Institute.
Appendix D (3 pages)	-	"competencies and performance objectives" relating to the approach designed by the Institute.
Appendix E (4 pages)	-	proposed course modules and time allocations
Appendix F (99 pages)	-	the Institute's mission statement, philosophy statement, and detailed program curriculum, including all module outlines detailing subject description, theory/skill objective, content outline, relative value or weight,

		length, method of evaluation, equipment needs, textbooks, teaching method
Appendix G (1 page)	-	statement regarding provincial/national standards
Appendix H (1 page)	-	statements regarding clinical or field placement experience
Appendix Z1 (1 page)	-	statement of reasons for offering the course
Appendix Z2 (1 page)	-	purpose of the program
Appendix Z3 (3 pages)	-	public clinic and hydro-therapy facility floor plans

For a record to qualify for exemption under section 17(1)(a), (b) or (c) the Ministry and/or the Institute must satisfy each part of the following three-part test:

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 Ministry 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.

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Because the Ministry did not provide representations, the onus is on the Institute to establish the requirements of the three-part test.

Type of Information

In its January 19, 1998 letter to the Ministry, the Institute submits that:

> This information is definitely considered a trade secret as it is the only aspect that differentiates us from our competition. This trade secret was developed after a significant investment by private funds (and not with public funds or public grants) in developmental costs incurred with outside consultants and internal staff. The proposal for the programme contains confidential information regarding faculty, staff, costs, revenues, consultant's information etc. that is considered proprietary and not for public consumption. We have been approached by other schools and institutions to purchase this curriculum and thereby it does have intrinsic value that would be nullified by the release of this information.

In Order M-29, former Commissioner Tom Wright considered the definition of "trade secret". He found that:

> "trade secret" means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which
>
> (i) is, or may be used in a trade or business,
> (ii) is not generally known in that trade or business,
> (iii) has economic value from not being generally known, and
> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

I adopt this definition of "trade secret" for the purposes of this appeal.

Having reviewed the records and the Institute's representations, I find that only the information on all pages of Appendix C, pages 2-3 of Appendix D, and pages 4-99 of Appendix F qualify as "trade secrets" for within the meaning of section 17(1).

The information contained on these pages was compiled by the Institute for use in the development and design of its unique vocational program. It includes research material on employment opportunities, detailed subject module outlines, theory/skill objectives, and other specifics used by the Institute in its business of message therapy training. I accept the Institute's position that this information is not generally known to other schools or institutes providing similar training programs, and that the Institute has been approached by other parties wishing to purchase the program, thereby establishing an economic value in this information. As far as the fourth requirement is concerned, the Institute states:

> This information was supplied to the ministry in confidence and has always been treated as such by both our school and the Ministry of Education. Further, we and the Ministry of Education have always treated this document and all previous curriculums [sic] in this manner. In consultation with one of the largest Private Vocational Schools in Canada and Ontario...they echo the same understanding of the confidentiality of curriculums [sic]. As such, it is not only we who have this understanding but other schools in this industry.

I find that the information contained on the pages of records referred to above was "the subject of efforts which are reasonable under the circumstances to maintain its secrecy", thereby satisfying the last requirement of "trade secret" outlined by former Commissioner Wright.

Although the remaining information has also been compiled by the Institute for the purpose of submitting its application for program approval, in my view, it is not sufficiently proprietary in nature to constitute a "trade secret". Specifically, I am not persuaded that this information, such as a generic job description for a Registered Massage Therapist contained in Appendix B, or the list of course modules and time allocations contained in Appendix E, is not generally known

within the massage therapy training industry. Nor am I satisfied that this information has economic value from not being generally known.

I also find that these remaining pages of records do not contain any of the other categories of information outlined in section 17(1).

Therefore, I find that only all pages of Appendix C, pages 2-3 of Appendix D, and pages 4-99 of Appendix F satisfy the first part of the section 17(1) exemption test.

Supplied in confidence

In order to satisfy the requirements of the second part of the test, again in the absence of any representations from the Ministry, the Institute must establish that the records which contain trade secrets were supplied to the Ministry, in confidence, either implicitly or explicitly.

