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

ORDER PO-2292

Appeal PA-030284-1

Ministry of Training, Colleges & Universities

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NATURE OF THE APPEAL:

The Ministry of Training, Colleges and Universities (the Ministry) received a request under the *Freedom of Information and Privacy Act (the Act*). The Ministry confirmed with the requester that he was seeking access to records relating to:

> . . . [a specified course of study] submitted by [a named private career college (the PCC)] that was approved by the Ministry of Education in late summer 2001. The Ministry also required Professionals in the field to review the Syllabus. This is essential for the Ministry approval process and it is essential that I also have that information (i.e., Syllabus and reviews). I also request any or all other documents that may have been included in the submission to the ministry along with the program itself.

The Ministry located a number of responsive records and notified the PCC and three other individuals (the affected parties) of the request under section 28 of the *Act*. Following the receipt of the representations of the affected parties, the Ministry denied access to the records, claiming the application of the mandatory third party information exemption in section 17(1) of the *Act*. The PCC raised the possible application of the mandatory invasion of privacy exemption in section 21(1) of the *Act*.

The requester (now the appellant) appealed the Ministry's decision.

During the mediation stage of the appeal, the PCC agreed to the disclosure of portions of the responsive records to the appellant. The Ministry subsequently provided the appellant with this information. Also during mediation, the appellant indicated that he was not seeking access to the telephone number in the last paragraph of page four of Record 1 and the information on page five of Record 2. Further mediation was not possible and the appeal was moved into the adjudication stage.

I initially sought the representations of the Ministry and the PCC and received submissions from both parties. The PCC indicates that it has no objection to the disclosure of the assessments that comprise Records 1, 2, 3, 4 and 5 so long as the personal information of the individuals performing the evaluations is not disclosed.

I then provided the appellant with a complete copy of the PCC's representations, as well as the non-confidential portions of the Ministry's submissions, along with a Notice of Inquiry. The appellant also made representations, which were in turn shared with the Ministry and the PCC. I then received further reply representations from the PCC. In his submissions, the appellant indicated that he was not seeking access to any information that might fall within the definition of "personal information", as defined in section 2(1); nor is he requesting "third party research materials or budgets". As a result of his further narrowing the scope of the request, the mandatory exemption in section 21(1) and the remaining portions of Records 1, 2, 3, 4 and 5, as well as the undisclosed portions of pages 12 and 128-129 of Record 6, are no longer at issue.

RECORDS:

The records remaining at issue consist of the undisclosed portions of a 189-page document entitled Labour and Course Analysis Study for the Toronto Market (Record 6). The undisclosed information consists of the overview at page 2, portions of the Course Outlines described in pages 62 to 122 and the Subject/Module Outline at page 130 of Record 6.

DISCUSSION:

THIRD PARTY INFORMATION

The sole issue to be determined in this appeal is whether the undisclosed portions of the records are exempt from disclosure under the mandatory exemptions in sections 17(1)(a), (b) or (c), which read:

> 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;

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 17(1) to apply, the Ministry and/or the PCC 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 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 paragraph (a), (b) and/or (c) of section 17(1) will occur.

Part 1: type of information

The PCC takes the position that Record 6 contains information that qualifies as "financial", "commercial" or "technical" information for the purposes of section 17(1). The Ministry submits that the record describes the services provided by the PCC in exchange for a fee, thereby qualifying as "commercial" information as contemplated by section 17(1).

The terms "financial", "commercial" and "technical" information have been discussed in previous orders of this office.

Technical information is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [Order PO-2010].

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

As noted above, the appellant has removed from the scope of the appeal any information pertaining to budgets or third party research materials. As a result, the information remaining at issue consists almost entirely of the course syllabus for each of the educational programs offered by the PCC. In my view, this information satisfies the definition of "commercial information" for the purposes of section 17(1) as it relates directly to the operation of a for-profit educational enterprise. In my view, the information has intrinsic commercial value to the PCC. I find that the undisclosed information contained in the Course Outlines described in pages 62 to 122 of Record 6 meet the definition of "commercial information" under section 17(1).

In addition, I find that the overview described at page 2 and the Subject/Module Outline at page 130 of Record 6 contain information which relates to the operation of the PCC and specific information about its future plans. I find that this information also satisfied the definition of "commercial information" for the purposes of section 17(1).

Part 2: supplied in confidence

Supplied

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties [Order MO-1706].

Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation [Orders PO-2018, MO-1706].

Both the PCC and the Ministry submit that the information contained in the records was "supplied" to the Ministry by the PCC. This contention is not disputed by the appellant. I agree that the remaining information at issue was supplied to the Ministry by the PCC within the meaning of section 17(1).

In confidence

In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [PO-2020].

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure [PO-2043]

The Ministry submits that:

> . . . it has been and continues to be the practice of staff within the Private Institutions Branch to treat application for registration confidentially, particularly the detailed information relating to the syllabus and other course information which are recognized as proprietary information. When such records are received, they are stored securely and handled only by staff who need to see them until the registration decision is made.

The Ministry goes on to describe the types of information made available through its website or in response to public queries about PCCs. It states that information contained in the syllabus is not made publicly available. It goes on to add that the Superintendent of Private Career Colleges and staff at the Private Institutions Branch "treat the applications as confidential, a fact that is known within the PCC sector and, the Ministry submits, relied upon by the sector." The Ministry submits that "by longstanding practice, there exists at the very least an implicit assumption that the records at issue would be treated in a confidential manner, given the competitively sensitive nature of the information."

