



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2795

Appeal PA07-272-3

Ministry of Training, Colleges & Universities



Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téloc: 416-325-9188
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The Ministry of Training, Colleges and Universities (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

. . . records created, amended, received or distributed between April 1, 2004 and May 31, 2007 (including electronic mail, paper and electronic documents and voicemail messages) regarding “ancillary fees”, “supplemental fees”, “incidental fees” and/or “auxiliary fees” charged by publicly funded colleges and/or universities in Ontario, including, but not limited to, those regarding such fees that are called or charged with the purpose of funding information technology, labs, libraries, library services, the mandatory lease of laptop computers, administration and student registration or admission.

The Ministry located the responsive records and issued a fee estimate in the amount of \$2,355, requiring that the requester pay a deposit of 50% of this fee to process the request. The requester paid the deposit, and subsequently, the Ministry issued a time extension for an additional 60 days, bringing the due date for response to September 28, 2007. The appellant appealed this time extension and Appeal PA07-272 was opened. This appeal was resolved when the appellant and the Ministry negotiated a mutually acceptable date for response to this request of September 12, 2007, at which time Appeal PA07-272 was closed. However, when the decision was not issued by this date, the appellant filed a “deemed refusal” appeal, and Appeal PA07-272-2 was opened. This file was closed shortly thereafter when the Ministry issued its decision respecting access to the requested records.

In its decision, the Ministry provided partial access to the records, applying the exemptions in sections 12(1) (Cabinet records), 13(1) (advice or recommendations), 17(1) (third party information), 18(1) (valuable government information), 19 (solicitor-client privilege), and 21(1) (personal privacy) of the *Act*. The Ministry also requested the payment of the balance of the fee, which it decided to reduce to \$557.50 from \$1,157.50. The Ministry also transferred a portion of the request to McMaster University pursuant to section 25 of the *Act*. In the index attached to the decision letter, the Ministry indicated that parts of the identified records were non-responsive to the request, and that it was applying section 15 (relations with other governments) to two of the records, although that exemption was not mentioned in the Ministry’s decision letter.

The requester, now the appellant, appealed this decision.

During mediation, the appellant confirmed that he was appealing only the balance of the fee, \$557.50, not the total fee. He also clarified that he is not appealing the transfer of a portion of the request to McMaster University, but wants the Ministry’s copies of the records which were produced by this other institution. The Ministry then confirmed that these records, which are identified as Record 177 on the index, are in fact an attachment to Record 176, which was withheld under section 13(1), and that access to Record 177 is also denied under section 13(1).

The appellant has raised the issue of scope of the request as it relates to fifteen of the records identified by the Ministry as non-responsive. The appellant removed from the appeal those records or parts of records to which the Ministry had applied section 21(1), with the exception of Records 27, 79 and 196, which remained at issue in the appeal during the mediation stage. As no

other mediation was possible, the file was moved to the adjudication stage of the appeals process in which an adjudicator conducts an inquiry under the *Act*.

I began the inquiry by sending a Notice of Inquiry to the Ministry setting out the background and the issues in the appeal and inviting its representations. The Ministry provided me with submissions in response. In its submissions, the Ministry indicates that it is prepared to disclose additional records to the appellant and that it wishes to apply the discretionary exemption in section 13(1) to Records 203, 204, 205 and 210, in addition to those originally identified as being exempt under that section. The Ministry also agreed to disclose Records 73, 212 and the charts that comprise part of Records 68 and 70, the only records which were subject to the mandatory exemption in section 17(1). As a result, this mandatory exemption is no longer at issue in this appeal. The Ministry chose not to provide submissions on the possible application of section 18(1) to the records. I have reviewed the contents of the records carefully and find that the evidence does not support a finding that the section 18(1) applies to any of them. I will not, accordingly, be considering this discretionary exemption further.

I then sent a Notice of Inquiry to the appellant, seeking its representations on the issues identified in the appeal. I enclosed most of the Ministry's representations with the Notice of Inquiry to the appellant. A small portion of them was withheld due to concerns about their confidentiality. The appellant also provided me with representations. In his submissions, the appellant accepts that Records 27, 79 and 196 contain information that qualifies as "personal information" within the meaning of the definition of that term in section 2(1) and that this information is properly exempt under section 21(1). Therefore, it is not necessary for me to consider its application to the information in Records 27, 79 and 196 to which the mandatory section 21(1) exemption was applied.

