



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

ORDER P-1614

Appeal PA_980156_1

Ministry of Education and Training



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NATURE OF THE APPEAL:

A request was made to the Ministry of Education and Training (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act) for a copy of inspection reports for an overseas private school located in Quarry Bay, Tai Koo Shing, Hong Kong (the school). The request covered reports prepared for the school years 1995 - 1996 and 1996 - 1997.

The Ministry located responsive records and determined that the interests of the school might be affected by disclosure of the information in them. Accordingly, the Ministry gave notice of the request to the school pursuant to section 28 of the Act. After receiving representations from the school, the Ministry issued a decision in which it granted full access to the responsive records to the requester.

The school appealed the Ministry's decision to grant access to the records.

This office sent a Notice of Inquiry to the school, the Ministry and the requester. Representations were received from the school only.

RECORDS:

The records at issue consist of two inspection reports dated 1995 and 1997. The Ministry advises that a report was not conducted for the school year 1995 - 1996 and determined that the previous year's report was "most" responsive to the request. The requester accepts that there was no report prepared for the 1995 - 1996 school year and agrees that the 1995 report is responsive to his request.

DISCUSSION:

THIRD PARTY INFORMATION

The school submits that the records are exempt under section 17(1). This section states:

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;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer, or other person appointed to resolve a labour relations dispute.

As I indicated above, the Ministry has decided to disclose the records. Therefore, for the records to qualify for exemption under sections 17(1)(a), (b) or (c) the school 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) or (b) of section 17(1) will occur.

[Order 36]

Types of Information

The school submits that the records contain commercial, financial and labour relations information. The school is also of the opinion that the records contain its trade secrets.

Previous orders of the Commissioner's office have defined the term "commercial information" to mean information which relates to the buying, selling or exchange of merchandise or services (Orders 47, 179 and P-318). "Financial information" has been interpreted as meaning information pertaining to finance or money matters (Orders 47 and P-607). I agree with and adopt these definitions for the purposes of the present appeal.

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.

In Order P-653, Inquiry Officer Holly Big Canoe defined "labour relations information" as information concerning the **collective** relationship between an employer and its employees.

I also adopt these definitions of “trade secret” and “labour relations information” for the purposes of this appeal.

I have reviewed the records and make the following findings. Although disclosure of an investigation report may have some impact on the financial viability of the school in that it may impact on selection of the school by prospective students, this does not equate to information about finance or money matters. Similarly, observations about the qualifications and performance of teaching staff may ultimately become an issue in contract discussions between the school and its teaching staff. However, the comments in the records do not concern this relationship. Accordingly, I find that they do not contain any financial or labour relations information as these terms are defined above.

Insofar as the school is of the opinion that the records contain its trade secrets, I find that although the records contain comments about the curriculum designed by the school, they do not reveal the specific elements of the curriculum in any detail. Moreover, the information which is contained in the records is the very information which would be provided to students, parents and prospective students interested in attending the school. In this regard, I find any argument that the school has made efforts to maintain the secrecy of this information to be unreasonable. Therefore, I find that the records do not contain trade secrets.

The school advises that it recruits students every year and that admission and attendance relate directly to it as a commercial enterprise. The school implies that the Ministry’s inspection of it is directly related to its commercial viability and value.

In Order 16, former Commissioner Sidney B. Linden commented on the scope of commercial information. He said:

While not an exhaustive list, the types of information that I believe would fall under the heading "commercial" include such things as price lists, lists of suppliers or customers, market research surveys, and other similar information relating to the commercial operation of a business.

The purpose of the inspections of the school by the Ministry was to determine whether the standard of instruction at the school in credit courses leading to the Ontario Secondary School Diploma is satisfactory. While the results of such an inspection may have some impact on the school as a commercial enterprise in that, if it does not meet Ministry standards it may lose its authorization to operate as a private school, the inspections themselves do not relate to the commercial operation of the school. Rather, they pertain directly to conformity with Ministry requirements. Therefore, I find that the records do not contain commercial information.

Since I have found that the first part of the test has not been met for the information contained in the records at issue, it is not necessary for me to go on and consider the remaining two parts of the test. However, I propose to deal with each of them briefly.

Supplied in confidence

In order to satisfy part two of the test, the school must show that the information was supplied to the Ministry and that it was supplied in confidence, either implicitly or explicitly. In addition, information contained in a record will be said to have been "supplied" to an institution, if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the Ministry.

To satisfy the "in confidence" element, there must be a reasonable expectation on the part of the supplier of the information that it will be held in confidence.

Section 16 of the Education Act, R.S.O. 1990, c. E.2 concerns the operation and inspection of private schools. Section 16(5) requires that schools provide the Ministry with information pertaining to enrolment, staff, courses of study and any other information as requested.

Pursuant to section 16(6), the Ministry may direct a supervisory officer to inspect a private school and in doing so may inspect the school and any records or documents relating to it.

The school submits that the information contained in the records was supplied by it to the inspectors in confidence. The record itself indicates that the information was obtained by the inspectors through interviews with staff and students, visitation to classrooms, personal observation and inspection of documents and students' work.

