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

ORDER PO-2690

Appeal PA07-143

Ministry of Training, Colleges & Universities

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NATURE OF THE APPEAL:

The Ministry of Training, Colleges & Universities (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to any complaints against twelve named private career colleges, including the private career college (PCC) that is the subject of this appeal. The request also sought the outcomes of any investigations and/or inspections by the Ministry of the PCC.

The Ministry identified a six page inspection report pertaining to the PCC as a record responsive to the request. After notifying the PCC, and receiving its objection to disclosure of the record, the Ministry provided the requester with its decision letter. Notwithstanding the objection of the PCC, the Ministry decided to disclose the record, in full to the requester.

The PCC (now the appellant) appealed the Ministry's decision to disclose the record.

Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeal process.

I commenced the inquiry by sending a Notice of Inquiry setting out the facts and issues in the appeal to the appellant, initially. The appellant provided representations in response to the Notice. In light of the content of the appellant's representations, which simply paraphrased the provisions in section 17(1)(a), (b) and (c) of the *Act*, I did not feel that it was necessary to seek representations from the requester or the Ministry on the issues in this appeal.

RECORD:

At issue in this appeal is a six page PCC Inspection Report pertaining to the appellant.

THIRD PARTY INFORMATION

The appellant claims that the mandatory exemptions at sections 17(1)(a), (b) and (c) of the *Act* apply to the record.

Sections 17(1)(a), (b) and (c) 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; or

> (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 [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. 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, PO-2371, PO-2384, MO-1706].

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

I will address the harms part of the section 17(1) test first.

To meet this part of the test, the party resisting disclosure 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].

Analysis and findings

I am not persuaded that disclosing the information in the record could reasonably be expected to result in any of the harms outlined in sections 17(1)(a), (b) or (c) of the *Act*. In this instance, the appellant bears the onus of proving that disclosure could reasonably be expected to give rise to the harms set out in sections 17(1)(a), (b) or (c). The appellant is in the best position to substantiate how disclosure would affect its interests since these sections are intended to protect those interests. However, the appellant's submissions simply paraphrase the component parts of

sections 17(1)(a), (b) and (c). In my view, neither the appellant's representations, nor my review of the record itself, indicates to me how disclosing the withheld information could reasonably be expected to result in the harms alleged.

The comments of Assistant Commissioner Beamish in Order PO-2435, involving a request for records from the Ministry of Health and Long-Term Care and the Smart Systems for Health Agency (SHHA), are instructive in understanding this office's approach to the harms issue. He writes:

> Both the Ministry and SSHA make very general submissions about the section 17(1) harms and provide no explanation, let alone one that is "detailed and convincing", of how disclosure of the withheld information could reasonably be expected to lead to these harms. For example, nothing in the records or the representations indicates to me how disclosing the withheld information could provide a competitor with the means "to determine the vendor's profit margins and mark-ups".
>
> Lack of particularity in describing how harms identified in the subsections of section 17(1) could reasonably be expected to result from disclosure is not unusual in representations this agency receives regarding this exemption. Given that institutions and affected parties bear the burden of proving that disclosure could reasonably be expected to produce harms of this nature, and to provide "detailed and convincing" evidence to support this reasonable expectation, the point cannot be made too frequently that parties should not assume that such harms are self-evident or can be substantiated by self-serving submissions that essentially repeat the words of the *Act*.
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> …
>
> While I can accept the Ministry's and SSHA's general concerns, that is that disclosure of specific pricing information or per diem rates paid by a government institution to a consultant or other contractor, may in some rare and limited circumstances, result in the harms set out in section 17(1) (a),(b) and (c), this is not such a case. Simply put, I find that the appellant has not provided detailed and convincing evidence to establish a reasonable expectation of any of the section 17(1)(a),(b) or (c) harms, and the evidence that is before me, including the records and representations, would not support such a conclusion.

In my view, the above-quoted analysis and findings of Assistant Commissioner Beamish in Order PO-2435 are directly on point in this case. The representations of the appellant lack particularity in describing how the harms identified in the component parts of sections 17(1)(a), (b) or (c) could reasonably be expected to result from disclosure in this case. In my view, the appellant has not provided the kind of detailed and convincing evidence required to support non-

disclosure under these circumstances. For this reason, I find that the harms test has not been met with regard to the information in the record at issue in this appeal.

As all three parts of the test must be met in order for the information to be found to be exempt under sections 17(1)(a), (b) or (c), I find that this exemption does not apply to the record at issue in this appeal.

ORDER:

I dismiss the appeal and uphold the decision of the Ministry to disclose the six page PCC Inspection Report pertaining to the appellant.

Original signed by: July 4, 2008
Steven Faughnan
Adjudicator