At the conclusion of the inquiry stage of the appeal, the issues remaining unresolved are as follows:

- scope of the request;
- whether the fee of \$557.50 ought to be upheld;
- application of the mandatory exemption in section 12(1)(a) and (e) to Record 45;
- application of the discretionary exemption in section 13(1) to Records 27, 68, 70, 72, 74, 101, 193, 203, 204, 205 and 210;
- application of the discretionary exemption in section 15 to Records 87 and 90; and
- application of the discretionary exemption in section 19 to Record 80.

This appeal is one of a series arising from requests to the Ministry from the same individual for information about its position on ancillary fees. This particular appeal covers records created during a specified time frame about the ancillary fees issue from April 1, 2004 to May 31, 2007. Recently, I issued Order PO-2787 which addresses a similarly worded request for information pertaining to ancillary fees which was focussed on a very specific time frame, June 1 to June 25, 2007. The decision in a third appeal (PA07-373-2) will follow this order. That appeal involves a

request for records relating to the ancillary fees issue covering the period from June 30, 2007 to the date of that request, September 14, 2007.

RECORDS:

The records at issue and the exemptions claimed for each are described in the Index of Records which accompanied the decision letter dated September 24, 2007.

DISCUSSION:

SCOPE OF THE REQUEST/RESPONSIVENESS OF THE IDENTIFIED RECORDS

Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;
 - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
-
- (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

As a general guiding principle, it is well-established in the jurisprudence of this office that in order to be considered responsive to the request, records must "reasonably relate" to the request [Order P-880].

The Ministry takes the position that the undisclosed information contained in Records 1(a) to (g), 3, 20, 24, 35, 65, 80, 82 and 195 is not responsive to the request.

I will reproduce the actual wording of the request as originally framed, as it will provide the context for a determination as what records are responsive to it. The requester sought access to:

. . .all records created, amended, received or distributed between April 1, 2004 and May 31, 2007 (including electronic mail, paper and electronic documents and voicemail messages) regarding ‘ancillary fees’, ‘supplementary fees’, ‘incidental fees’ and/or ‘auxiliary fees’ charged by publicly funded colleges and/or universities in Ontario, including, but not limited to, those regarding such fees that are called or charged with the purpose of funding information technology, labs, libraries, library services, the mandatory lease of laptop computers, administration and student registration or admission. . .

Clearly, the request was focussed on those fees paid by students which did not include tuition fees. Records relating to the payment of tuition fees were not expressly excluded in the request, and it is very broadly drafted. In my view, a reasonable interpretation of the scope of the request leads one to conclude that the request is limited to include only records that are related to fees charged by colleges and universities in Ontario over and above what are normally considered to be tuition fees. In the specified list contained in the request, the appellant could have included “tuition fees” along with the delineated types of fees which were listed. Instead, he chose to exclude records relating to these types of fees. The Ministry’s approach to the charging of “ancillary fees’, ‘supplementary fees’, ‘incidental fees’ and/or ‘auxiliary fees” was an issue of great concern at the time these requests were submitted and I find that the parties themselves understood the request to be limited to records relating to fees other than tuition fees.

I will examine each of the records listed above in order to determine whether they are, in whole or in part, responsive to the request, as framed.

The undisclosed portions of Records 1(a) to (g)

These records are successive versions of an issue note prepared by the Ministry and entitled Postsecondary Tuition Fee Policy. In my view, these records pertain only to the Ministry’s policies regarding university and college tuition fees and do not address, even peripherally, the fees described in the request above. As such, I conclude that they are not “reasonably related” to the request and fall outside its ambit.

The undisclosed portions of Records 3 and 35

The undisclosed portion of Records 3 and 35 consists of summaries of various issues, updates and media reports that may be of interest to the Ministry for the period April 9-13, 2004 and November 30, 2004. I find that these media updates relate to matters other than those outlined in the request and fall, accordingly, outside the scope of the request.