Previous orders of this office have considered whether information obtained as a result of inspections can be said to have been "supplied in confidence". In Order 16, former Commissioner Linden found:

In order to satisfy the second part of the test, the information must have been supplied by the third party to the institution in confidence. In this case the information in the records was not supplied by the third parties to the institution as required by the Act. Rather, the institution obtained the information itself through inspections required by statute. The Federal Court of Appeal in the recent decision of Canada Packers Inc. and Minister of Agriculture et al (July 8, 1988) addressed the issue of the meaning of "supplied" in the context of the federal Access to Information Act S.C. 1980_81_82, c.111. The Canada Packers case involved federal meat inspection team audit reports and, speaking for the Court, Justice MacGuigan at pg. 7 states:

"Paragraph 20(1)(b) [of the Federal Act] relates not to all confidential information but only to that which has been 'supplied to a government institution by a third party'. Apart from the employee and volume information which the respondent intends to withhold, none of the information contained in the reports has been supplied by the appellant. The reports are, rather, judgments made by government inspectors on what they have themselves observed."

In addition, even if the third party appellants could successfully argue that the information had been provided by them, there is nothing in the Meat Inspection

Act (Ontario) or elsewhere to indicate that the information gathered on an inspection must be kept confidential by the institution.

In Order P-952, former Inquiry Officer Anita Fineberg dealt with records which had been obtained by a search warrant. She analogized this method of obtaining records to cases in which they are obtained through inspections. She stated:

The fact that they were received by virtue of a search warrant, in my view, makes them more analogous to information obtained by an institution itself, through investigations or inspections, than to information provided to an institution pursuant to a mandatory reporting requirement.

I have considered these interpretations of the term “supplied in confidence” and have reviewed the records and the school’s representations. In my view, the school did not simply provide the records to the Ministry pursuant to the mandatory reporting requirements of the Education Act. Rather, the school provided access to its documents, classrooms, students and staff in order to enable the Ministry’s employees to conduct an investigation into the school’s academic operations.

I find that, for the most part, the reports contain the inspectors’ views, opinions and recommendations as a result of their independent inspection into these areas. Therefore, I find that this information was not supplied to the Ministry. I do agree with the school, however, that parts of the reports refer to elements of the curriculum designed by it. In this regard, I find that disclosure of the reports would reveal information which was provided to the inspectors by the school. That being said, however, there is nothing in the Education Act which indicates that information pertaining to school academic curricula must be kept confidential. Therefore, I find that any expectation that the school had in the confidentiality of the information it provided to the Ministry is not reasonable.

Harms

The school indicates that because it recruits students every year, disclosure of the reports, especially selective disclosure, could reasonably be expected to interfere significantly with the contractual negotiations between it and its students (section 17(1)(a)). This, it argues, could reasonably be expected to result in undue loss to it and undue gain to its competitors (section 17(1)(c)).

While I can accept that having this information may provide students with information which they can use to assist them in determining whether they wish to attend the school, I do not accept that disclosure of this information could reasonably be expected to interfere significantly with any contractual negotiations it might have with its students in enrolling in the school. I cannot infer, and the school does not indicate, how disclosure of this information could interfere with the school’s recruitment process, costs of attendance or the course curricula offered. Accordingly, I find that the harm in section 17(1)(a) could not reasonably be expected to occur from disclosure.

With respect to section 17(1)(c), the term “undue” is defined in the Concise Oxford Dictionary (3rd Ed.) as “1. excessive, disproportionate. 2. Not suitable. 3. Not owed.”. In my view, in order to operate as a private school which is authorized to grant Ontario secondary school credits and the Ontario Secondary School Graduation Diploma, the school is required to conform to Ministry standards. If an inspection report indicates that the school is not in compliance with these standards, it would not be reasonable to expect that any loss of student enrolment as a result could be considered “excessive” or “undue”. On the other hand, if the reports present a positive view of the school’s academic operations, it is not reasonable to expect that their disclosure would result in any loss, let alone “undue” loss. Therefore, as the reports provide information regarding whether the school is in conformity with Ministry standards, I find that their disclosure could not reasonably be expected to result in **undue** loss to the school.

The school also submits that disclosure of this information could reasonably be expected to result in similar information no longer being supplied to the Ministry where it is in the public interest that similar information continue to be so supplied. In this regard, the school states that the purpose of the preparation of these types of reports is for the Ministry to evaluate the schools concerned and to make recommendations for improvements, and not for the public to get access to the information. The school argues that it is in the public interest that information be supplied to the Ministry without fear of having it subsequently released to unknown parties.

I am not persuaded by the school’s arguments. In my view, private schools are obligated to provide the Ministry with information regarding their curricula and school operations to ensure that they are providing a satisfactory course of study. Similarly, the Ministry has an obligation to the public to ensure that the education and accreditation given to students in private schools meets acceptable standards as determined by the Ministry. In my view, there is no public interest at risk in disclosing the records at issue.

As I have found that none of the three parts of the section 17(1) test have been met for the two reports at issue, they are not exempt. Accordingly, they should be disclosed to the requester.

ORDER:

1. I uphold the Ministry’s decision to disclose the records.
2. I order the Ministry to provide copies of the records to the requester by **October 30, 1998**, but not before **October 26, 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 requester pursuant to Provision 2.

Original signed by
Laurel Cropley
Adjudicator

September 25, 1998