In addition to its representations under part one of the test, the Institute also submits that all its dealings with the Ministry have been undertaken with a reasonable and implicit expectation of confidentiality, for the following reasons:

> First: specific student issues that arise from time to time that are obviously confidential for which we seek advise [sic] but also proactively notify the Ministry of education regarding specific student problems, issues etc.
>
> Second: we are a private corporation and provide information to the Ministry of Education in various forms. These include curriculum proposals, research information regarding various careers and vocational training, faculty selection, financial information, business plans and the like. The providing of this information has never been supplied with the expectation that it would become public knowledge and disclosed. This information has been provided so that the Ministry of Education can review this material, perform due diligence, and protect the public of Ontario in so doing.

In addition, in its February 25, 1998 letter to the Ministry, the Institute submits:

> Some of the information (specifically Appendix "B", "C" "D") was collected, compiled and reported by other organisations/people that we had independently contracted. Within those arrangements, no provisions were made for the public disclosure of the information which we contracted for and this might violate the terms of the contracts that we have for the preparation of this information and work.
>
> In addition, optional and non-compulsory Appendices should be further exempted due to the fact that they are not required by the Ministry, no disclosure notice was signed for these sections, and are not considered an integral part nor a mandatory part of this application.

In order to find that information qualified as a trade secret under part one, I needed to be satisfied that this information was "the subject of efforts that are reasonable under the circumstances to maintain its secrecy". I made this finding with respect to certain records. Based on this finding, together with the evidence provided by the Institute with respect of part two of the test, I am satisfied that the Institute supplied its trade secrets to the Ministry with the implicit understanding that this information would be confidential to the Ministry and would not be disclosed to other parties.

Harms

In order to satisfy the third requirement of this exemption claim, the Institute must present evidence which is detailed and convincing, and must describe a set of facts or circumstances that would lead to a reasonable expectation that one or more of the harms described in section 17 would occur if the information was disclosed (Orders P-278 and P-249).

In its representations, the Institute submits that:

> If the disclosure of this information is granted, there would be several results. First, it would negatively impact our competitive position due to this access of this proprietary information to our competitors. Second, we (as would all Private Vocational Schools) be reluctant in proactively sharing information with the Ministry.

In its January 19, 1998 letter to the Ministry, the Institute also submits that if the records are released:

> Harm will occur as this would be a competitive disadvantage to our schools due to the fact that our school invested in the development costs of this programme. If disclosure is granted, a competitor can request through FOI, a copy of the curriculum and not incur the cost of its development. This would result in an unfair playing field for the private vocational school industry. If this application were successful, harm would occur insofar as it would set a precedent to allow other private vocational schools to obtain a "free and approved" curriculum.
>
> If disclosure were granted, harm would result insofar as future such applications for new programmes might not be as comprehensive due to the fact that schools would want to keep "their competitive" and share only "the requirements" and not the "entire package". This would impose additional burdens on the regulatory body in performing their role.
>
> Financial loss would occur if this disclosure were required due to the fact that significant monies were invested in the development of the curriculum and would be considered an undue loss and also result in undue gain by the petitioners.
>
> If this application were successful, harm would also occur insofar as it would set a precedent to allow other private vocational schools to obtain a "free and approved" curriculum.

In the circumstances of this appeal, I accept that the Institute has incurred time and expense in developing and designing a unique and detailed program to offer to its students, some of which constitutes its trade secrets. The Institute operates in a competitive marketplace and I am satisfied that, if disclosed, these trade secrets could be used by others to duplicate the Institute's program or otherwise gain a competitive edge. In my view, disclosure of records containing information which would reveal the Institute's trade secrets could reasonably be expected to prejudice significantly the its competitive position or result in an undue loss to the Institute, thereby satisfying the third part of the section 17(1) exemption test.

Accordingly, I find that all three requirements of section 17(1)(a) and (c) have been established for those records which contain the Institute's trade secrets, and these records should not be disclosed.

ORDER:

1. I uphold the Ministry's decision not to disclose pages 2-17 of Appendix A, all pages of Appendix C, pages 2-3 of Appendix D, and pages 4-99 of Appendix F.

2. I order the Ministry to disclose page 1 of Appendix A, all pages of Appendix B, page 1 of Appendix D, all pages of Appendix E, pages 1-3 of Appendix F, and all pages of Appendices G, H, Z1, Z2 and Z3 by **October 6, 1998** but not before **October 1, 1998**.

3. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: September 8, 1998
Tom Mitchinson
Assistant Commissioner