The undisclosed portions of Records 20 and 24

Records 20 and 24 are the speaking notes for the Minister’s appearance at the General Assembly of the College Student Alliance held at Centennial College in Toronto on July 20, 2004 and the Canadian Federation of Students Ontario General Membership Meeting held in Markham on

August 13, 2004. The undisclosed portions of the presentation relate directly and exclusively to the subject of tuition fees and other initiatives of the government of the day which do not include discussion of other types of fees such as those referred to above by the appellant. Although the appellant was present when the speech was delivered, the information in this record is not responsive to his request.

The undisclosed portions of Record 65

Record 65 is a detailed spread sheet consisting of the aggregated Consolidated Financial Information System Account Balances for all of Ontario's community colleges for the years 2004-05 and 2005-06. It contains a line by line listing of a huge number of assets and income sources for each of the colleges. Included in the information disclosed by the Ministry are the line items for "Other Student Fees" and "Non-Tuition Incidental Fees", which the Ministry associates with the requested information about "ancillary fees" charged to students. It argues that the line item "Ancillary Revenue" relates only to "revenue from ancillary operations, such as from facility rental, operation of a campus bookstore, etc., not the collection of student ancillary fees." Further, it argues that the other line items do not contain information that relates to the ancillary fees issue identified in the request.

I have reviewed the record and the representations of the parties and conclude that the undisclosed portions of Record 65 are not responsive to the request, as framed. This information does not relate to the payment or collection of ancillary fees by students, as identified by the request, and it is not, accordingly, responsive to it.

The undisclosed portion of Record 80

Record 80 is a lengthy memorandum drafted by the Deputy Minister and addressed to the Minister regarding certain proposed revisions to the tuition fee policy, specifically addressing the impact such changes would have on students with disabilities. The Ministry disclosed to the appellant a small portion of the record which contained information related to ancillary fees. The Ministry takes the position that the remainder of Record 80 addresses only the tuition fee issue and is not, therefore, responsive to the request. I have carefully reviewed all of Record 80 and conclude that, with the exception of the portion released to the appellant, it relates only to the tuition fee issue, rather than ancillary or other types of fees. The remaining portions of Record 80 are not, accordingly, responsive to the request. As a result of this finding, it is not necessary for me to consider whether Record 80 is exempt from disclosure under section 19. As this is the only record for which the Ministry claims section 19, I will not consider that exemption further.

The undisclosed portions of Records 82 and 195

I have reviewed the contents of the undisclosed portions of these records, which are Question and Answer documents prepared by Ministry staff to address the issue of a revised tuition fee policy. I agree with the position taken by the Ministry that they do not contain information that relates to the issue of ancillary fees. Rather, they address only matters relating to tuition fees.

To summarize, I uphold the Ministry's decision that the undisclosed portions of Records 1(a) to (g), 3, 20, 24, 35, 65, 82 and 195 are not responsive to the request as this information is not "reasonably related" to the request.

ADEQUACY OF THE FEE

During mediation, the appellant confirmed with the mediator that he was not appealing the amount of the original fee charged, \$2,355.00, but rather was appealing only the balance of the fee of \$557.50 sought by the Ministry following the conclusion of mediation.

In the Notice of Inquiry provided to the Ministry, it was asked to provide representations in support of its position that a fee of \$557.50 was appropriate. In its representations, the Ministry states:

The Ministry is not making further submissions with respect to the balance of the fee owing.

As I have not been provided with evidence to substantiate the charging of a further fee, I find that I am unable to determine whether the fee is appropriate in the circumstances. Accordingly, I will not address this issue further and will not uphold the Ministry's decision to charge a fee of \$557.50 in this order.

CABINET RECORDS

The Ministry argues that Record 45, a document dated June 8, 2005 was prepared to brief the Minister on certain tuition fee consultations that were ongoing at that time. As a result, it submits that Record 45 is exempt from disclosure under the introductory wording to section 12(1) and sections 12(1)(a) and (e), which read:

A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,

- (a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;
- (e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy; and

The Ministry provided me with confidential representations in support of its argument that Record 45 is subject to exemption under section 12(1)(e). Based on my review of the record and the representations of both the appellant and the Ministry, I find that Record 45 was prepared to brief the Minister about a matter that was to be brought before the Education Policy Committee and Management Board of Cabinet, both of which are Cabinet committees.

