



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER PO-2794**

**Appeal PA08-335**

**University of Guelph**



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## **NATURE OF THE APPEAL:**

The University of Guelph (the University) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for a number of records. A portion of the request was for the following:

A copy of emails, contracts, and other terms of reference with respect to the recent [identified endowment from an identified company] to the University of Guelph.

In response to the request, the University issued a decision in which it granted access, in part, to certain identified records, and denied access to the remaining records, in whole or in part, on the basis of a number of exemptions, including section 18(1)(c) (economic and other interests). In the decision letter, the University also stated that "... certain portions [of the records] have been redacted under section 18(1)(c) of the [*Act*] in order to protect the University's economic interests and future negotiations with potential donors." One of the records at issue, of which portions were not disclosed, was a donor agreement, and the University referred to Order PO-2619 of this office in support of its position that a portion of the donor agreement ought to be withheld.

The requester, now the appellant, appealed the University's decision. In her appeal letter, the appellant stated that the donor agreement ought to be "fully disclosed", and that the public ought to know all details of agreements of this nature.

During mediation, the parties confirmed that the only record remaining at issue was a portion of Record 1.01, namely, a portion of section 4 of a Memorandum of Understanding entered into between the University and an identified corporate donor.

In addition, during the processing of this appeal, the University provided additional information in support of its decision to deny access to the portion of the record at issue.

Mediation did not resolve this appeal and it was transferred to the inquiry stage of the process. I sent a Notice of Inquiry to the University, initially, and the University provided representations in response. I then sent the Notice of Inquiry, along with a copy of the University's representations, to the appellant. The appellant did not provide representations but indicated that she continued to pursue access to the withheld portion of the record.

As noted above, the appellant's appeal letter indicated that she believed that the public ought to have access to the information, and I invited the parties to address the possible application of the "public interest override" in section 23 of the *Act*. The University addressed this issue in its representations, taking the view that section 23 does not apply. These representations were shared with the appellant, who has chosen not to provide representations addressing this issue. In the absence of representations or any evidence in support of the position that section 23 applies, I will not address this issue in this appeal.

## **RECORDS:**

The record at issue is a part of section 4 of a Memorandum of Understanding entered into between the University and an identified company.

## **DISCUSSION:**

### **ECONOMIC AND OTHER INTERESTS**

The University claims that the withheld portion of the record is exempt under section 18(1)(c) of the *Act*. Section 18(1)(c) reads:

A head may refuse to disclose a record that contains,

information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

The purpose of section 18 is to protect certain economic interests of institutions and avoid creating an unfair advantage for those with whom the institution may do business by the premature disclosure of plans to change policy or commence projects. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute. ...

There are a number of situations in which the disclosure of a document revealing the intentions of a government institution with respect to certain matters may either substantially undermine the institution's ability to accomplish its objectives or may create a situation in which some members of the public may enjoy an unfair advantage over other members of the public by exploiting their premature knowledge of some planned change in policy or in a government project. ...

[T]here are other kinds of materials which would, if disclosed, prejudice the ability of a governmental institution to effectively discharge its responsibilities. For example, it is clearly in the public interest that the government should be able to effectively negotiate with respect to contractual or other matters with individuals, corporations or other government. Disclosure of bargaining strategy in the form of instructions given to the public officials who are conducting the

negotiations could significantly weaken the government's ability to bargain effectively.

For section 18(1)(c) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution 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 purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions [Order P-1190].

This exemption is arguably broader than section 18(1)(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position [Order PO-2014-I].

## **Representations**

The University provides representations in support of its position that the withheld portion of the record qualifies for exemption under section 18(1)(c).

The University states that the disclosure of the withheld information could reasonably be expected to prejudice the economic interests or competitive position of the University. It reviews the purpose of the section 18(1)(c) exemption, and then reviews the sources for the University's funding over the last number of years, and identifies how it (along with all other universities in Ontario) is being required to seek out alternative sources of funding, including gifts from private donors and corporations. It identifies how this has increased the competition for private funding, and has required universities to adopt new methods of attracting donors. It then states:

In response to the request, the University has provided the Memorandum of Agreement in full except for the partial redaction of one (1) paragraph. The disclosed portions of the Memorandum provide details including the total amount of the donation and payment schedule, the purpose of the donation and objectives, the term of the agreement, the supply of nutritional products by the donor, the establishment of working committees and boards, the establishment of ongoing educational programs and communications strategy. The University has redacted only that portion of the Memorandum which it believes was unique to the

negotiation and securing of this donation. This approach is consistent with the facts in PO-2619 where York University exercised its discretion not to disclose the particular covenant made between the University and the donor in order to secure the donation. It is the University's position that information contained in the record, if disclosed, could seriously hamper the University's ability to secure significant private donations.