Included with the PCC's reply representations is an excerpt from the employment contract of the appellant. In Article 6 of the contract entitled "Confidential Information", it states:

> [Y]ou hereby acknowledge that all information about the [PCC's] syllabus, curriculum content and design, business plans, student recruitment methods, student list, student information, graduate placement plans, marketing plans and strategies and private corporate financial information about the [PCC] is confidential, proprietary to us and a valuable trade secret, disclosure of which could severely damage the economic interests of the [PCC]. You agree to maintain the confidentiality of this information and not disclose it either during your employment or after your employment has ended. This provision will survive the termination of this agreement.

The appellant does not directly address this aspect of the test under section 17(1). In my view, the information was provided to the Ministry by the PCC with a reasonably-held expectation that it would be treated confidentially. The submissions of the PCC and the Ministry demonstrate the very competitive nature of the private career college industry and the desire of the PCC to maintain the confidentiality of the syllabi and course outlines describing the courses it offers. The PCC clearly was of the view that the information contained in these records was to be treated in a confidential manner by those who had access to it.

In my view, private career colleges submitting applications for Ministry approval of their educational programs that include a detailed syllabus and course description would have a reasonable expectation that the information supplied would not be shared by the Ministry with its competitors. On this basis, I am satisfied that the information contained in the remaining portions of Record 6 was supplied to the Ministry by the PCC in confidence for the purposes of section 17(1).

Part 3: harms

To meet this part of the test, the institution and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

The PCC submits that the disclosure of the information contained in the records relating to the course content of the programs it offers "would severely impact our organization". Specifically, it indicates that the disclosure of the information in page 2 of Record 6 "would prejudice significantly our competitive position". With respect to the syllabus information, the PCC submits that:

> . . . the general approach that educational institutions have is that syllabi are proprietary. These are detailed week by week lesson plans. It could only be of interest/value to another school. Release of such would also prejudice our competitiveness, and affect the willingness of instructors/consultants to develop these for the institution.
>
> A general description is available to the public. This is usually adequate to understand the exact goal and scope of the course so that an informed consumer choice can be made prior to enrolling. There is really no need except to directly copy and compete with the school for the release of the syllabi.

The Ministry relies on the submissions made to it by the PCC in response to its notification under section 28 and notes that "the private career college sector is competitive." In its representations following the initial notification by the Ministry, the PCC submitted that:

> . . . the detailed class by class and project by project outlines of our courses in this programme would enable a competitor school to structure a programme [on the subject matter of the course], which would compete directly with our own offering. This is highly proprietary sensitive information. A competitor would be able to avoid literally hundreds of hours of detailed curriculum design by copying or modifying, work in which we have invested significant amounts of time and resources.

The Ministry suggests that "[I]f a competitor can obtain these records without the consent of or payment to the owner, the competitor can compete for the same students and potential employers as the owner and is enriched at the expense of the owner."

The appellant points out that he is a former employee of the PCC and was personally responsible for the preparation of the syllabi for some of the courses comprising Record 6. Attached to his representations were copies of the records that comprise pages 65-67, 68-70 and 71-75 of the syllabus documents at issue in Record 6. In its reply representations, the PCC acknowledges that the appellant was the author of some, though not all, of the course outlines comprising pages 62 to 122 of Record 6.

Clearly, as the appellant is already in possession of pages 65 to 75 of Record 6, their disclosure to him would not serve to bring about any of the harms contemplated by section 17(1). I will, accordingly, order that these pages be disclosed to the appellant in their entirety.

With respect to the remaining pages of Record 6, I am not satisfied, based on the representations of the appellant, that he has copies of these documents. In addition, based on the submissions of the PCC, I find that the appellant was not the author of the majority of the course outlines contained in Record 6. I note that the records provided to me by the appellant are outlines for Level 1 courses while most of the remaining records relate to courses at Levels II and III.

The PCC operates in a very competitive environment where competition for students and faculty is necessarily very keen. In my view, the disclosure of the contents of the course outlines not already in the possession of the appellant, as well as the undisclosed portions of pages 2 and 130 of Record 6, would serve to harm the competitive position of the PCC. Based on the submissions of the Ministry and the PCC with respect to the nature of the private career college industry and the subject matter of the records, I am satisfied that the disclosure of this information could reasonably be expected to result in the harms contemplated by section 17(1)(a). Article 6 of the appellant's employment contract demonstrates the determination of the PCC to ensure that the information in Record 6 remained confidential. Clearly, by including such a clause in the appellant's employment contract, the PCC considered that the disclosure of this information would have serious repercussions to its competitive position. In my view, this concern about the confidentiality of the information was warranted.

As a result, I find this information to be exempt from disclosure under section 17(1)(a) and uphold the Ministry's decision to deny access to those portions of Record 6 which are not already in the possession of the appellant. Specifically, I uphold the Ministry's decision to deny access to pages 2, 62 to 64, 76 to 122 and 130 of Record 6.

ORDER:

1. I uphold the Ministry's decision to deny access to pages 2, 62 to 64, 76 to 122 and 130 of Record 6.

2. I order the Ministry to disclose pages 65 to 75 of Record 6 by providing him with a copy by **July 21, 2004,** but not before **July 16, 2004**.

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

Original signed by: June 15, 2004
Donald Hale
Adjudicator