Accordingly, I find that Record 45 qualifies for exemption under section 12(1)(e).

ADVICE OR RECOMMENDATIONS

The Ministry has claimed the application of the discretionary exemption in section 13(1) to Records 27, 68, 70, 72, 74, 101, 193, 203, 204, 205 and 210. Section 13(1) states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

The purpose of the exemption in section 13(1) is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

“Advice” and “recommendations” have a similar meaning. In order to qualify as “advice or recommendations”, the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and*

Privacy Commissioner), [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563]

Record 27

The Ministry agreed to the disclosure of the appendices to Record 27 though it is unclear if these have actually been disclosed to the appellant. It goes on to argue that all of Record 27, a decision note addressed to the Deputy Minister from an Assistant Deputy Minister, is exempt from disclosure under section 13(1) because “it is not possible to sever any portion of the decision note without revealing the recommended option.” I have carefully reviewed the contents of Record 27 and find that the only portion which contains advice or recommendations within the meaning of section 13(1) is the Option and Recommendations sections on page 7 of the decision note. I do not agree that the disclosure of the remainder of the note would reveal the actual recommendation or allow it to be accurately inferred. Accordingly, I uphold the Ministry’s decision only with respect to the information contained in page 7 of Record 27 and will order that the rest of this document be disclosed, since no other exemptions have been applied to it and no mandatory exemptions apply.

The undisclosed portion of Record 60

Record 60 is a memorandum from the Assistant Deputy Minister to the Acting Deputy Minister dated November 1, 2005. In two lines of this memorandum, the writer explicitly sets out a recommended course of action to be accepted or not by the recipient. This is the sole information from the record which has not been disclosed. I find that it qualifies for exemption under section 13(1).

Record 70

Record 70 is an 18-page document entitled Ancillary Fee Policy Review dated November 23, 2005. This document includes a section entitled Context which outlines the factual basis for the charging of ancillary fees and the historical background for these charges. It also defines the issues that exist between universities and colleges around this question. At pages 12 to 15 of the paper, there are a number of recommended courses of action set out under the heading Proposals. In my view, these represent a recommended course of action which may be accepted or rejected by the recipient of the document. Accordingly, I find that they are exempt under section 13(1). The remaining information in the record, including that set forth in the Context, Issues and the three Appendices do not qualify for exemption under section 13(1), no other exemptions have been claimed for them and no mandatory exemptions apply. Accordingly, the Appendices to Record 70 must be disclosed.

Record 72

The Ministry submits that this email chain contains a recommended course of action between two civil servants regarding “the course of action to be taken when considering . . . [a particular

issue relating to ancillary fees].” I have reviewed the record and I do not agree that it contains a specific recommendation of a course of action. Therefore, I find that section 13(1) has no application to this record and I will order that it be disclosed, since no other exemptions have been claimed and no mandatory exemptions apply.

Record 101

Record 101 is a memorandum from the Director, Colleges Branch, to the Assistant Deputy Minister dated August 9, 2006 seeking her approval for the revision of the Ministry’s policy respecting ancillary fees. I find that only the section of the paper entitled “Recommendation” at page 5 of the document contains information that qualifies for exemption under section 13(1). The remaining information relates only to providing context and background information to the Deputy Minister and is not exempt under section 13(1).

Record 193

Similarly, Record 193 is a lengthy decision note from the Assistant Deputy Minister of the Postsecondary Education Division to the Deputy Minister “seeking a decision a proposed amendment to the College Ancillary Fees Policy.” The majority of the document is an explanation of the changes contained in the amendment and the background behind its creation. The actual recommendation of a course of action is included only on page 6 of the document. Several appendices are attached to the note describing changes that will be required in order to comply with the recommended protocol on ancillary fees and the types of fees which will fall within the ambit of the protocol, and those which will not.