Later in its representations the University also refers to other factors it took into account in deciding not to disclose the withheld portion of the record. These factors include:

- its concern that disclosure of the withheld portion may affect its competitiveness in the market;
- the importance of this clause to this particular donation;
- the University's need to compete for private funding;
- the uniqueness and sensitivity of this particular clause;
- the University's concern that disclosure may affect its ability to negotiate other large private funding, as well as its on-going drive to seek out alternative forms of private funding; and
- the fact that the clause is still current.

In addition, the University provides representations identifying the various factors it took into account in deciding to exercise its discretion in favour of disclosing the bulk of the record, but not disclosing the withheld portion.

### ***Finding***

I have carefully reviewed the record at issue and the representations of the University. The University has granted access to almost all of the Memorandum of Understanding entered into between it and an identified company, and has only denied access to a small portion of this agreement. In the circumstances, I am satisfied that the withheld portion of the record qualifies for exemption under section 18(1)(c).

Section 18(1)(c) allows an institution to deny access to a record that contains information where "the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution." The University's representations identify the concerns the University has about the disclosure of the one remaining clause, and how its disclosure will result in the harms under section 18(1)(c). Specifically, the University identifies that this clause was "unique to the negotiation and securing of this donation", and particularly important to this donation. It also identifies its concern that disclosure of this clause will affect its competitiveness, as it competes with other universities for funding.

In addition to the University's representations, I must also review the record itself to determine if it qualifies for exemption under the *Act*. I have carefully reviewed the withheld clause and, based on the nature of the clause and supported by the representations of the University, I am

satisfied that the disclosure of this clause could reasonably be expected to prejudice the economic interests of the University. In my view, the unique nature of the clause supports the University's position that it was instrumental in securing the donation, and that this clause is particularly sensitive. In addition, given the fact that the University competes with other universities for funding, in light of the nature of the clause, I am satisfied that its disclosure could affect its ability to secure other donations, and would reveal its strategies with respect to securing donations of this nature, thereby impacting its competitiveness.

I find support for my decision in the findings made in Order PO-2619, in which Adjudicator Diane Smith found that a portion of an agreement between a named donor and York University qualified for exemption under section 18(1)(c). In that order Adjudicator Smith found that the withheld section of the agreement contained the covenant the University made with the donor in order to secure the donation, and that disclosure of that covenant could reasonably be expected to prejudice the University's ability to secure similar large donations. She also determined that disclosure of that information could reasonably be expected to provide competing universities with insight into York University's strategy in securing large donations, and would thereby prejudice the competitive position of the University.

## **EXERCISE OF DISCRETION**

### **General principles**

The section 18 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, this office may determine whether the institution failed to do so. In addition, this office may find that the institution erred in exercising its discretion where, for example:

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

If any of these circumstances are present, the matter may be sent back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution.

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
  - o information should be available to the public
  - o individuals should have a right of access to their own personal information
  - o exemptions from the right of access should be limited and specific

- the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

The representations of the University were shared with the appellant, and identify the considerations it took into account in deciding to exercise its discretion not to disclose the withheld portion of the record. The considerations identified by the University include:

- that it released the majority of the agreement including the amount of the donation, the term and payment schedule, the purpose and objectives of the donation, the supply of nutritional products by the donor, and other key information, and only withheld the portion which may affect its competitiveness in the market;
- that in releasing the majority of the Memorandum of Agreement the University attempted to balance transparency to the public with its need to compete for private funding
- that sufficient details are disclosed to meet standards of accountability and transparency and to encourage the public's confidence in the operation of the institution, and that withholding the portion of the record will not materially affect public confidence; and
- that the information is unique to this agreement in a way that is significantly sensitive to the University, and disclosure may affect the University's ability to negotiate other large private funding.

Although the appellant did not provide representations, one of the concerns identified by the appellant earlier in this appeal is her concern that the public ought to know all of the details of agreements of this nature, and that the donor agreement ought to be "fully disclosed", which suggests that disclosure will increase public confidence in the operation of the institution.

Having carefully reviewed the information at issue, including the representations of the University, the nature of the information which was disclosed to the appellant, and the information that was not disclosed, I find nothing improper in the manner in which the University exercised its discretion.

Accordingly, I uphold the University's decision to withhold the record under section 18(1)(c) of the *Act*.

**ORDER:**

I uphold the decision of the University that the withheld portion of the record qualifies for exemption under section 18(1)(c), and I dismiss this appeal.

Original Signed By: \_\_\_\_\_

Frank DeVries  
Adjudicator

\_\_\_\_\_ June 22, 2009