I find that, with the exception of the information listed under the heading “Recommendation” on page 6 of the document, none of Record 193 qualifies for exemption under section 13(1). The remaining information does not relate to a specific course of action that may or may not be followed by the individual to whom the communication is addressed. As no other exemptions have been applied to this document and no mandatory exemptions apply, I will order that it be disclosed, with the exception of that portion of page 6 described above.

Records 203, 204, 205 and 210

These records are, respectively, a “Q & A”, a draft memorandum to college presidents from the Director of the Ministry’s Colleges Branch, and two flow charts. All of the information contained in these records describes the new policy regarding the charging of ancillary fees by Ontario’s colleges. None of these records contain any information which could be construed as “advice or recommendations” which provide a recommended course of action within the meaning of section 13(1). Accordingly, I find that the exemption has no application to them. As no other exemptions have been claimed and no mandatory exemptions apply to them, I will order that they be disclosed, in their entirety.

Further I find that the exceptions set out in section 13(2) do not apply to the exempt information contained in Records 27, 60, 70, 101 and 193.

RELATIONS WITH OTHER GOVERNMENTS

The Ministry has claimed the application of the discretionary exemption in section 15(a) and (b) to the information contained in Records 87 and 90. These sections state:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

- (a) prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;
- (b) reveal information received in confidence from another government or its agencies by an institution; or

and shall not disclose any such record without the prior approval of the Executive Council.

Section 15 recognizes that the Ontario government will create and receive records in the course of its relations with other governments. Section 15(a) recognizes the value of intergovernmental contacts, and its purpose is to protect these working relationships. Similarly, the purpose of sections 15(b) and (c) is to allow the Ontario government to receive information in confidence, thereby building the trust required to conduct affairs of mutual concern [Order PO-1927-I; see also Order P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

For this exemption 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 Ministry indicates in its representations that all but a portion of Record 90 may be disclosed to the appellant, as the remainder was not provided to it by the province of British Columbia with an expectation of confidentiality. However, the email from an official with the province of Manitoba which comprises Record 87 clearly indicates that the data contained therein is to be kept confidential and not shared “outside of the government environment.”

Based on my review of the contents of Record 87 and the remaining portion of Record 90, as well as the representations of the Ministry, I am satisfied that disclosure could reasonably be expected to reveal information that was received in confidence from another government.

Representatives of the two provinces whose information is reflected in these records specifically asked that it be kept confidential. Accordingly, I find that Record 87 and the remaining portions of Record 90 are exempt under section 15(b).

EXERCISE OF DISCRETION

The exemptions in sections 13(1) and 15 are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner 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

In either case this office may send the matter 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 [section 54(2)].

In support of the manner in which it exercised its discretion, the Ministry submits:

. . . the Ministry has endeavoured to disclose as many records as possible. In the course of preparing these Representations, the Ministry has decided to disclose a further 17 records in full, and portions of 10 other records. Also, the Index of Records that was disclosed to the appellant gives a reasonable description of the records that were withheld in whole or in part. This shows that the Ministry is mindful of the public's interest in access to information.

Based on the Ministry's representations and my review of the records found to be exempt and those which were disclosed, I am of the view that the Ministry exercised its discretion to disclose in an appropriate manner and took all relevant, and only relevant, factors into consideration in doing so.

ORDER:

1. I do not uphold the fee of \$557.00.
2. The undisclosed portions of Records 1(a) to (g), 3, 20, 24, 35, 65, 80, 82 and 195 are not responsive to the request, as framed.

3. I order the Ministry to disclose to the appellant all of Record 27, with the exception of the Options and Recommendations section on page 7; all of Record 70, except the Proposals section at pages 12 to 15; Records 72 and 101; all of Record 193, except the Recommendations section on page 6; and all of Records 203, 204, 205 and 210 by providing him with a copy by no later than **July 16, 2009**.
4. I uphold the Ministry's decision to deny access to the Options and Recommendations section at page 7 of Record 27; Record 60; the Proposals section at pages 12 to 15 in Record 70; and the Recommendations section on page 6 of Record 193.
5. In order to verify compliance with the requirements of Order Provision 3, I reserve the right to require the Ministry to provide me with a copy of the records ordered disclosed.

Original signed by: _____
Donald Hale
Adjudicator

_____ June 24, 2009